

THE
LAW TIMES REPORTS
OF
Cases Decided

IN
THE HOUSE OF LORDS, THE PRIVY COUNCIL,
THE COURT OF APPEAL,
THE CHANCERY DIVISION, THE KING'S BENCH DIVISION, THE
PROBATE, DIVORCE, AND ADMIRALTY DIVISION,
THE KING'S BENCH DIVISION IN BANKRUPTCY,
THE COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED
AND THE RAILWAY AND CANAL COMMISSION COURT.

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THE REPORTERS

OF THE CASES IN THIS VOLUME.

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received from K. and Co., when due, direct to your good selves, for account of K. and Co." The plaintiffs sent these two documents to the defendants with a request to sign and return the counterpart. The counterpart was returned to the plaintiffs, but was signed by a person who had no authority to sign on behalf of the defendants. Held, that the two documents did not constitute "an absolute assignment" of the debt, within sect. 25 (6) of the Judicature Act 1873. (<i>Brandts, Sons, and Co. v. Dunlop Rubber Company Limited.</i>) 106		of; it must be an address at which the debt can be paid or secured or compounded for, and of a place at which the creditor is to be found during the seven days limited by the notice, whether the address is of the residence or place of business of the creditor. If the address given in the notice is such an address at the date of the service of the notice, the occasional absence of the creditor from the place, even for a whole day, will not render the notice inefficient, unless the absence is such as to deprive the debtor of a reasonable opportunity of paying or securing or compounding for the sum due. It would not make any difference that the address was the temporary home of the creditor, who had no permanent home; or that his absence occurred on the last day of the seven. But if the creditor, after the service of the notice, abandons his place of address, so that it ceases to be a place where at reasonable times he, or some authorised agent on his behalf, can be found to receive payment of the debt, or to deal with the question of security, the bankruptcy notice will cease to be efficient. In July 1901 an action for libel was commenced, the defendant being described in the writ and the pleadings as "a married woman." At that date a decree <i>nisi</i> had been made for the dissolution of the defendant's marriage, and in Nov. 1901 the decree was made absolute. On the 30th Oct. 1902 the libel action was tried, and a verdict was found for the plaintiff with 5000 <i>l.</i> damages, and judgment was entered accordingly. In June 1903, on the application of the defendant, the Court of Appeal ordered a new trial unless the plaintiff consented to the damages being reduced to 1500 <i>l.</i> The plaintiff consented, and the judgment was on the 19th July amended accordingly, but on the date of the 30th Oct. was not altered. The judgment as drawn up was in the ordinary form of a judgment against an unmarried woman. The 1500 <i>l.</i> not having been paid, the plaintiff, on the 28th July, served a bankruptcy notice on the defendant claiming payment of the 1500 <i>l.</i> , with interest from the 30th Oct. 1902, the address of the creditor being given at an hotel in London, where she was then staying, and where she was in the habit of staying, but she did not permanently retain a room there. On the 4th Aug., the last of the seven days limited for compliance with the notice, the creditor left the hotel at 10.15 a.m., leaving no address. She went to Newhaven and thence to France, and did not return to England till the end of September. The debtor not having complied with the bankruptcy notice, on the 24th Aug. the creditor presented a bankruptcy petition against her, and a receiving order was made. Held, that, as at the date of the trial the defendant had been divorced and a judgment could have been obtained against her creating a personal debt, the fact that she was described in the writ and pleadings as a married woman, and the judgment was drawn up in the form applicable to an unmarried woman, was a matter of form only, and the Court of Bankruptcy had no power to go behind the judgment. Held also, that an objection that interest was claimed from the 30th Oct. 1902 instead of the 19th July 1903 was concluded by the judgment. Held also, that the address given in the notice was sufficient, and that the creditor did not abandon it when she left the hotel. (<i>Re Beauchamp; Ex parte Beauchamp.</i>) 594	
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be kept by the Births and Deaths Registration Act 1836 (6 & 7 Will. 4, c. 86), the certified copy of such entry is evidence not only of the fact of the birth, but also of the actual date on which the birth took place. (In the Goods of Mary Goodrich; <i>Payne v. Bennett.</i>)	170	any description shall be granted or renewed until the electors of the district have previously determined in manner hereinafter provided (1) whether the number of licences existing in the district is to continue; (2) whether the number of licences existing in the district is to be reduced; (3) whether no licences are to be granted in the district." By sect. 8, sub-sect. 4, if "none of the proposals respecting licences in the district is carried by the prescribed majority . . . the number of licences shall continue as they are until the next licensing poll." A "licensing poll" was taken in the N. district, in accordance with the provisions of the Act, but was afterwards declared void on the ground of certain irregularities. The appellant, who was the holder of a licence in the district, afterwards applied to the licensing committee for a renewal of his licence. No objection was made to the renewal, but the committee held that, under the circumstances, they had no power to renew any licence. Held, that the contingency of the poll taken being legally null and void was covered by sect. 8, sub-sect. 4, and that all existing licences continued in force until the next licensing poll. (<i>Smith v. McArthur and others.</i>)	744
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Debenture-holders' action—Insufficient assets—Costs of second mortgage debenture-holders made defendants. —In an action by first mortgage debenture-holders of a limited company, in which the company and the second mortgage debenture-holders were made defendants, the assets proved insufficient to satisfy the claims of the first mortgage debenture-holders. On the further consideration of the action the question was raised whether the second mortgage debenture-holders made defendants ought to be allowed their costs. Held, that the second mortgage debenture-holders made defendants were not entitled to costs. (<i>Re Clayton Engineering and Electrical Construction Company Limited.</i>)... .. 283		Forged share certificate—Issue by secretary—Liability of company—Estoppel. —A certificate of shares in a limited company was delivered by the secretary of such company at their offices, such certificate in form being perfectly regular. In fact the certificate was a forgery, and was made and delivered by the secretary acting fraudulently and not for or on behalf of or for the benefit of the company, but solely for himself and for his own private purposes and advantage. Held, that the company were estopped from denying the title of the transferees of the shares, and that they were liable in damages for refusing to place the names of the transferees on their list of shareholders. (<i>Ruben and Ladenburg v. Great Fingall Consolidated Limited and others.</i>) 163	
Debenture trust deed—Payment of interest and principal—Default—Realisation of securities—Appropriation by payees to principal and interest—Income tax. —The trustees of a debenture deed were directed, in case of default by the J. C. M. Trust Company, to pay the principal moneys and interest for which it should become liable under its debentures, to realise the securities, and apply the proceeds to payment, first, of all arrears of interest on the debentures, and, secondly, in or towards payment of principal. The J. C. M. Trust Company having made default, an order was made in a debenture-holder's action for the trusts of the debenture deed to be carried into execution. Under numerous orders made in the action sums were paid to the debenture-holders on account both of interest, less income tax, and of principal and interest generally. The realisation had now been practically completed, and it was proposed to pay a final dividend to the debenture-holders. It was admitted that if the whole of the past payments which had been made on account generally and any further sums available were attributed solely to principal, they would be insufficient to discharge the whole amount thereof. The Inland Revenue authorities claimed income tax on all payments made generally on account of principal and interest. Held, that all payments hitherto made by the trustees on account generally might be attributed, at the option of the payees as between themselves and the trustees at their election, as payments on account of principal or interest, without prejudice to any question whether or not such payments should be treated in the hands of the payees as principal or interest; and that income		Gas company—Standard rate of dividend fixed by statute—Payment of dividend free of income tax. —Sect. 16 of the Ashton Gas Act 1877 provides that the profits of the Ashton Gas Company to be divided among the shareholders in any one year shall not exceed the rate of 10 per cent. per annum (defined in the Act as the standard rate of dividend) on the ordinary share capital or stock of the company authorised by Parliament and paid up. Sect. 17 of the same Act provided that a standard price is to be charged by the company for gas, and that the company may increase or diminish the standard dividend in a certain ratio, to be determined by reference to the price charged by them for gas. The company for many years paid dividends exceeding the standard rate of dividend to their shareholders, diminishing the standard price of gas and increasing proportionally the standard rate of dividend. The company distributed all such dividends to their shareholders free of income tax. Held, that by paying the maximum rate of dividend free of income tax the company were in effect paying a higher rate of interest than was authorised by sects. 16 and 17 of the Ashton Gas Act. (<i>Attorney-General v. Ashton Gas Company.</i>) 204	
		Payment of dividend out of capital—Ultra vires—Bona fide mistake of directors—Knowledge of shareholders—Action by them against directors—Retention of dividend by plaintiffs—Right to maintain action. —Where a company had, by a bona fide mistake of its directors, illegally paid a dividend out of capital, and an action was brought against the company and the directors by shareholders (purporting to sue on behalf of themselves and all other the shareholders of the company) who had received—and still retained—their shares of that dividend with full knowledge of all the circumstances, it was held that the plaintiffs, having the dividend in their pockets which they knew was wrongfully there, ought not to be allowed to complain, and could not obtain any greater right of complaint because in form their action was an action by themselves and all other the shareholders of the company. (<i>Towers v. African Tug Company Limited.</i>) 208	
		Prospectus—Untrue statements—Omission of contracts—Liability of directors. —Upon the faith of the statements contained in a prospectus issued by the defendants and their co-directors, the plaintiffs became shareholders in a company. The prospectus contained certain untrue statements, and also omitted to specify the dates and names of the parties to a certain contract that had been entered into by or on behalf of the company. Held, as regards the untrue statements, that, even though they constituted material misrepresentations and remained untrue to the date of notice of allotment, yet, the defendants having reasonable ground to believe that the statements were true, the plaintiffs were not entitled to compensation from the defendants under sect. 3 of the Directors' Liability Act 1890; and, as regards the omission to specify the dates and names of the parties to the contracts, that, the contracts being material to be known, the prospectus was to be	

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deemed to be fraudulent on the part of the defendants within the meaning of sect. 38 of the Companies Act 1867, and that the plaintiffs were entitled to damages accordingly. (<i>De la Cour v. Clinton; Trechmann v. Calthorpe.</i>)	615	without any express bargain with the liquidator that he should retain the benefit of the lien. He then claimed to retain the debt out of the purchase money, and applied for liberty to amend the proof by stating the security and the estimated value of it, or, in the alternative, to withdraw the proof and rely on the security for payment. It appeared that the proof was made out by a clerk who was unaware of the existence of the lien, and that the solicitor, being told by the clerk that the proof was in order, signed and swore it, the statement in it that he held no security for the debt having escaped his attention. Held, that under the circumstances leave ought not to be given to amend or withdraw the proof, as, even if "inadvertence" was proved, in the interval between the carrying in of the proof and the application for leave to amend, the position of all parties, and of the liquidator in particular, had been altered. (<i>Re Safety Explosives Limited.</i>) ...	332
Registration of transfer of shares—Unreasonable delay—Reconstruction of company—Date on which transfer to be treated as registered.—The court has power under sect. 35 of the Companies Act 1862 to rectify the register of members after the liquidation of the company has commenced; and such power is not limited by sect. 98 to rectification for the purpose of settling the list of contributories. Where there had been unnecessary delay in registering a transfer of shares, and in consequence it had not been registered when the company went into voluntary liquidation for the purpose of reconstruction under sect. 161 of the Companies Act 1862, the court, on the application of the transferee, ordered the transfer to be registered as of a date prior to the winding-up, which rendered valid a notice of dissent given by the transferee under sect. 161 after the date on which the transfer ought to have been, but was not, registered. (<i>Re Sussex Brick Company.</i>) ...	426	Summons taken out by liquidator for alleged misfeasance by directors—Security for costs of application—Practice.—The court has no jurisdiction to require the liquidator of a company which is in course of being wound-up to give security for the costs of an application against directors of the company for misfeasance under sect. 10 of the Companies (Winding-up) Act 1890. But an order for payment of costs by the liquidator personally will be made in a proper case. (<i>Re Strand Wood Company Limited.</i>)	800
Shares—Calls—Forfeiture for nonpayment of calls—Sale—Certificate—Liability of purchaser.—Certain shares of the value of 5s. each were issued by the respondent company. The sum of 3s. 4d. each was paid up upon them, and a further call of 1s. 8d. was made, but not paid by the holder. The shares were thereupon forfeited, and sold by the respondents to the appellant company, and by the certificate it was stated that they were 5s. shares on which 3s. 4d. was paid up, and the remaining 1s. 8d. had been called up and was payable by the former holder. It was further stated that the purchasers were "to be deemed to be holders of the said shares discharged from all calls due prior to the date hereof." Subsequently another call was made on the shares. Held, that the appellants were liable to pay this call. (<i>New Balkis Eersteling v. Randt Gold Mining Company Limited.</i>)	494	COMPENSATION.	
Transfer—Address of transferor not appearing—Number of share not stated—Refusal of company to register.—Where by a clause of the articles of association of a company every member may transfer all or any of his shares, but every transfer must be in writing and in the usual common form, the fact that the deed of transfer of a member of the company who is selling his only share does not set out the address of the transferor or the number of the share is not sufficient ground for the company to refuse to register the transfer on the ground of irregularity. (<i>Re Letheby and Christopher Limited; Jones' case.</i>)	774	Leasehold.—Subsequent acquisition of freehold—Assignment of claim for damage—No notice to treat—Assignment of tort.—A freeholder and leaseholder had notices to treat served upon them by a railway company in respect of their interests. The freeholder then agreed to give the leaseholder a new lease, and subsequently received compensation from the railway company in settlement of all claims under the notice to treat, except claims for damage by subsidence. The freeholder then sold the freehold to the leaseholder. During the new lease and after the acquisition of the freehold, structural damage was caused to the premises and to the stock and the trade. Held, that the original leaseholder was only entitled to compensation in respect of such damage, if any, as occurred under the original lease in respect of which the notice to treat was served. The acceptance by the sub-lessee of a new sub-lease and the implied surrender of the original one after the notice to treat has been served in respect of the interest in the original sub-lease, the damage having been done during the continuance of the original sub-lease, does not preclude the sub-lessee from recovering compensation. A claim for compensation under sect. 68 of the Lands Clauses Act 1845 is in the nature of a claim for damages for a wrong, and as such is not a legal <i>chose in action</i> within sect. 25 of the Judicature Act 1875 so that the assignee can sue in her own name. (<i>Dawson v. Great Northern and City Railway Company.</i>) ...	20
WINDING-UP.		Right to supply refreshments in a theatre—Use of cellars—Right to let spaces for advertisements—Licence—"Interest in land."—The lessees of a theatre by a written agreement granted to a refreshment contractor at a fixed weekly rental, for the term of the lease of the theatre, the free and exclusive right to sell refreshments there, with the necessary use of the refreshment-rooms, bars, cloakrooms, and cellars of the theatre, together with the right, during the usual hours, of free access thereto as might be necessary and usual and proper for the purpose of exercising the rights thus granted, and also the sole and exclusive privilege during the term of advertising and letting spaces for advertisements in the refreshment and cloak rooms. Held, that the agreement did not create any "interest in land" within the meaning of sect. 68 of the Lands Clauses Consolidation Act 1845, so as to entitle the refreshment contractor to compensation on the theatre being taken over under the Act.	
Petition—Taxation—Copies of evidence—Costs of contributories successfully opposing.—Upon a winding-up petition, where charges of fraud were brought against director contributories, the common order as to costs was made in dismissing the petition. The contributories who had successfully opposed claimed that they were entitled to recover from the petitioner the costs of taking copies of the evidence filed by him, and objected to the registrar's disallowance of them. Held, that, unless a special order as to costs were made at the hearing, contributories appearing to oppose were not entitled to such costs. (<i>Re Ibo Investment Trust Limited.</i>)	373		
Proof of debt—Amendment—Solicitor—Lien—Omission to value security—"Inadvertence."—The solicitor of a company in liquidation had a claim against it for costs, and claimed a lien for them on certain documents in his possession. He sent in a proof for the costs in the winding-up, stating he held no security for the debt, and voted at a meeting of the creditors in respect of the whole debt. He afterwards acted for the liquidator in completing the sale of the company's property, and on completion received the purchase money and handed over the title deeds to the purchaser,			

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(Frank Warr and Co. Limited v. London County Council.)	368
CONFLICT OF LAWS.	
Scotch contract of marriage—Husband domiciled in England—Wife domiciled in Scotland—Trustees subject to English courts—Settlement of wife's property—Real estate in Scotland—Life interest of husband—Alimentary clause—Provision against alienation—Charges created—Validity.—A contract executed in Scotland in Scotch form on the marriage in Scotland of a domiciled Englishman with a domiciled Scotchwoman, whereby certain Scotch heritable bonds, the property of the wife—which according to the law of Scotland are regarded as immovables—were (<i>inter alia</i>) settled, was held to be subject to Scotch law, and the husband was held to be entitled to such interest only thereunder as the courts in Scotland would declare him entitled to, and that he was therefore entitled to the whole income of the settled property during his life free from the claims of any assignees or incumbrancers, but without prejudice to the rights (if any) of his alimentary creditors, and without prejudice to any prior payment in respect of a certain policy of insurance on his life. So held by Williams and Cozens-Hardy, L.JJ. (<i>dissentiente</i> Stirling, L.J.). (<i>Re Fitzgerald; Surman v. Fitzgerald.</i>)	266
CONTRACT.	
Contract made in France—Duress and undue influence—Agreement not to prosecute—Contract not invalid in France—Validity of contract in England.—The courts of this country will not enforce a contract made in a foreign civilised country between persons domiciled in that country, if it has been obtained by coercion, whether moral or physical, even though the contract is valid and enforceable by the law of the country in which it was made. (<i>Kaufman v. Gerson.</i>)	608
Implied condition—Contract to pay bonus to customers for four years—Sale of business—Implied contract to continue to carry on business—Breach of contract.—In consideration of a promise by the defendant, a retail tobacconist, not to sign any agreement with any company or firm which would prevent him from buying or selling the goods of the plaintiffs, and to continue to buy and sell the plaintiffs' goods, the plaintiffs agreed that the defendant should for four years share in a distribution by them of an annual bonus among such of their customers as should purchase direct from them, the distribution to be made according to the purchases for the year. In pursuance of the agreement, the defendant bought goods from the plaintiffs; but the plaintiffs, before the expiration of one year, sold their business and went into liquidation. Held, that it was an implied term of the contract that the plaintiffs would not discontinue to carry on business during the term of four years, so as to prevent the defendant from earning his share of the bonus, and that the defendant was entitled to damages for breach of the contract. (<i>Ogdens Limited v. Nelson; Ogdens Limited v. Telford.</i>)	656
Impossibility of performance—Money paid by one party—Right to recover back—Money due and payable before contract became impossible—Right to recover.—The defendants agreed to give the plaintiff the use of a room to view the intended Coronation procession on the 26th June 1902 for the sum of 141 <i>l.</i> , which was payable upon the making of the contract, and on the 20th June the plaintiff paid 100 <i>l.</i> on account. The intended procession being subsequently abandoned, the plaintiff claimed repayment of the 100 <i>l.</i> as having been paid upon a consideration which had wholly failed, and the defendants claimed payment of the balance of 41 <i>l.</i> Held, that the defendants were entitled to recover the unpaid balance which was payable before the procession was abandoned. Held, also, that the plaintiff could not recover back the 100 <i>l.</i> which he had paid. (<i>Chandler v. Webster and Girling.</i>)	217

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Performance rendered impossible—No default by either party—Money payable before performance became impossible—Right to recover—Construction of contract—Cheque given, but payment stopped.—It was agreed between the plaintiff and the defendants that the plaintiff should provide the refreshments for a steamer which the defendants had hired to carry passengers to the naval review which was arranged to take place on the 28th June 1902 in connection with the Coronation of the King. The contract provided that 300 <i>l.</i> should be paid to the plaintiff on account of the refreshments on the 23rd June; and the defendants stipulated that "in the event of the cancellation of the review before any expense is incurred by the contractor there shall be no liability on our side." On the 23rd June the defendants sent a cheque for 300 <i>l.</i> to the plaintiff. On the 24th June the review was cancelled owing to the illness of the King, and the defendants stopped payment of the cheque. The plaintiff had incurred only a small amount of expense. The plaintiff brought this action to recover the amount of the cheque. Held, that the true construction of the contract was that, in the event of the review being cancelled, the defendants were to be liable only for the expenses incurred by the plaintiff, and that the plaintiff was not entitled to recover the sum of 300 <i>l.</i> (<i>Elliott v. Crutchley and another.</i>)	497.
(See STATUTE OF FRAUDS—VENDOR AND PURCHASER.)	
COPYHOLD.	
Fine—Colourable admittance—Customary tenant—Right of lord to have admittance cancelled.—By the custom of the manor of R. a person not already a customary tenant taking any estate as a purchaser by surrender or otherwise has to pay an arbitrary fine to the lord, but a customary tenant purchasing other customary lands pays only two years' quit rent of the purchase. S., who was not a customary tenant, having agreed to purchase certain property within the manor, agreed with L. to purchase of him a cottage within the manor for 100 <i>l.</i> , S. agreeing to pay all expenses in connection with the transfer, to reconvey the cottage within three months for 75 <i>l.</i> , and to allow L. to collect and retain the rent of such cottage, L. to pay all outgoings. If S. desired to retain the cottage he was to pay 80 <i>l.</i> more. S. was duly admitted to the cottage, and paid an arbitrary fine in respect thereof to the lord. He then applied and was admitted to the certain other property, paying a sum of 6 <i>d.</i> as quit rent only. Held, that, as the transaction with regard to the cottage was a colourable one (though not fraudulent), the lord of the manor was entitled to an arbitrary fine in respect of the property as if S. had not been admitted to the cottage. (<i>Attorney-General v. Sandover and Long.</i>)	490
COSTS.	
Administration—Priority—Administrator's costs— <i>Res judicata</i> .—Where in an administration action an order made on further consideration has directed the payment of the costs of all parties out of a fund which subsequently proves insufficient to pay the costs in full, the administrators are entitled to have the whole of their costs paid in priority to the other parties. The order having been silent as to the priorities of the parties <i>inter se</i> must be assumed to have directed payment according to the strict rights of the parties. (<i>Re Griffith; Jones v. Owen.</i>)	639
Interest—Action dismissed with costs—Payment of costs and interest—Order reversed by Court of Appeal—Return of costs and interest—Order of Court of Appeal reversed by House of Lords—Second return of costs and interest—Right to further interest.—On the 22nd June 1901 the plaintiff's action was dismissed by Joyce, J. with costs; and on the 26th March 1902 the plaintiff accordingly paid the defendants' costs, together	

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with interest thereon. On the 11th July 1902 the Court of Appeal reversed the order of Joyce, J.; and on the 21st July 1902 the defendants repaid to the plaintiff the costs and interest. On the 9th Nov. 1903 the House of Lords reversed the order of the Court of Appeal and restored the order of Joyce, J. The plaintiff returned the costs and interest to the defendants. Held, that the defendants were also entitled to interest on the costs as from the 21st July 1902. (<i>Ashworth v. English Card Clothing Company Limited</i> , No. 2.)	263	dants were entitled to costs, and (2) that they were entitled to have their costs taxed under scale C—that is, the scale applicable where the sum recovered exceeds 50 <i>l.</i> (<i>Aston Tube Works Limited v. Dumbell and another.</i>)	315
Reference to master under Order XIV.—High Court scale.—Where an action is brought in the High Court and an application is made under Order XIV., and the action is referred to a master under rule 7 of that order, if the plaintiff recovers more than 20 <i>l.</i> , but less than 50 <i>l.</i> , he can only recover County Court costs of action, but, so far as the costs of the reference are concerned, the master is to be deemed an arbitrator, and he has the same discretion as to costs, including the power to certify for High Court costs of the reference, as an arbitrator has. A master has no power to extend the twenty-one days allowed for obtaining judgment under Order XIV. with High Court costs, as by sect. 116 of the County Courts Act 1888 that power is only given to a judge of the High Court. (<i>Haycocks Limited v. Mulholland.</i>)	88	Cross-judgments—Separate actions—Payment of judgment debt into court—Right to set off smaller judgment debt—Solicitor's lien for costs—Right to enforce lien against whole sum in court.—By sect. 150 of the County Courts Act 1888 it is provided: "If there shall be cross-judgments between the parties, execution shall be taken out by that party only who shall have obtained judgment for the larger sum, and for so much only as shall remain after deducting the smaller sum, and satisfaction for the remainder shall be entered, as well as satisfaction on the judgment for the smaller sum; and if both sums shall be equal, satisfaction shall be entered upon both judgments." Held, that this section applies where cross-judgments are obtained by the parties in separate actions, and not merely where the cross-judgments are obtained in a claim and counter-claim in the same action; and also where the party against whom judgment has been obtained for the larger sum has paid that sum into court without waiting for execution to be taken out, but the party against whom judgment has been obtained for the smaller sum has not paid that sum into court; and that before the party in whose favour the larger sum has been paid into court can have that sum paid out to him, the other party is entitled to have deducted from it the smaller sum for which he has obtained judgment, although that sum has not been paid into court, notwithstanding that the solicitor of the party in whose favour the judgment for the larger sum has been obtained has a lien for his costs upon the whole sum in court, as in such case the solicitor's lien for his costs extends not to the whole sum in court, but to the balance only. (<i>Ward v. Haddrill.</i>)	232
Taxation—Costs after threat of proceedings.—A letter threatening an action was written by the plaintiff's solicitors on the 3rd March 1903. The defendant on the 20th March 1903 obtained a transcript of the speeches, evidence, and judgment of actions against other defendants in which the fraud, to which it was alleged the defendant was a party, was disclosed. The writ was issued on the 16th April 1903. The action was dismissed for want of prosecution. The taxing master had allowed the costs of the transcript. Held, that the matter must be referred back to the master, with a direction to allow only the costs of so much of the transcript of the evidence and judgment as related to the question whether the defendant was or was not party or privy to the fraud disclosed in the former actions. (<i>Bright's Trustee v. Sellar.</i>)	155	Jurisdiction—Specific performance—Sale of equity of redemption—Purchase money less than 500 <i>l.</i> —Value of property exceeding 500 <i>l.</i> —Sect. 67, subsect. 4, of the County Courts Act 1888 gives the County Court jurisdiction in actions for specific performance of any agreement for the sale or purchase of any property where the purchase money does not exceed 500 <i>l.</i> Held, that under this sub-section the County Court has jurisdiction to hear an action for specific performance of an agreement for the sale of an equity of redemption in any property where the actual purchase money agreed to be paid for such equity of redemption does not exceed 500 <i>l.</i> , although the property itself may be of a value exceeding 500 <i>l.</i> , or may be subject to a charge exceeding 500 <i>l.</i> , the test of the jurisdiction in such cases being, not the value of the property or the amount of the charge, but the actual amount of the purchase money to be paid. (<i>Rex v. Judge of the Birmingham County Court and another; Ex parte Rogers.</i>)	514
Taxation—Inspection of machinery by arrangement between parties and without order of court.—Discretion of taxing master.—Where for the purposes of an action there has been an inspection of machinery by arrangement between the parties and without an order of the court being obtained thereto, the taxing master is not debarred by Order L., r. 3, of the Rules of the Supreme Court from allowing the costs of such inspection. (<i>Ashworth v. English Card Clothing Company Limited</i> , No. 1.)	262		
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COUNTY COURT.			
Costs—Remitted action—Payment into court under Order XIV. of part of claim as condition of leave to defend—Trial in County Court—Judgment for defendant for balance with costs—Scale of costs applicable.—In an action of contract brought in the High Court for 71 <i>l.</i> an order was made under Order XIV. that on the defendants paying into court 23 <i>l.</i> they should have liberty to defend the action, otherwise judgment for that amount and costs, with liberty to the defendants to defend as to the residue. The defendants paid the 23 <i>l.</i> into court, and the action was remitted to a County Court under sect. 65 of the County Courts Act 1888. After the action was so remitted, and more than five clear days before the day fixed for the hearing, the defendants gave the plaintiffs notice that they were willing to consent to judgment for the 23 <i>l.</i> in court with costs. At the trial the County Court judge gave judgment for the defendants for the residue of the claim, with costs after payment into court, the plaintiffs to have the money in court and costs up to payment in, which were paid by the defendants. Upon taxation of the defendants' costs: Held, (1) that the defen-			

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- the action it was held that the defendant was affected with notice of the building stipulations, and that the plaintiff had only committed a trivial breach of a trivial covenant, and that such a breach did not disentitle the plaintiff from having the building stipulations strictly enforced, and judgment was given for the plaintiff with costs, the defendant being directed to remove certain buildings erected by him on the land. The third party to the action had sold the property to the defendant, and upon such sale had written a letter agreeing to indemnify the defendant, as purchaser, against all "costs, damages, and expenses" which the defendant might suffer or incur "by reason of the building stipulations and conditions being other than those set out in the copy." Held, that the third party was liable to pay the defendant the difference in the value of the plot in consequence of the amount of land available for building under the provisions of the deed of 1854 being less than under the supposed copy; and also of the defence that the plaintiff was disentitled to sue in consequence of his having broken one of the covenants. Held, also, that the defendant, having had actual notice of the provisions of the deed of 1854 before he commenced to build, the third party was not liable for the cost of building or removing the buildings. Held, also, that the defendant was not entitled to recover from the third party the costs of the plaintiff incurred in the action and paid by the defendant, or the defendant's own costs so far as they related to the following defences set up by the defendant—viz., a denial that the provisions of the deed of 1854 applied to the plot purchased by him or that he had notice of such provisions; that the liquidator of the company formerly owning the land to which the deed of 1854 applied had, under a power given by that deed to the "vendors, their heirs or assigns," by an agreement in writing, approved of by the court, released or waived the covenant which it was alleged had been broken; that no building scheme was contained in the deed of 1854, and if there was it had come to an end by mutual consent of the various purchasers of the land comprised in it. (*Hooper v. Bromet; Raphael, Third Party.*) ... 234
- Sale of medical practice—Covenant not to set up in practice within certain distance—Residence beyond distance—Attending former patients within distance.—Where on the sale of a medical practice the vendor covenants not to "set up in practice" within the distance of two miles from the house at which he carried on the practice sold, he does not commit a breach of that covenant by attending at their request for remuneration two or three of his former patients within that distance, though it is not essential to the breach of such a covenant that the vendor should reside within the prohibited area; he may reside beyond the distance and yet commit a breach of the covenant by acts done within it. (*Robertson v. Buchanan.*) ... 390
- (See LANDLORD AND TENANT—SOLICITOR.)

CRIMINAL LAW.

- Bankruptcy—Fraudulent debtor—Absconding with property—Debtor's property—Deed of assignment—Revocable deed.—Property of an assignor does not become the property of the trustee under a deed of assignment for the benefit of creditors until it has come into the possession of the trustee. J. H. executed a deed of assignment whereby he assigned all his property to W. B. as trustee for his creditors. The deed was duly registered as a deed of assignment, but was not disclosed to the creditors. Immediately after the execution of the deed J. H., having, without the knowledge of the trustee, collected certain debts due to him, absconded with part of the proceeds of his collection, and left England. He was thereupon adjudicated a bankrupt, and subsequently indicted, under sect. 12 of the Debtors Act 1869, for having quitted England and taken with him part of his property which should have been divided amongst his creditors. Held, that the money with

which J. H. absconded, having never come into the possession of the trustee, was not the property of the trustee, but remained the property of J. H., and that J. H. was therefore properly convicted under sect. 12 of the Debtors Act 1869. (*Rex v. Humphris.*)... 555

CUSTOM.

- Sale of goods—Right to reject—Custom limiting right—Validity—Custom incorporated in contracts—Powers of trade arbitrators.—By a custom a buyer of barley was not entitled to reject for difference or variation in quality unless the same was excessive or unreasonable and was so found by arbitration under the contract. Held, that the custom was good. *Seemle*, that where a custom applicable to contracts in a certain trade comes to be incorporated as an express term in the contracts of that trade, the proper inference to be drawn is that it destroys that custom as a custom. Apart from custom or contract, an arbitrator has no jurisdiction to award a money compensation instead of rejection, where such right to reject exists. (*Walkers, Winsor, and Co. v. Shaw, Son, and Co.*) ... 454

DAMAGES.

- Measure of—Sale of goods—Disclaimer of responsibility for bad workmanship—Costs of action by sub-vendee against purchaser reasonably defended.—The plaintiffs having undertaken the repairs of a steamship for the owners, employed the defendants, an engineering company, to construct a new crank shaft. The defendants agreed to do so, upon the terms of their not being responsible for failure of material or workmanship beyond the replacement of faulty work supplied by them. In an action by the plaintiffs against the ship-owners to recover the price of the shaft which had been supplied by the defendants, the ship-owners counter-claimed for damages for breach of contract in consequence of the shaft having broken down on a voyage. The plaintiffs, after communicating with the defendants, who thereupon repudiated all responsibility, defended the counter-claim. The shipowners succeeded on their counter-claim, the shaft being found to have been of faulty workmanship. In an action by the plaintiffs to recover from the defendants the costs of the shipowners' counter-claim, as damages resulting from the defendants' breach of contract: Held, that the terms on which the defendants had supplied the shaft did not relieve them from paying these costs; and that the plaintiffs were entitled to recover the costs of the counter-claim except so far as they were increased by any issue other than the faultiness of the material or workmanship of the shaft. (*Prince of Wales Dry Dock Company (Swansea) Limited v. Fownes Forge and Engineering Company Limited.*)... 527

DENTISTRY.

- Unregistered person—Supply of false teeth—Fitting set in patient's mouth—Right to recover fee—"Dental operation, dental attendance or advice."—A person who was carrying on the practice of a dentist, but who was not registered under the Dentists Act 1878, made for the defendant and fitted to the defendant's mouth a set of false teeth which were taken by the defendant and kept and used by him. The defendant having refused to pay for the same: Held, that sect. 5 of the Dentists Act 1878, which prevented an unregistered person from recovering any fee or charge for "the performance of any dental operation, or for any dental attendance or advice," did not prevent the unregistered person from recovering the price of the set of teeth so supplied, as distinguished from the fitting of the same. (*Hennan and Co. Limited v. Duckworth.*)... 546

DESIGN.

- (See PATENTS, DESIGNS, AND TRADE MARKS.)

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receives a ticket by which he can have a 3d. cigar or its value at his option. It was established by evidence that dexterity could be acquired to some extent by the operator by practice, but the magistrate came to the conclusion that it was not proved that the chances were alike favourable to the appellant and the operator. Held, that T. was properly convicted of permitting the shop to be used for the purpose of unlawful gaming, contrary to the Gaming House Act 1854. (<i>Thompson, app. v. Mason, resp.</i>)	649	haulage being done partly by horses and partly by a traction engine. The quantity of timber so hauled was about 1500 tons, and the felling and hauling were done under several separate contracts extending over the two years. During this period the traffic of the defendants over the roads was unusual traffic, did unusual damage to the roads, and caused unusual expenses in repairing the roads, which were constructed to bear ordinary country traffic, usually agricultural traffic. In an action brought by the highway authority to recover the expenses of repairing the roads, as being "extraordinary expenses" incurred by them in consequence of the "extraordinary traffic" within sect. 23 of the Highways and Locomotives Act 1878, the defendants alleged that the timber was the natural produce of the land and that the carting of such produce to the railway station was ordinary traffic and an ordinary user of the road. Held, that, having regard to the total weight carried, the frequency of the loads and the means by which it was carried, the traffic was "extraordinary traffic" within the meaning of sect. 23, and the fact that the timber was the natural produce of the land did not, under the circumstances, prevent the traffic from being "extraordinary," or the expenses from being "extraordinary expenses," which the highway authority were entitled to recover. Held, further, that the work was not a "particular work extending over a long period" within the meaning of sect. 12, sub-sect. 1 (b), of the Locomotives Act 1898, and that therefore the sub-section did not give the highway authority the right to bring their action for the recovery of the whole of the expenses within six months after the completion of the work, and consequently that by the sub-section their claim was barred for any expenses incurred more than twelve months before the commencement of the action. (<i>Norfolk County Council v. Green and another.</i>)	451
GRANT OF LAND.		WILFUL OBSTRUCTION. —No obstruction in fact—Truck in street for purpose of cleaning house—Purpose, time, and space reasonable.—A truck, 6ft. long by 2ft. 8in. wide, containing an apparatus for removing dust from houses, was placed by D. in a highway 30ft. wide for some hours, while the dust was being removed from a certain house. There was no evidence that anyone was incommoded or that anyone was prevented from passing along the highway. It was found as a fact that the business, purpose, and time selected were reasonable, and that neither the time nor the space occupied were excessive, but that the system of cleaning was not necessary to the ordinary comfort or exigency of life, and was still in the experimental stage, and that the noise of the apparatus and the collection of sight-seers might cause discomfort or inconvenience to the occupiers of houses and people using the street. Held, that there was no evidence of wilful obstruction within sect. 54 (6) of the Metropolitan Police Act 1839. (<i>Dunn, app. v. Holt, resp.</i>)	577
Reservation to grant—Omission from subsequent grant—Effect.—In 1829 the Crown granted land adjoining the sea to a corporation, reserving (<i>inter alia</i>) "all such part of the said piece or parcel of land hereinbefore described as may be within 100ft. of high-water mark on the sea coast, or in any creek, harbour, or inlet." In 1830 the corporation, in execution of a previous contract, sold the land to D., through whom the respondents claimed, and D. executed a mortgage to the corporation to secure part of the purchase money, which was then unpaid. The land was conveyed to D. "to hold the same subject to the reservation and conditions in the now recited grant" (meaning the grant of 1829 from the Crown) "contained." In 1833 the corporation was dissolved by Order in Council, and its property thereupon reverted to the Crown, "subject to all mortgages and contracts for sale previously lawfully made." In 1840 D. paid off the mortgage, and the Crown granted the land to him. This grant made no mention of the reservation above mentioned, and described the land as being bounded on one side "by the water of" the "harbour." Held, that the effect of the grant of 1840 was to do away with the reservation contained in the earlier grant. (<i>Attorney-General for New South Wales v. Dickson and others.</i>)	213	HUSBAND AND WIFE.	
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Repair — Extraordinary traffic — Extraordinary expenses for repairs—Haulage of timber over roads—Timber the natural produce of land—Period of limitation for recovery of expenses—"Particular work extending over long period."—The defendants for a period extending over two years bought from the owner of an estate a large quantity of timber which was felled on the estate, and the timber was hauled by the defendants to the railway station over two roads for a distance of between two and three miles on each road, the			

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her. During the hearing of the summons the wife gave an undertaking not to remove the child out of the jurisdiction of the court. On the 10th March 1903 the summons was dismissed and the wife was ordered to pay the costs out of her separate property, notwithstanding that it was subject to a restraint on anticipation, and she was also ordered to deliver the child to the husband forthwith. It was then discovered that she had sent the child out of the jurisdiction two or three days before the 10th March, and had since gone abroad herself, and she had remained abroad with the child ever since. On the 12th March an order was made for her committal for contempt of court, and directing a writ of attachment should issue against her. The wife gave notice of appeal from so much of the order of the 10th March as directed the costs to be paid out of her separate estate, and it was contended that the court had no jurisdiction to make it. Held, that the rule that a person who is in contempt cannot be heard, <i>prima facie</i> applies to voluntary applications on his part, to cases where he is asking for something, and not to cases in which all he seeks is to be heard in matters of defence; that the appellant objected to the order on the ground that there was no jurisdiction to make it; and its legality ought to be determined, and therefore the appeal must be heard. Held also, that the summons was not a "proceeding instituted" by the married woman within sect. 2 of the Married Woman's Property Act 1893, but an application in the divorce suit, and there was no jurisdiction to order her to pay the costs out of her separate estate which was subject to a restraint on anticipation. (<i>Gordon v. Gordon.</i>) ... 597	separated from her husband in 1889 and had never lived or cohabited with him afterwards, and he became bankrupt in 1890, but the bankruptcy was annulled in 1896. The question having arisen whether, although the wife was no longer in fact "the cohabiting wife" of the husband, the trust in her favour was still subsisting, on the ground that the settlor had attempted to fetter her interest in a manner which was contrary to public policy: Held, that the gift of the life interest to the wife was by way of limitation, and was not a gift defeasible on the performance or non-performance of a condition, and that being so long as she cohabited with her husband, it was a gift rather in favour of morality than against it, and upon the proper construction of the settlements it must be held good. Per Kekewich, J.: "Policy of the law" ought not to be impressed into the service of highly improbable contingencies. (<i>Re Hope-Johnstone's Trusts; Hope-Johnstone v. Hope-Johnstone.</i>) ... 253
Divorce—Wife's petition—Decree nisi—Adultery of petitioner—Discretion of court.—The court has full discretion as to granting a decree nisi in favour of a petitioner, who has been found guilty of adultery, under sect. 31 of the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85), where the misconduct of the petitioner is more or less pardonable or can be excused, but in order that it may exercise this discretion the misconduct of the petitioner must have been caused by the misconduct or the offences of the respondent. (<i>Wyke v. Wyke, The King's Proctor showing cause.</i>) ... 172	Presumption in favour of a valid marriage—Long-continued open cohabitation—Ceremony—Foreign marriage—Recognition—Strict proof.—Where there is clear proof that English persons intended to be married to one another, some evidence of a ceremony by way of a French marriage <i>de facto</i> , and of recognition of them afterwards as man and wife by their families and by them of their children as legitimate, during a long course of years, the court will not require strict proof of the marriage, even upon the assumption that to contract marriage in France in the manner alleged was not in accordance with the habits of law-abiding people there. The offspring of such a union held therefore entitled to share in a gift under a will to "children." (<i>Re Shephard; George v. Thyer.</i>) ... 249
Marriage settlement—Covenant to settle wife's after-acquired property—Annuities—Construction of covenant.—By her marriage settlement, dated in 1886, a wife covenanted to settle all her after-acquired property, real and personal, whether in possession, reversion, or otherwise (with certain small exceptions), upon trust to be sold and converted and held by the trustees upon the trusts of the settlement. During the coverture the wife became entitled to certain annuities. Held, that the annuities were not caught by the covenant. (<i>Re Dowding; Gregory v. Dowding.</i>) ... 82	Separation — Desertion — Condonation — Second separation.—Where an offence has been committed which <i>prima facie</i> entitles a married woman to an order under sect. 4 of the Summary Jurisdiction (Married Women) Act 1895, and the offence has been condoned by the wife, the effect of such condonation depends upon the common law and not upon any section of that Act. A married woman issued a summons against her husband complaining of his desertion. The hearing of the summons was adjourned by the justices before whom it came, and before the resumed hearing the wife resumed cohabitation with her husband. She subsequently left him—this also before the resumed hearing—and the justices at the hearing granted her an order for separation and an allowance for maintenance. Held, the order must be discharged since the wife had put an end to the original cause of complaint by the resumption of cohabitation, and that the justices had nothing to adjudicate upon at the date of the adjourned hearing when the order was made. (<i>Williams v. Williams.</i>) ... 174
Policy of the law—Post-nuptial settlements by husband—Trusts for his wife "so long as she shall continue the cohabiting wife or the widow" of husband—Condition—Limitation.—By post-nuptial settlements, which did not purport to be agreements between husband and wife, in consideration of natural love and affection, the husband assigned leaseholds to trustees upon trusts during the natural life of the wife or so long as she should continue the cohabiting wife or the widow of the husband, to pay the income to the wife for her separate use, and from the decease of the wife in the lifetime of the husband, or from and after the dissolution of the marriage or judicial separation between them, a protected life interest in the annual proceeds was given to the husband, with a provision for the maintenance of their children. The deed contained an ultimate trust of the corpus of the trust premises in default of children in favour of the next of kin of the husband. There was also a power of advancement during the joint lives and the subsistence of the marriage with the joint consent of the husband and wife and, after her decease or after the dissolution of their marriage or a judicial separation between them, with the consent of the husband. The wife	Separation deed—Construction—Voluntary settlement or deed of separation—Reconciliation—Trust for children.—Where articles of agreement under seal are entered into between husband, wife, and a trustee, reciting that the husband, who was entitled to a share of residue under a will, as a condition of a mutual separation which had been agreed on, had agreed to assign his interest under the will to the trustee upon trust to pay the interest thereof to the wife and then as to the principal for the three children of the marriage, and the wife covenants not to molest the husband, and are followed by a separation and nine months afterwards by reconciliation and return to cohabitation: Held, that, upon the true construction of the articles, the trusts thereby declared in favour of the wife and children were subsisting notwithstanding the reconciliation, and that there was no resulting trust for the settlor, the husband, of the property comprised therein. (<i>Re Spark's Trusts; Massey v. Spark.</i>) ... 54
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Women) Act 1893 has the same meaning as in the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85). It does not signify simply cessation of cohabitation, but cessation of cohabitation without reasonable cause. It is the duty of justices before whom a summons under the Act of 1893 is heard to allow the husband to cross-examine his wife as to her conduct, and to admit evidence on his behalf showing that the husband has a reasonable excuse or cause for refusing to live with his wife and so to leave her. If the justices find that the husband had reasonable cause for separating from his wife, there is no desertion under sect. 4 of the Act of 1893, and the wife is not entitled to any order. (<i>Frowd v. Frowd</i> .)	175	
Tort of wife—Action against husband and wife—Defence—Different defences by husband and wife—Practice.—In an action to recover damages from a husband and wife for a libel alleged to have been published by the wife, if the husband pleads a payment into court in satisfaction of the plaintiff's claim, the wife cannot plead a defence denying liability. (<i>Beaumont v. Kaye and another</i> .)	51	
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Application form—Policy—Construction—Warranty not to commit suicide—Insurance for benefit of creditor—Executor suing as trustee for creditor.—An application for a policy of life insurance was expressed to be the basis and part of the contract, and contained the following undertaking by the assured: "I also warrant and agree that I will not commit suicide, sane or insane, during the period of one year from the date of the said contract." The policy was taken out for the benefit of a creditor, and by the policy the defendants agreed to pay, subject to conditions, 4000 <i>l.</i> to the creditor "in consideration of the application for this policy which is hereby made a part of this contract." During the period of one year from the signing of the policy, the assured committed suicide in a fit of temporary insanity. Held, that the undertaking was such that the breach of it rendered the policy void, and that it was not an undertaking the breach of which could only give the insurance company a right to claim against the estate of the assured. (<i>Ellinger and Co. and Schlesinger v. Mutual Life Insurance Company of New York</i> .)	494	
Lapse of policy on failure of payment of premium—Subsequent payment—Conditional receipt by insurance company—Neglect of assured to read conditions of receipt—Duty of insurance company—Estoppel.—A policy of life insurance effected with an insurance company was expressed to be conditional upon the payment of the premiums each year within thirty days of their becoming due. The holder of the policy failed to pay a certain premium within thirty days of its becoming due. On his afterwards sending the money to the company they sent back to him a receipt upon a printed form, which stated that the policy had lapsed and that the payment was accepted subject to certain conditions printed on the back of the receipt. He received this receipt, but did not read it. One of these conditions was that the person whose life was insured had been during the past twelve months in continuous good health and free from all disease; and he was in fact, and to his knowledge, suffering at that time from a disease of which he afterwards died. Until he died the subsequent premiums were punctually		
paid. On his death the company refused to pay the sum for which his life had been insured on the ground that the policy had lapsed, and the conditions of the receipt above mentioned had not been complied with. In an action to recover the amount of the insurance money: Held, that, as the policy had lapsed on account of the breach of its conditions, and the plaintiff had given no evidence of any conduct on the part of the company which would justify him in thinking that the policy had not lapsed, and would estop them from relying on the lapsing of the policy, he was not entitled to succeed in the action. (<i>Handler v. Mutual Reserve Fund Life Association</i> .)	192	
Want of insurable interest—Void policy—Innocent misrepresentations of insurance agent as to validity of policy—Ignorance of assured—Mistake of law—Recovery back of premiums paid by assured.—The plaintiff was induced to insure his mother's life with the defendant insurance company by the representations of the company's agent that the policy would be a valid one. These representations were made by the agent innocently, and without any fraudulent intent. In an action by the plaintiff to recover back from the company the premiums he had paid, alleging that the policy was void for want of insurable interest: Held, that, assuming the policy to be void under the Life Insurance Act 1774, yet the misrepresentation of the agent would be a misrepresentation of law, and, the parties being <i>in pari delicto</i> , the plaintiff could not recover in the action. (<i>Haras v. Pearl Life Assurance Company</i> .)	245	
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Lloyd's policy—"Subject to average"—No average clause attached—Other policies on zones—Applying policies rateably.—A timber yard, as a whole, was insured by a Lloyd's policy for 11,450 <i>l.</i> and in three zones by various fire insurance companies for 25,500 <i>l.</i> On zone B there was only one company's policy for 3000 <i>l.</i> The value in the three zones was 36,500 <i>l.</i> —viz., 1940 <i>l.</i> in zone A, 13,260 <i>l.</i> in B, and 21,300 <i>l.</i> in C; and 12,850 <i>l.</i> —viz., 1900 <i>l.</i> in zone A, 9400 <i>l.</i> in B, and 1550 <i>l.</i> in C—was the value of the timber burnt. The Lloyd's policy was expressed to be "subject to average," but had no average clause attached. Held, that the system of marshalling the policies, so as to apply the Lloyd's policy and the company's policy for 3000 <i>l.</i> rateably to the loss in zone B, and the then unexhausted portion of the Lloyd's rateably with the other policies on zones C and A respectively, could not be introduced by the words "subject to average" in a Lloyd's policy. On this policy the plaintiffs, being insured on only a portion of the goods at risk, must be considered as being their own insurers for the difference, and must bear a rateable share of the loss accordingly. The underwriters were liable for 12,850 <i>l.</i> Whether the average clause is attached to a Lloyd's policy or not, if the policy is expressed to be "subject to average," it is according to the usage of Lloyd's the same as if the clause were attached. (<i>Acme Wood Flooring Company Limited v. Marten</i> .)	313	
JUSTICES.		
Action against justice—Issue of distress warrant—Limitation of action—Time of conviction or distress.—In February the defendant, who was a magistrate, convicted the plaintiff of an alleged offence against the Vaccination Acts, and in April the plaintiff having failed to pay the fine inflicted the defendant issued a warrant of distress, which was executed against the plaintiff's goods. In an action for illegal distress: Held, that the limitation imposed by sect. 1 of the Public Authorities Protection Act 1893 ran from the date of the issue of the warrant of distress and not from the date of the conviction. (<i>Polley v. Fordham</i> .)	755	
Mayor of borough—Borough justice <i>ex officio</i> —County justice sitting within the borough—Mayor's right to preside—Borough business.—If a borough has no separate commission of the peace,		

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- so that the mayor is a borough justice *virtute officii*, he is not entitled to take the chair at a sitting within the borough of county justices where the court is sitting as a petty sessional division, and the fact that the offence being tried was committed entirely within the borough makes no difference. The expression "business of the borough," as used in the Municipal Corporations Act 1882, s. 155 (2), means the business which a court assembled by the mayor of a borough transacts. The business of a court sitting as a petty sessional division is county business and remains so, although the particular case being tried might have been treated as borough business. (*Lawson v. Reynolds and others.*) ... 278
- Quarter sessions—Appeal from licensing justices—County solicitor—Disallowance of profit costs of justices' clerk—A county solicitor was appointed for the West Riding of Yorkshire, and paid a salary out of the county funds. His duty was to represent the justices in all judicial business affecting their acts as justices, including the defence of appeals from their decisions under the Licensing Acts. Held, that the quarter sessions were not entitled to disallow the profit costs of a clerk to justices, who had been retained to act for such justices upon an appeal against a decision under the Licensing Acts, merely because he was employed by the justices instead of the county solicitor. (*Rex v. Justices of West Riding of Yorkshire; Ex parte Ellis.*) ... 381
- Summary jurisdiction—Lists of persons liable to serve on juries—Justices sitting in "special petty sessions" for revising jury lists—Power of justices to state special case—Justices sitting in special petty sessions under sect. 10 of the Juries Act 1825, for revising the lists of jurors, are not a court of summary jurisdiction within the meaning of sect. 13, sub-sect. 11, of the Interpretation Act 1889, and have no power under sect. 33 of the Summary Jurisdiction Act 1879, or otherwise, to state a special case for the opinion of the High Court upon the application of a person aggrieved by their decision. (*Hagmaier, app. v. Overseers of Willesden, resps.*) ... 683
- (See PUBLIC HEALTH.)
- LANDLORD AND TENANT.
- Covenant by lessor running with the reversion—Assignment of reversion by lessor—Liability of lessor to lessee after assignment—Award under arbitration clause—Covenant in new lease to perform award—Action on award—Merger.—At the expiration of a lease of an oil mill certain differences arose between the lessees and the lessors as to repairs and works to be done on the demised premises, and, these differences having, in pursuance of an arbitration clause in the lease, been referred to arbitration, the arbitrators awarded that certain millstones should be repaired by the lessors. Before the award was published the lessees took from the lessors a new lease which also contained a similar arbitration clause as to differences between the lessors and the lessees, and which, after reciting the reference to arbitration and that the award had not been published, contained a covenant that as soon as the award should be published the lessors should execute all the repairs therein stated to be within their province to repair. Subsequently both the lessees and the lessors assigned their interests in the premises, and, the lessors having refused to do the necessary repairs to the stones, the assignees of the lessees did the repairs, and brought an action on the award to recover the expenses from the lessors. Held, that the lessors' liability under the award to do the repairs was not merged or extinguished by the covenant in the new lease whereby the lessors covenanted to execute the repairs according to the award, and that an action on the award could be maintained by the lessees and their assignees for the expenses of the repairs which the lessors were bound to do, although there had been no reference to arbitration under the arbitration clause in the new lease.
- Seemle*: A lessor who assigns his reversion remains liable to the lessee upon an express covenant to do repairs to the demised premises—a covenant running with the reversion—as sect. 2 of the statute 32 Hen. 8, c. 34, while giving to the lessee a right of action against the assignee of the lessor for breach of the covenant, does not release the lessor from his express covenant or from his liability thereunder. (*Stuart and others v. Joy and Nantes.*) ... 78
- Covenant by tenant to pay all charges—Paving expenses—Notice to tenant to pay—Payment by tenant—Deduction of amount paid from rent—Landlord's right to distrain for amount deducted.—The lease of a house contained a covenant on the part of the tenant to pay the rent free of all deductions except landlord's property tax, and to pay all rates, taxes, and assessments whatsoever, and all charges imposed by any local authority upon the frontagers in respect of the taking over and the making and repair of the roads abutting on the premises. The local authority, having incurred expenses in paving the road and having apportioned the expenses among the frontagers, gave the tenant notice, under sect. 96 of the Metropolis Management (Amendment) Act 1862, not to pay his rent without first deducting the amount of the paving expenses due to the local authority from the landlord as owner of the house. The amount of the expenses so claimed from the tenant exceeded the whole sum which he owed to his landlord as rent, and the tenant paid to the local authority the whole rent then due, in accordance with the notice. The landlord then demanded the rent from the tenant, which the tenant refused to pay, and thereupon the landlord distrained upon the tenant for the rent, the whole amount of which the tenant had paid to the local authority. Held, that the tenant having paid the whole amount of the rent to the local authority, as he was bound under the section to do, that payment was, under the section, to be taken as a payment of the rent, and that therefore the rent was gone and the landlord had no right to distrain for the same, though by the proviso at the end of the section the landlord's rights under the tenant's covenant to pay all such charges remained. (*Skinner v. Hunt and others.*) 430.
- Distress for rent—Sale by auction—Purchase of goods by landlord—2 Will. & M., sess. 1, c. 5, s. 2—Practice—Appeal from County Court—Claim for less than 20l.—Appeal by leave—"Right of appeal."—Sect. 1, sub-sect. 5, of the Judicature Act 1894 applies to all cases in which an appeal has properly come before the High Court, whether it has come with leave or without leave. A landlord who has distrained for arrears of rent cannot himself purchase the goods distrained when they are sold by auction under 2 Will. & M., sess. 1, c. 5, s. 2. (*Moore, Nettlefold, and Co. v. Singer Manufacturing Company.*) ... 460
- Forfeiture—Nonpayment of rent—Judgment for possession against assignee of lease—Application by sublessee for relief.—The court has jurisdiction to grant relief to an underlessee under sect. 4 of the Conveyancing Act 1892 in case of forfeiture of the original lease for nonpayment of rent. (*Gray and others v. Bonsall.*) ... 404
- Lease—Breach of covenant—Covenant not to "do or suffer to be done" an act—Act done by sublessee—Liability of lessee.—The lease of a licensed public-house contained a covenant by the lessee, for himself and his assigns, that he would not do or suffer to be done on the premises any act whereby the licence might be forfeited or indorsed, or the renewal withheld. The defendant, who was the assignee of the lease, sublet the premises by a lease which contained covenants similar to those in the superior lease. The sublessee was convicted of an offence against the licensing laws committed on the premises and the licence was indorsed, in consequence whereof the renewal of the licence was subsequently refused. Held, that the defendant had not, within the meaning of the covenant, done or suffered to be done the act whereby the

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licence was lost, and that he was not liable in damages for breach of the covenant in an action brought by the lessor. (<i>Wilson v. Twamley</i> .)	751	side to terminate this agreement." Held, that the tenancy was a yearly one terminable by three months' notice at the end of a year of the tenancy. (<i>Dixon v. Bradford and District Railway Servants' Coal Supply Society Limited</i> .)	122
Lease—Covenant to pay all assessments "which now are or during the term shall be imposed or assessed"—Paving expenses under Public Health Act 1875—Works completed before lease—Apportionment after lease—Liability of lessee.—A covenant by a lessee that he will pay "all rates, taxes, and assessments whatsoever which now are or during the said term shall be imposed or assessed upon the said premises or on the landlord or tenant in respect thereof by authority of Parliament or otherwise" does not apply to paving expenses which have become a charge upon the premises under the Public Health Act 1875 upon the completion of the works before the date of the lease, although such expenses do not become payable until after that date. (<i>Lumby v. Faupeul</i> .)	140	Tenant's fixtures—Removal by mortgagee after forfeiture of lease.—In June 1896 the defendant company issued debentures charging with the payment of the moneys advanced its undertaking and all its property whatsoever, both present and future. In July 1896 the defendant company took a lease of certain premises, the lease containing a clause that, if the company should become bankrupt or insolvent or go into liquidation, the term should cease and determine and be void to all intents and purposes; and upon that there was power of re-entry. On the 8th Feb. 1901, in a debenture-holders' action brought on behalf of the debenture-holders to enforce their charge, a receiver and manager was appointed of the undertaking of the defendant company, and of all the present property whatsoever or wheresoever comprised in or subject to the security. On the 8th July 1903 an application was made in the debenture-holders' action that certain trade fixtures upon the premises, which were the subject of the lease of July 1896, might be sold by the receiver, and that the receiver might be at liberty to remove the same from the premises of the defendant company, and on the 24th Aug. 1903 an order was made accordingly. On the 16th Oct. 1903 the defendant company passed an extraordinary resolution for a voluntary winding-up. On the 13th Nov. 1903 the reversioner of the premises, which were the subject of the lease of July 1896, applied to the receiver for delivery and possession of the same. Upon an application by the reversioner for an inquiry as to her interest in the premises and the buildings and fixtures thereon, and for delivery of possession of the premises by the receiver to the reversioner: Held, that the interest of the receiver in the premises was not concluded by the resolution of the 16th Oct. 1903, but that the receiver still retained the right to remove the fixtures during a reasonable time. (<i>Re Glasdir Copper Mines Limited; English Electro-Metallurgical Company Limited v. Glasdir Copper Mines Limited</i> .)	412
Lease—Forfeiture—Proviso for re-entry—"Commit any breach of covenants to be performed"—Breach of covenant not to underlet without consent.—In a lease containing covenants by the lessee to pay rent, rates, and taxes, to repair, to repair within three months after notice, not to use the premises except for a specified purpose, and not to assign or underlet without the consent of the lessor, there was a proviso for re-entry "if the lessee shall commit any breach of the covenants hereinbefore contained and on his part to be performed." Held, that the proviso for re-entry applied to a breach of the covenant not to assign or underlet without the consent of the lessor. (<i>Harman v. Ainslie</i> .)	624	Tithe—Agreement to pay tithe as further rent—Validity.—An agreement by a tenant to pay to his landlord a certain rent for a farm and "also by way of further rent so much as the landlord shall pay by way of tithe rentcharge on the said premises" is void by virtue of sect. 1 of the Tithe Act 1891. (<i>Lord Ludlow v. Pike</i> .)	458
Lease for three years—Covenant by tenant to pay "outgoings"—Reconstruction of drainage by order of local authority—Liability of tenant.—By an agreement in writing the plaintiff let a house to the defendant for a term of three years, and then from year to year until either party should give three months' notice, at a yearly rent of 55 <i>l.</i> ; and the defendant agreed to pay "all outgoings of every description for the time being payable in respect of the premises." During the term of three years the plaintiff expended 83 <i>l.</i> in reconstructing the drainage of the house in compliance with a notice from the local authority. Held, that the tenant was liable to pay the expense of doing this work as an "outgoing" within the meaning of the agreement, although the term was short and the rent small. (<i>Stockdale v. Ascherberg</i> .)	111	LEASE.	
Mortgage—Lease by mortgagor after mortgage—Foreclosure—Payment of rent to mortgagee—Licence to tenant to grant underlease—Sale by mortgagee subject to tenancy—Estoppel <i>in pais</i> .—A lessee mortgaged leaseholds by subdemise in 1881, and in 1892 granted an underlease to a third party. In 1894 the mortgagee foreclosed, and the underlessee paid rent to him. In 1899 the mortgagee died, and his executors granted to the underlessee licence to grant a sublease of part of the premises, which he accordingly did. In 1900 they sold the premises, the assignment being made subject to the underlease. Held, that the mortgagee's executors having led to the belief that the reversion expectant upon the determination of the underlease was vested in them were estopped from averring the contrary; and that therefore the purchaser was not entitled to say that the underlease was not binding upon him. (<i>Keith v. R. Gancia and Co. Limited</i> .)	395	Covenant not to let adjoining property for purpose of a certain business—Breach of covenant—Remedies of lessee.—By an agreement in writing, dated the 30th Oct. 1901, T. agreed to grant to the plaintiff a lease of a shop in an arcade for twenty-one years, such lease to contain a covenant by the lessee "not to carry on upon the premises any other trade or business than that of a dealer in pictures (oil and water-colours), prints, engravings, photographs, etchings, and articles of vertu, artistic and heraldic stationer, frame-maker and dealer in photographic frames, artists' colours, and the accessories to the said trade or business"; and also a covenant by the lessor "not to let any other portion of the said arcade for the trade or business hereinbefore mentioned to be carried on by the tenant." By an agreement in writing, dated the 25th Sept. 1902, T. agreed to let to G. a stall in the arcade on a yearly tenancy, and it was agreed that the tenant should "not carry on any business other than that of a librarian, news-agent, bookseller, or stationer." The plaintiff alleged that G. was selling articles which came within the covenant in the deed of the 30th Oct. 1901, and brought an action against T. and G. claiming an injunction restraining T. from letting or allowing to remain let and G. from using the premises comprised in his agreement for any of	
Tenancy—Grant of lease during tenancy—Notice to quit by original landlord—Validity.—A landlord who, during the currency of a yearly tenancy, grants a lease of the premises to a third person, cannot, during the term granted by such lease, give the yearly tenant notice to quit. (<i>Wordsley Brewery Company, apps. v. Halford, resp.</i>)	89		
Tenancy.—"Three months' notice . . . to terminate agreement"—Tenancy from year to year.—Premises were let to the defendants "at an inclusive rental of 25 <i>l.</i> per annum from the 1st Oct. 1894. The company to pay rates and taxes in addition. Three months' notice on either			

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the purposes of the trade or business described in the tenant's covenant in the agreement of the 30th Oct. 1901. Held, the evidence showed that there had been a substantial breach of the agreement with the plaintiff; that the covenant being against letting and not against using, and the plaintiff having in that action treated the letting to G. as an existing fact, he had no remedy against G.; but as against T. he was entitled to a declaration that the letting to G. was a breach of the covenant not to let, and an inquiry as to the damages sustained by the breach, with liberty to apply for an injunction in case of any attempt at any further letting contrary to the covenant. (<i>Brigg v. Thornton</i> .) 327		continuously since the 1st May 1869, was for the first time convicted of the offence of selling spirits without a licence, and the beerhouse was thereupon closed. At the next special sessions the owner of the beerhouse applied under sect. 15 of the Licensing Act 1874 for the grant of a licence for the sale of beer and wine by retail in respect of the premises to a person who was then the resident-occupier of the premises. The licence was refused by the special sessions upon grounds other than one of the four grounds specified in sect. 8 of the Wine and Beerhouse Act 1869. Held, upon the authority of <i>Ex parte Flinn and Sons</i> (No. 2) (81 L. T. Rep. 221; (1899) 2 Q. B. 607)—the distinction between the application, as in that case, to a court of summary jurisdiction for an authority to carry on the business in the meantime, and the application to the special sessions for the grant of a licence, being for this purpose immaterial—that sect. 19 of the Wine and Beerhouse Act 1869 applied, and that consequently the special sessions had not a general discretion to refuse the licence, but could only refuse the same upon one or other of the four grounds specified in sect. 8 of that Act. (<i>Tower Division Licensing Justices, apps. v. Chambers and others, resps.</i>) ... 228	
Merger— <i>Res judicata</i> .—By an indenture of lease dated the 20th Aug. 1880 W. demised certain property to M. for a term of ninety-five years at the rent of 222l. 5s. 6d. By a mortgage dated the 24th June 1881 M. demised the term, less three days, at a peppercorn rent to H. to secure 2000l. and further advances. Eight thousand pounds was now due on the security. M. procured a conveyance of the fee on the 27th March 1882, and in 1883 sold to F., the conveyance being expressed to be subject to the lease of the 20th Aug. 1880. In July 1902 M. became bankrupt, his trustee disclaimed the lease, and on the 5th May 1903 an order was made by the registrar of the Warwick County Court that H.'s representatives should be excluded from all interest in the lease, and that the same should be vested in a purchaser from F., unless H.'s representatives declared their option to accept a vesting order of the lease. H.'s representatives did not appeal from the order in bankruptcy, but now asked (1) a declaration that the term created by the lease of the 20th Aug. 1880, subject to the subterm created by the mortgage of the 24th June 1881, became merged and extinguished on the conveyance of the fee to M.; and (2) a declaration that H.'s representatives were entitled to the premises for the residue of the term created by the mortgage, subject only to a peppercorn rent and the equity of redemption. Held, that the County Court judge had full jurisdiction to determine the question of merger, and that, as H.'s representatives had not appealed from the registrar's decision, they were estopped by the proceedings in the Bankruptcy Court, and could not have the question tried over again. Held, also, that, even if there were no estoppel, there was no merger, as it was for the benefit of M. and his intention to keep the term subsisting. (<i>Lea v. Thursby</i> .) 667		Objection to licence—Not required—Evidence.—On an appeal to quarter sessions against the refusal of licensing justices to grant the renewal of a licence on the ground that the licence was not required in the locality or neighbourhood, evidence was given by a surveyor, who produced an Ordnance Survey map, that within a certain radius of the licensed house objected to there were a large number of licensed houses and beerhouses, that for ten years the house in question had been licensed, and the neighbourhood, which was thickly populated, had not altered except that the population had increased. It was also proved that the neighbourhood was troublesome to the police. The objection to the licence had been served by the direction of the licensing justices. Held (<i>dissentiente Kennedy, J.</i>), that there was no evidence justifying the quarter sessions in refusing to grant the renewal of the licence. (<i>Raven and another, apps. v. Southampton Justices, resps.</i>) ... 94	
(See COMPENSATION—LANDLORD AND TENANT.)		Order taken by traveller—Appropriation—Sale off licensed premises.—An order for beer having been given to the traveller of a person licensed to retail beer at his premises by a customer at such customer's house, the traveller handed the order to the licensee at the licensed premises, who appropriated the beer by placing it in a box at those premises with a piece of paper on which was the customer's name. The beer was delivered and paid for at the customer's house. Held, that this was not a sale off the licensed premises. (<i>Walker, app. v. Walker, resp.</i>) 88	
LEGACY DUTY.		Sale of beer—Sale at unlicensed place—Canvasser employed to take orders at customers' houses—Duty of canvasser to transmit orders—Acceptance of order and appropriation at licensed premises—Executory contract of sale at customer's house.—The appellant, a brewer who was licensed for the sale by retail of liquors at his licensed premises, employed one C. to obtain orders for the appellant's beer from persons in a certain district, and subsequently to deliver the beer so ordered at the houses of the persons ordering the same. In obtaining the orders and delivering the beer, C. was required to observe certain rules to the effect that no beer was to be delivered unless the same had been previously ordered and the order had been entered in an order-book and sent to the licensed premises the day before the order was to be executed, and no money was to be taken for the beer by the person taking the order until the goods were delivered. These rules were not known by, or communicated to, customers. Postcards were also given to C. for the use of customers upon which they could send their orders; but these were not always given to persons on whom he called. In accordance with his usual course of business, C. called at a customer's house and received an order for a jar of beer. He entered the order in his order-book, which on the	
(See REVENUE.)			
LIBEL.			
Libel by officer of corporation—Liability of corporation—Scope of duty of agent—Malice.—A limited company is liable for a libel published by one of its officers acting within the scope and in the course of his employment, on the ordinary principles of agency; and, if there is evidence that it was within the scope of the agent's authority and employment to write the letter which contained the libel complained of, the fact that he went farther than the facts warranted, and made charges which he knew to be false, will not relieve the company from liability. (<i>Citizens' Life Assurance Company Limited v. Brown</i> .) 739			
LICENSING.			
Beerhouse licensed before 1869—Conviction of licensee-holder for selling spirits—Disqualification of licensee-holder—Application by owner to special sessions for licence—Discretion of justices—Limitation to the four specified grounds.—The holder of the licence of a beerhouse which had been licensed for the sale of beer and wine to be consumed on or off the premises, prior to and			

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next day was sent on to the appellant at his licensed premises, where the order was accepted and the jar was appropriated to the customer at the licensed premises. The jar was placed on the appellant's cart and was delivered to the customer at his house, where it was paid for on delivery. Held, that what took place at the customer's house was merely the taking of an order to be forwarded on to the licensed premises, to be there dealt with by the appellant, and that, therefore, there was no evidence of any contract, whether executory or otherwise, for the sale of the beer made at the customer's house, and that the appellant could not be convicted under sect. 3 of the Licensing Act 1873 of selling the beer at a place where he was not authorised to do so by his licence. (Strickland, app. r. Whittaker, resp.)	445	the cost of maintaining the highways in that parish: Held, that the rural district council had no ground for contending that, as their income and expenses were affected by the alteration, it was a matter requiring adjustment under sect. 62 of the Local Government Act 1888. (Caterham Urban District Council v. Godstone Rural District Council.)	633
		By-law—Building—"Place of habitual employment for any person in any business"—Stables of building contractor.—By by-law No. 2 certain buildings, which should not be constructed or adapted to be used "as a place of habitual employment for any person in any manufacture, trade, or business," were to be exempt from the by-laws relating to new buildings. Held, that a building divided into three parts, consisting of a rain goods store, a timber store, and stables, used by a building contractor, was not a building used "as a place of habitual employment for any person in any manufacture, trade, or business" even although part consisted of the stables. (Linzell, app. v. Felixstowe and Walton Urban District Council, resps.)	389
		By-law—Erecting shed—Neglecting to comply with notice—Sufficiency of notice.—By certain by-laws Nos. 53 and 96 it was provided that if any person should erect new domestic buildings certain open space was to be provided, and anyone who was intending to erect a building was to give notice to the council and deliver plans thereof, a description of the materials to be used, and other details. By by-law No. 98, where a person who has erected a building or done any other work to which the by-laws apply receives a notice in writing specifying any matters in respect of which the erection or the work is in contravention of any by-law, such person must cause anything done in contravention to be amended. A notice was served stating: "I am directed . . . to call your attention to the fact that a wooden erection has been made . . . contrary to Nos. 53 and 96 of the by-laws. . . ." Held, that such notice was sufficient. (Dickinson, app. r. Forsyth, resp.)	30
		Hoarding—"Abutting" on street.—A hoarding for advertisements, 60ft. long and 12ft. above a hedge, no part of such hoarding being nearer to the street than 2ft. and having the hedge between it and the street, does not "abut" on the street. (Barnett, app. v. Covell, resp.)	29
		Private Act—Inconsistency with public Act.—By a private Act of 1894 the appellants were specially authorised to do certain works and to make and maintain in connection with the works so authorised (<i>inter alia</i>) all necessary and proper buildings and other works on any lands within the limits of deviation. The erection of a certain building on lands within the limits of deviation was rendered necessary by works so authorised. Held, that the interference and control involved in sect. 76 of the Metropolis Management Act 1855 was inconsistent with the powers conferred by the private Act, and so the appellants were not bound to serve on the respondents a notice under that section in respect of such building. (Surrey Commercial Dock Company, apps. v. Mayor, &c., of Bermondsey, resps.)	123
		Private street works—Apportionment of expenses on frontager—Notice of objection—Objection that street is not a street within meaning of Act—Evidence that street is repairable by inhabitants at large—Admissibility.—Sect. 7 of the Private Street Works Act 1892 enables the owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing private street works under the Act to serve a written notice on the urban authority, objecting to the proposals of the urban authority, on the grounds (amongst others): (a) That an alleged street is not a street within the meaning of the Act; and (b) that a street is a highway repairable by the inhabitants at large; and by sect. 5 a "street" means a street as defined by the Public Health Acts, "and not being a highway repairable by the inhabitants at large." Held, that	
Formation of school district and incorporation of board of managers—Sale of property belonging to board of managers and investment of proceeds—Dissolution of district by Local Government Board—Postponement of dissolution—Transfer of Consols—Bank of England—Orders of Local Government Board.—The Local Government Board made an order dissolving a metropolitan school district under the Metropolitan Poor Act Amendment Act 1869 as from a date therein mentioned. By subsequent orders the date of dissolution was further extended, but ultimately the district was dissolved. At the date of dissolution a sum of Consols was standing at the Bank of England to the credit of the board of managers of the dissolved union. The Local Government Board made an order directing the last acting managers of the dissolved district to transfer the Consols to certain poor law authorities in the order named in the proportions therein mentioned. The Bank of England refused to recognise the validity of the order or the powers of the last acting managers to transfer the Consols, insisting that if the corporate board of managers was in existence it could only transfer the Consols under its seal, and that if it was not in existence a vesting order was required. An action having been brought by the last acting managers for a declaration of their right to transfer: Held, that, on the dissolution of a district constituted under the Poor Law Amendment Act 1845, the corporate board of such district constituted under sect. 45 of that Act continues to exist, while the Dissolved Boards of Management and Guardians Act 1870, s. 12, does not automatically vest the property of the district in the last acting managers, and consequently that the plaintiffs could transfer the Consols under their seal as a corporate board. It is doubtful whether, when once the Local Government Board has dissolved a district under the Dissolved Boards of Management and Guardians Act 1870, it has power to set it up again or to continue the managers for more than a period of twelve months except for a certain purpose specified on the face of the order. (Morton v. Bank of England.)	375		
		(See HIGHWAY—TRAMWAY.)	
		LOCAL GOVERNMENT.	
Alteration of boundaries—Creation of new urban district—Adjustment of property and liabilities.—The loss of a portion of a ratepaying area does not support a claim for an adjustment of "property, income, debts, liabilities, or expenses," within the meaning of sect. 62 of the Local Government Act 1888. Therefore where a parish forming part of a rural district was made into a separate urban district by an order of the county council under the Act, and before the alteration the contribution out of the rates of that parish towards the expense of maintaining the highways in the rural district had largely exceeded			

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sub-sect. (a) includes and overlaps sub-sect. (b), and that under a notice of objection given under sub-sect. (a) "that the alleged part of a street does not form part of a street within the meaning of the Act," the objector is entitled to give evidence that the street in question is a highway repairable by the inhabitants at large, although that ground of objection is specifically dealt with in sub-sect. (b). (<i>Carey, app. v. Mayor, Aldermen, and Burgesses of Bexhill.</i>)	58	marriage settlement real estates of the husband were settled upon trusts for the husband, the wife, and the children of the marriage, and portions for the younger children were charged on the estates and secured by a term created thereon, the ultimate limitation of the estates being to the settlor in fee, who covenanted that, so long as the interests and terms thereby created should subsist, the estates comprised in the settlement should continue to be of a specified annual value. On the death of a younger child, whose portion had vested, but had not been raised, intestate and unmarried, the portion devolved upon the settlor as sole next of kin, but he did not take out administration to his son's estate, and on his death his testamentary dispositions (which, however, were executed at a date prior to his son's death) contained no reference to the portion. On an originating summons taken out by the trustees of his will, the question was raised whether the portion which devolved upon him on the death of his son sank into the estates upon which it was charged and of which the settlor was absolute owner subject to the interests and terms created by the settlement, or whether it continued to subsist and formed part of his personal estate: Held, that it was for the benefit of the settlor that the portion should sink into the estates, and that it had merged in the inheritance thereof. (<i>Re French-Brewster's Settlement; Walters v. French-Brewster.</i>)	378
Public health—Sanitary authority—Power to provide "public sanitary conveniences"—Subway—Subsoil of highway—Vesting in sanitary authority—Right of adjoining owner <i>usque ad medium flumen</i> —Trespass.—Where a sanitary authority, purporting to act under the powers conferred upon them by sect. 44 of the Public Health (London) Act 1891, had constructed beneath the middle of a street certain public lavatories and sanitary conveniences, with requisite and proper means of approach thereto and exit therefrom on both sides of the street so that the approaches in fact constituted a subway for crossing the street, the entrances to the subway being by staircases placed at each side of the street at or near the edge of the footway, it was held that the sanitary authority had been exercising the powers conferred by the statute for a purpose not thereby authorised, they having no power to acquire lands for the purpose of constructing a subway; and that therefore the plaintiffs, opposite the doors of whose premises one of the entrances to the subway was placed, were entitled to a mandatory injunction to restrain the trespass. (<i>London and North-Western Railway Company v. Mayor and Corporation of the City of Westminster.</i>)	461	(See LEASE.)	
LUNACY.		METROPOLIS.	
Administration of lunatic's property—Permanent additions to and improvements of freehold estates—Orders for payment of expenditure out of personal estate—Jurisdiction.—Sect. 118 of the Lunacy Act 1890 gives the court jurisdiction to make a charge upon the real estate of a lunatic for the whole or any part of any moneys expended under a previous order for the permanent improvement, security, or advantage of such property, unless in making the previous order the judge had that section before his mind and deliberately exercised the jurisdiction conferred by it. If the jurisdiction has been exercised once when the original order was made it cannot afterwards be exercised a second time. (<i>Re Gist.</i>)	35	By-law—Reasonableness—No provision as to notice—Insufficient water-closet accommodation.—By by-law 26 made by the London County Council pursuant to sect. 39 (1) of the Public Health (London) Act 1891 it was provided that: "The landlord or owner of any lodging-house shall provide and maintain in connection with such house water-closet, earth-closet, or privy accommodation in the proportion of not less than one water-closet, earth-closet, or privy for every twelve persons." The by-laws further provided a penalty upon any breach thereof. There was no provision as to notice to the landlord or owner. Held, that the by-law was bad on the ground that it was not reasonable. (<i>Nokes and another, app. v. Islington Borough Council, resps.</i>)	22
Application of property for maintenance of lunatic—Jurisdiction of Chancery Division.—Where a person of unsound mind not so found, who was detained in an asylum abroad, was absolutely entitled to certain trust property in this country, and directions were desired as to her maintenance thereout, the Court of Appeal (acting under the jurisdiction in Chancery), upon an undertaking by the trustees to bring the trust property into court, ordered that the interest thereof should, during the lifetime of the lunatic, or until further order, be paid to the lunatic's sister, who was one of the trustees, she undertaking to apply the same for the maintenance of the lunatic. (<i>Re Carr's Trusts; Carr v. Carr.</i>)	592	Drainage—Low-lying land—Dwelling-houses on—Houses capable of being drained by gravitation for greater part of year—Houses so situate "as not to admit of being drained by gravitation"—Permission of council for erection—Time for taking proceedings.—The appellant erected ten houses, intended to be used as dwelling-houses, on low-lying land, the surface of which was below the level of Trinity high-water mark. During the greater part of the year these houses admitted of being, and were in fact, drained by gravitation through an intermediate sewer into a main sewer, which was an existing sewer of the London County Council; but for some days in the year, in times of considerable rainfall, the main sewer became full of flood water, and so the water in the main sewer, by closing a hinged flap at the junction of the intermediate sewer, kept the sewage back in the intermediate sewer and prevented it from going into the main sewer, and on those days the houses could not be drained into the main sewer. There was no other existing sewer of the council into which they could be drained by gravitation. Upon informations under sects. 122 and 200 (9) of the London Building Act 1894 against the appellant for erecting, without the permission of the council, upon such low-lying land dwelling-houses which were so situate "as not to admit of being drained by gravitation into an existing sewer of the council": Held, that as the houses were capable of being drained by gravitation into an existing sewer of the council for the greater part of the year, the fact that for some days in the year they could not be so drained, owing to the flood water in the main sewer keeping back the sewage in the intermediate sewer, did not	
Practice—Vesting order—Direction to transfer stock—Title of proceedings.—An order in Lunacy containing a direction made under sect. 133 of the Lunacy Act 1890 should be intitled "In the matter of the Lunacy Acts 1890 and 1891," as well as in the matter of the particular lunacy. But this is not to apply to a case under sect. 116, sub-sect. 1 (d), where the title contains a reference to the statutes 53 Vict. c. 5 and 54 & 55 Vict. c. 65. (<i>Re Purvis, a Person of Unsound Mind.</i>) ...	394		
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Settlement—Charge of portions—Devolution of unraised portion upon owner of estate charged therewith—Benefit of owner of estate.—By a			

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make them houses which were "so situate as not to admit of being drained by gravitation into an existing sewer of the council" within the meaning of sect. 122, and that therefore no offence under these sections had been committed by the appellant in erecting the houses without the permission of the council. Held, further, that proceedings under these sections are in time if taken within six months from the erection of the buildings, though more than six months from the commencement of such erection. (<i>Ellis, app. v. London County Council, resps.</i>)...	206	served previously or included in such notice. Therefore, a notice having been given under sect. 4 (2), a court of summary jurisdiction can make an order under sect. 5 prohibiting a recurrence of the nuisance and specifying works to be executed, where the only notice served has been under sect. 4 (2), if such court is satisfied that the nuisance, although abated, is likely to recur. On the hearing of informations and complaints under sect. 5 (1) (b), the respondents proved the nuisances alleged, but offered no evidence as to how the black smoke which caused the nuisances had been caused or as to what works were necessary to abate or prevent such nuisances. The appellants' witnesses stated that the black smoke might have been caused by two furnace doors being open at the same time. The magistrate determined that the respondents were entitled to a prohibition order, and thereupon the appellants required that the order should specify the works they were to execute under sect. 5 (5), but insisted that, the case being closed, the magistrate was precluded from hearing further evidence as to the works necessary. The magistrate therefore added to his prohibition order a direction to the appellants to fit up apparatus to prevent the furnace doors being opened simultaneously. Held, that the order was valid. (<i>Central London Railway Company v. Hammersmith Borough Council.</i>) ...	645
Drains—By-laws—Reconstruction of drain of old building—Necessity of intercepting trap—Work "in any building." —By a by-law made under the powers of the Metropolis Management Act 1855 it was provided that every person who should construct or reconstruct any pipe or drain, or other means of communicating with sewers, so far as he should effect any such works "in any building" erected before the confirmation of the by-laws, should provide in such drain a suitable and efficient intercepting trap. Held, that the word "in"—in the words "in any building"—meant, not "inside the building," but "in connection with the building," and that consequently the by-law applied to the reconstruction of a drain in connection with an old building erected before the confirmation of the by-laws, as the reconstruction of the drain was a work "in" such building, although such drain was outside the building, and that such drain ought to be reconstructed with an efficient intercepting trap, as required by the by-law. (<i>Kingland, app. v. Haben, resp.</i>) ...	449	Street opened by water company—Reinstatement of street by contractor employed by local authority—Power of local authority to recover expenses of supervising and superintending the works. —Where the soil of a street in the metropolis has been opened up by a water company, the local authority can by virtue of sect. 114 of the Metropolis Management Act 1855 recover the expenses of superintending and supervising the filling in and making good the soil so opened up. (<i>New River Company, apps. v. Mayor, &c., of Westminster, resps.</i>) ...	792
New drainage—Removal of old disused drains—By-law or regulation and direction. —By regulation 29 of the respondents all disused drains were to be broken up and destroyed, and the materials and foul earth removed and dry earth, ballast, or brick rubbish substituted. By sect. 83 of the Metropolis Management Act 1855 a penalty is provided if any drain thereinbefore mentioned is found not to have been provided according to the directions or regulations of the respondents. The appellants constructed new drains, which were connected with the respondents' sewer. On the premises were old disused drains which were not physically joined or connected with the new drains. The old drains were not taken out. Held, that the regulation was rightly made, and the appellants were properly convicted for constructing the new drain not in accordance with the directions of the respondents. (<i>London School Board, apps. v. Fulham Borough Council, resps.</i>) ...	116	MINES AND MINERALS.	
Smoke—Chimney of club—Smoke from cooking ranges and heating apparatus—"Private dwelling-house." —The chimney of a club of 750 members, such club containing the usual club accommodation, emitting smoke from the cooking ranges and the furnaces of a vertical boiler used for heating the premises, is not the chimney of a "private dwelling-house" within the exception contained in sect. 24 (b) of the Public Health (London) Act 1891. (<i>McNair, app. v. Baker, resp.</i>) ...	24	Owner of mine—Duty to fence—Public well in shaft of abandoned mine—Vesting of well in local authority—Liability of local authority to fence. —Where the shaft of an abandoned mine contains water and is used by the inhabitants of the district as a well and as being a public well becomes vested in the local authority under sect. 64 of the Public Health Act 1875, the local authority are not the "owners" of the mine, or the persons "interested in minerals of the mine," within the meaning of sect. 13 of the Metaliferous Mines Regulation Act 1872, and are not bound under that section to fence the shaft, and consequently, in the absence of negligence on their part, they are not liable for injuries caused by the shaft not having been fenced. (<i>Knuckey v. Redruth Rural District Council.</i>) ...	226
Smoke from tug—Nuisance—"Chimney" —Prohibition order—Specifying works.—The funnel of a tug plying to and fro in the river Thames, within the jurisdiction of the port sanitary authority of London, is a "chimney" within sect. 24 (b) of the Public Health (London) Act 1891. If a court of summary jurisdiction makes a prohibition order under sect. 5 of the Public Health (London) Act 1891, such order need not specify the works to be done by the person against whom the order is made if in the opinion of the court no works could be done to prevent a recurrence of the nuisance. (<i>Tough, app. v. Hopkins, resp.</i>) ...	672	Right to let down surface—Inclosure Act—Award—Manorial rights. —By an Inclosure Act and award certain waste land was allotted amongst commoners. The Act provided that nothing therein contained should be construed to diminish the rights of the lord of the manor in respect to his seignory and royalties except in respect of his ownership of the soil to be inclosed. And the Act further provided that the lord and his successors should hold and enjoy all mines and quarries under the waste together with liberty of searching for, winning and working the same, as fully and freely as if that Act had not been passed, and that without making or paying any satisfaction for so doing. And the Act further provided a summary means by which any person injured through the lord's working of the mines should be compensated by the occupiers of allotments in the same township. Held, in action brought by surface owners against an assign of the lord to restrain by injunction any injury to the surface by mining operations, that there was nothing in the Inclosure Act to deprive a surface owner of his common law right of support (the clause as to compensation in the Act relating to	
Smoke nuisance—Notice to abate—Notice to prevent recurrence—Prohibition order—Specifying works—Evidence. —Before a notice is served under sect. 4 (2) of the Public Health (London) Act 1891 requiring the person served to do what is necessary for preventing a recurrence of the nuisance, it is not necessary that a notice requiring such person to abate the nuisance under sect. 4 (1) shall have been			

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surface user only), and that consequently the plaintiffs were entitled to an injunction. (*Bishop Auckland Industrial Co-operative Flour and Provision Society Limited v. Butterworth Colliery Company Limited.*)... 149

MORTGAGE.

Debenture stock of company—Collateral agreement for purchase—Clog on equity of redemption.—The appellant agreed to make an advance to the respondent company upon the security of first mortgage debenture stock of the company with an option of purchasing the whole or any part of the stock so pledged at an agreed price at any time within twelve months. The company were desirous of paying off the loan before the expiration of the twelve months, and the respondent gave notice that he intended to exercise his option of purchasing. The company thereupon brought an action claiming a declaration that the agreement was not binding on them, and for consequential relief, and the appellant counter-claimed for specific performance or damages. Held, that the case came within the rule that a mortgagee is not allowed at the time of making the loan to enter into a contract for the purchase of the mortgaged property, and that the option of purchasing could not be enforced. (*Samuel v. Jarrah Timber and Wood Paving Corporation Limited.*)... 731

Priority.—Notice—Charges upon expectant legacy.—Fund not in existence or under control of any person at date of creation of incumbrances.—Notices given by incumbrancers on fund coming under control.—Where charges were created, during the lifetime of a testator, by a beneficiary upon his expectant legacy under the will of the testator—of which charges no effective notice could be given by any of the incumbrancers until the legacy charged came into existence and some person had control of it—it was held that the order of the dates at which notices were given, by the incumbrancers of their respective securities, to the legal personal representative of the testator, was sufficient to determine the priorities of the several incumbrancers, according to the principle of *Johnstone v. Cox* (45 L. T. Rep. 657; 19 Ch. Div. 17) and similar authorities; and that such priorities ought not to be regulated by reference to the dates of the securities themselves. (*Re Dallas.*)... 177

(See LANDLORD AND TENANT—PRINCIPAL AND SURETY.)

NUISANCE.

Electric lighting works—Vibration and noise.—Borough council—Injunction.—Under a provisional order confirmed by Act of Parliament, the St. P. Borough Council supplied electricity in the borough, and for this purpose had an electric generating station about 50ft. from the nearest point of a row of houses. The provisional order provided that nothing contained in it should exonerate the council from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them. In May 1903 the council began to run new and enlarged works and machinery at the generating station, including two engines each of about 750 horse-power. The lessees and occupiers of the row of houses complained that the new machinery increased an already existing nuisance by vibration and noise so as to interfere with their comfort and enjoyment, cause injury to health, and diminish the value of their interests in their houses; and they brought an action against the council claiming an injunction restraining them from causing nuisance to the plaintiffs and damaging their interests in their houses by vibration and noise from the electric generating station, and damages. The defendants contended that the vibration and noise were due to certain defects in the balance of the engines which they were endeavouring to remedy, and which they ought to be allowed time to remedy completely. Held, on the evidence,

that the vibration and noise were productive of an amount of annoyance against which the plaintiffs were entitled to be protected on the principle laid down in *Broder v. Saillard* (2 Ch. Div. 692) and *Bamford v. Turley* (6 L. T. Rep. 721; 3 B. & S. 62); that the annoyance was not merely temporary and occasional, but calculated to work material injury to the plaintiffs' property; that the defendants were not entitled to carry on their works unless they could do so without occasioning a nuisance; and that an injunction must be granted, with an inquiry as to damages. (*Colwell and others v. St. Pancras Borough Council.*)... 153

Noise, vibration, and smell—Electrical works—Generating station—Injunction.—By a provisional order made under the Electric Lighting Acts, and duly confirmed by Act of Parliament, the corporation of R. were authorised to supply electrical energy for public and private purposes within the area of the borough; it being provided by the order that nothing therein should exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused or permitted by them. The corporation entered into arrangements with the defendant company for the erection, maintaining, and working of a generating station within the borough; and the defendant company, in pursuance of such arrangements, acquired as a site for the proposed works a piece of land adjoining the garden of the plaintiff's house, and proceeded to erect therein the requisite engines, dynamos, and other machinery. The plaintiff, who occupied her house as a ladies' school, complained of various annoyances to the inmates of her establishment by noise, vibration, and offensive smells or vapours produced by the operation of the defendant company's works, and instituted an action for an injunction and damages in respect of the alleged nuisance. The court being of opinion that the annoyances complained of were not trivial or a kind to be expected from any ordinary and reasonable use by the defendant company of the land they had acquired, and, further, that, in spite of a diminution in intensity and frequency of the annoyances complained of since the commencement of the action, yet even at the date of the trial such annoyances had repeatedly and recently occurred, an injunction and damages were granted accordingly. (*Knight v. Isle of Wight Electric Light and Power Company Limited.*)... 410

Public and private nuisance—Smallpox hospital—Injunction—Public convenience—Public health—Scientific evidence as to the effects of similar hospitals.—A *quia timet* action was brought by the Attorney-General on the relation of certain owners and occupiers in a district near a populous city, and by the same owners and occupiers as plaintiffs to restrain the use by the corporation of the city of certain buildings as a smallpox hospital, both as a public and a private nuisance. Held, that to succeed in such a case it is necessary for the plaintiffs to show, not merely that inconvenience may be experienced or a sentiment of danger may exist; but a strong probability, amounting to a moral certainty that the hospital, if established, will be an actionable nuisance, and that the plaintiffs having failed to show this, that their action must be dismissed. In the course of the trial the plaintiffs adduced scientific evidence to show from the experience of other smallpox hospitals that such hospitals tended by aerial convection to spread the disease; and rebutting scientific evidence was adduced by the defendants. At the desire of the parties his Lordship heard the evidence; but expressed considerable doubt as to its admissibility. (*Attorney-General v. Mayor, &c., of Nottingham.*)... 308

(See PUBLIC HEALTH.)

PARTNERSHIP.

Dissolution—Expulsion clause—Conduct detrimental to partnership business or flagrant breach of any duties of partner—Conviction by police magistrate

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for travelling without a ticket—Injunction.—Articles of partnership provided that the managing partner, in the event of either of the other partners being addicted to notorious intemperance or immorality or other scandalous conduct detrimental to the partnership business or at any time during the partnership permitting or being guilty of any flagrant breach of any of the duties of a partner, should be at liberty to remove either or both of them from the partnership on giving them six days' notice in writing. One of the partners was convicted by a police magistrate of travelling on a railway without a ticket with intent to avoid payment and fined the full penalty, and thereupon the managing partner gave him notice expelling him from the partnership. On motion by the partner for an interim injunction to restrain his expulsion: Held, that, as the plaintiff had been convicted of dishonesty, the case was within the expulsion clause, and that there was ample justification for the notice of dissolution, and the court declined to interfere by injunction. (<i>Carmichael v. Evans.</i>) 573		preparation as a preparation of the plaintiffs'. Messrs. T. contended that "Absorbine" ought not to have been registered as a trade mark, and moved to expunge it from the register. Held, that "Absorbine" was not an invented word, since the first two syllables formed an ordinary English word, and the last was a meaningless flourish or termination, and there was no invention in continuing the syllables; and that it must therefore be expunged from the register, and the action be dismissed. (<i>Christy v. Tipper; Re Young's Trade Mark.</i>) 85	
		POLICE.	
		Pension—Approved service—Continuous service—Break in service.—The "approved service" referred to in sect. 1 of the Police Act 1890 must be continuous service to entitle a constable to a pension. (<i>Garbutt, app. v. Durham Joint Committee, resps.</i>) 26	
		POOR LAW.	
PATENTS, DESIGNS, AND TRADE MARKS.		Overseers—Distress for rates—Illegal distress by assistant overseer—Liability of overseers for illegal acts of assistant overseer.—Overseers are not liable <i>virtute officii</i> for an illegal and excessive distress by an assistant overseer in the execution of a distress warrant for non-payment of rates. A distress warrant for nonpayment of rates was issued by justices, addressed in the usual statutory form to the overseers and constables, and it was handed by one of the overseers to the assistant overseer of the parish, who had been duly appointed to act as such assistant overseer. The assistant overseer, while purporting to execute the distress warrant, was guilty of an illegal and excessive distress, the overseers having taken no part in the same. Held, that the overseers were not liable for the illegal acts of the assistant overseer in executing the warrant. (<i>Baker and Wife v. Wicks and others.</i>) 705	
Design—Registration—Infringement—Patent and registered design for same invention—Second registered design similar to previous design—Marking goods—Registration of design not known to infringer—Injunction—Damages.—The plaintiffs registered a design for improvements in motor cycles between the time when they applied for and the time when they obtained letters patent for a similar invention. Subsequently they registered a new design, which in fact was similar to the originally registered design, and sold machines marked with the second registration number only. The fact of the registration was unknown to the defendants prior to the issue of the writ in an action against them for infringement, but they sold some machines after the writ was issued, and on an application for an interim injunction they offered to keep an account. Held, that a patent and a registered design for the same invention might co-exist, the rights conferred did not clash, and the registration was valid; that the first registration was not forfeited; and that want of knowledge was not a reason why an injunction should not be granted, but that it protected the defendants from payment of damages in respect of sales effected by them before writ. (<i>Werner Motors Limited v. A. W. Gamage Limited.</i>) 342		Removal of pauper—Settlement—Married woman—Husband having no settlement—Derivative settlement.—A pauper and her husband, who was a foreigner with no settlement, came to reside in the parish of Birmingham in Jan. 1901, and resided there until June 1901, when the husband went to America with no intention of deserting his wife, and with the intention of returning. The wife and her children continued to reside in the parish of Birmingham until March 1902, when they went into the workhouse. Held, that the pauper and her children, who were all under the age of sixteen years, were irremovable from the parish of Birmingham. (<i>Tewkesbury Guardians v. Birmingham Guardians.</i>) 787	
Patent action—Petition for revocation—Liberty to apply for leave to amend by disclaimer—Conditions as to infringement prior to order—Discretion of judge.—Where a patent is ordered to be revoked unless within a certain time the patentee obtains leave to amend by disclaimer, the judge has a discretion as to the terms on which he will give the patentee the opportunity of obtaining the leave to amend, and such discretion will only be reviewed by the Court of Appeal in exceptional cases. (<i>Re Geipel's Patent.</i>) 70		POOR RATE. (See RATING.)	
Trade mark—"Invented word"—"Absorbine"—Removal from register.—Y., a manufacturing chemist, residing in America, obtained in Nov. 1901 the registration in the United Kingdom of the word "Absorbine" as a trade mark in respect of chemical substances used for agricultural, horticultural, veterinary, and sanitary purposes, and also in respect of chemical substances prepared for use in medicine and pharmacy. He used the word in connection with a liquid preparation designed to absorb and remove various growths and diseases in animals. Messrs. T. were well-known manufacturers of an ointment intended for similar purposes, which they sold under the name of "Absorbent" till 1901, but about the time of Y.'s registration of "Absorbine" they, without any knowledge of that fact, changed the name of their ointment to "Absorbine," and sold it under that name. Y. and his English agents, Messrs. C., brought an action against them to restrain them from infringing the registered trade mark "Absorbine," and from passing off any veterinary		PRACTICE.	
		Administration—Common order for administration against executor—Subsequent action by same plaintiff charging wilful default and fraud—No evidence of fresh information acquired since date of common order—Leave of the court.—A plaintiff who has obtained a common order for administration of an estate against the executor may obtain the leave of the court to bring a fresh action charging (<i>inter alia</i>) wilful default against the executor without proving that he did not acquire the information on which he founds his fresh action in time to utilise it in the former proceeding in which he obtained the common order for administration, proof of which was required in the case of <i>Laming v. Gee</i> (40 L. T. Rep. 33; 10 Ch. Div. 715), on the plaintiff, who was an undischarged bankrupt, giving security to the satisfaction of the master for the executor's costs of the fresh action. (<i>Re Kurtz, deceased; Emerson v. Henderson.</i>) 12	
		Administration action—Parties—Trustee—Representation of trust estate.—An action for breach of	

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trust was brought by a beneficiary under a marriage settlement against the executors of one of the trustees, but not the surviving trustee of the settlement. The surviving trustee was also dead, and no new trustees of the settlement had been appointed by the person in whom the power was vested. Held, that the representatives of the surviving trustee must be added as defendants, or that new trustees of the settlement must be appointed and added as defendants. (<i>Re Jordan; Hayward v. Hamilton.</i>)	223	paper, of an opera composed by the plaintiff, the defendants pleaded that the words complained of were fair and <i>bona fide</i> criticism of and comment on the opera, and were published without malice. The plaintiff applied for leave to deliver interrogatories to the defendants asking them whether they had not previously published an incorrect statement about the plaintiff, what information they had which induced them to believe that statement was true, from whom they derived such information, whether it was derived from the same source as the article complained of, and what steps they had taken to verify it. Held (dismissing the appeal), that leave to deliver the interrogatories had been properly refused as not being relevant to the question of malice. (<i>Caryll v. Daily Mail Publishing Company.</i>)	307
Appeal—Specially indorsed writ—Action by consent referred to master—Decision of master—Right to appeal to Divisional Court from decision of master.—An appeal does not lie to the Divisional Court from the decision of a master in an action which has been referred to him by consent of the parties under Order XIV., r. 7, which provides that, upon the hearing of an application for leave to enter final judgment, "with the consent of the parties, an order may be made referring the action to a master." (<i>Fraser v. Fraser.</i>)	709	Discovery—Production—Privilege—Further affidavit—Sufficiency—Omission of statement by party that documents for which protection is claimed contain nothing impeaching his own case.—In an action to enforce the right to profit made upon an alleged joint purchase and resale of land and an account, defendant had counter-claimed for specific performance of an alleged agreement between him and the plaintiff as to certain properties purchased by defendant and, as alleged, by the plaintiff and defendant jointly and payments to be made, for a sale, and the execution of a proper conveyance. Defendant in an affidavit of documents had sworn that he objected to produce certain documents on the ground that they related only to his own case, and did not tend to prove or support the plaintiff's case. Held, that the affidavit was technically sufficient, although not containing the statement that the documents for which privilege was claimed contained nothing impeaching his own case. (<i>Johnson v. Whitaker.</i>)	535
Appeal on question of fact—Concurrent findings of two courts below.—There is no rule of practice in the House of Lords that the House will not entertain an appeal on a question of fact where there have been concurrent findings in the courts below. (<i>Montgomery and Co. v. Wallace-James.</i>)	1	Discovery—Production of documents—Marine insurance—Underwriter's right to discovery and production—Action by underwriters against assured to recover over-payments.—In an action by underwriters to recover the amount of overcharges which they had paid to the assured in respect of claims upon policies of marine insurance, which overcharges they alleged had been obtained by means of false and fraudulent accounts: Held, that the underwriters were entitled to have as full discovery from the assured as they would have been entitled to in an action brought against them upon the policies. (<i>Boulton and others v. Houlder Brothers and Co. and others.</i>)	621
Compromise—Distribution of fund among bondholders—Limitations of times for claims by absent parties. (<i>La Compania de los Ferrocarriles de Zaragoza v. Collingham and others.</i>)	212	Execution—Discovery in aid—Judgment against a company—Examination as to property of company—Ex-director—"Any officer."—Order XLII., r. 32, provides that when a judgment for the payment of money has been recovered against a company, the court or a judge may order that "any officer thereof" shall be orally examined as to whether the company has any property or means of satisfying the judgment. Held, that the court or a judge has jurisdiction under this rule to make an order for the examination of a person who has been a director of the company, though he may have ceased to hold that office. (<i>Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France v. Johann Maria Farina and Co.</i>)	472
Costs—Action settled—"Record withdrawn. No costs on either side"—Costs of interlocutory proceedings ordered to be paid by plaintiff—Right of defendant to tax after settlement of action.—During the progress of an action several orders were made, upon interlocutory applications, that the plaintiff should pay the defendants' costs, in some cases "in any event." The action was subsequently settled upon the terms, indorsed on the briefs of counsel, "Record withdrawn. No costs on either side," the question of the costs of the interlocutory proceedings not being present to their minds. Held, that after the settlement of the action the defendants were entitled to taxation and payment of their costs of the interlocutory proceedings which the plaintiff had been ordered to pay. (<i>Walter v. Bewicke, Moreing, and Co.</i>)	409	Receiver—Writ of possession—Time.—Where an order was made directing delivery of certain premises into the possession of a receiver appointed by the order, but no time within which delivery of possession was to be made was specified in the order, it was held that a writ of possession could not issue because Order XLI., r. 5, had not been complied with. (<i>Savage v. Bentley.</i>)	641
Costs—Application for judgment or new trial—Costs of successful applicant—Discretion of court.—Where an application is made to the Court of Appeal for judgment or a new trial on appeal from a judgment and verdict at a trial before a judge and jury, on the ground of misdirection or otherwise, and such application is opposed by the other side, but a new trial is granted, although there is no absolute rule applicable to all such cases, and the court has a discretion either to give or refrain from giving, or to reserve the costs of the successful application to abide the result of the new trial, yet, in the absence of special circumstances, <i>prima facie</i> the costs of the successful application ought to be borne by the party who opposed it. The order made in <i>Bray v. Ford</i> (73 L. T. Rep. 609; (1896) A. C. 44) is not to be considered as an order laying down any general rule upon the point, but merely as an order in that particular case. (<i>Hamilton v. Seal.</i>)	502	Remitting action to County Court—Claim on writ exceeding 100 <i>l.</i> —Amendment of writ—Claim reduced to sum not exceeding 100 <i>l.</i> —Jurisdiction to remit.—Where in an action of contract brought in the High Court the claim indorsed on the writ in the first instance exceeds 100 <i>l.</i> , but the writ is subsequently amended and the claim reduced to a sum not exceeding 100 <i>l.</i> , there is jurisdiction to order the action to be tried in a County Court	
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- under sect. 65 of the County Courts Act 1888. (Sneade v. Wotherton Barytes and Lead Mining Company Limited.) ... 53
- Service of writ out of the jurisdiction—*Prima facie* evidence of breach within jurisdiction.—Where application is made for leave to serve a writ out of the jurisdiction, or to discharge an order for such service, the court is not called upon to try the merits of the action, but the affidavits should show a *prima facie* cause of action within the jurisdiction, and disclose a substantial question which the plaintiff *bona fide* desires to try. Sufficient information should be given to make clear the ground on which the court is asked to proceed. (Chemische Fabrik vormals Sandoz v. Badiache Anilin und Soda Fabriks.) ... 733
- Staying proceedings—Frivolous and vexatious action—Interlocutory application in County Court—Subsequent action in High Court raising same question.—Where an action was brought in good faith to try a legal point which ought to be tried, a motion, under Order XXV., r. 4, to dismiss the action as frivolous and vexatious and an abuse of the process of the court, on the ground that the point was *res judicata*, having been raised and determined in previous proceedings, was dismissed with costs in any event. (Lea v. Thursby.) 265
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- PRINCIPAL AND AGENT.**
- Commission—"When and if the purchase is completed by private treaty."—The defendant agreed to pay the plaintiff commission on the sale of an hotel "when and if the purchase is completed by private treaty." The plaintiff introduced a purchaser, who signed a contract to purchase with the defendant, and paid a deposit. The purchaser was unable to carry out the contract, and the defendant agreed to release her, and he was to retain the deposit. Held, that the plaintiff was entitled to his commission. (Chapman v. Winson.) 159
- Mistake—Money paid to agent—Remittance to banker—Credit given by banker to customer—Remittance made by mistake—Recovery back from banker by payer.—K. was a merchant, financed by two banks. These banks were each in the habit of advancing money to K. on the security of the shipping documents of goods, bought by him. When he sold such goods he was in the habit of obtaining from them the necessary documents to enable him to deliver the goods, and at the same time assigning to them the purchase money. On receipt of the purchase money from the purchasers of the goods, the banks would credit the amount to K.'s account. The plaintiffs bought several parcels of goods from K., and received from him notice of the assignment of the purchase money. The purchase money of some of the parcels was assigned to one bank, and of the other parcels to the other bank. Through a mistake of their clerk the whole of the money payable by the plaintiffs in respect of all these parcels of goods was paid over by them to only one of the banks, with instructions to credit K.'s account with the amount. This was accordingly done by the bank under the belief that the whole of the money was rightly paid over to them. On discovering the over-payment, the plaintiffs asked the bank to return it. The bank refused. In an action to recover back the money: Held, that the plaintiffs were entitled to the return from the bank of the money that had been thus paid them by mistake. (Continental Caoutchouc and Gutta Percha Company v. Kleinwort, Sons, and Co.) ... 474
- Secret commission—Corrupt bargain—Confirmation by principal—Evidence—Necessity of full knowledge of all facts.—The defendant, acting through his agent, entered into a contract with the plaintiffs, who were shipbuilders, for the building of a ship. Before the contract was arranged the plaintiffs secretly agreed to give a commission to the defendant's agent. At an interview which afterwards took place between the plaintiffs and the defendant as to the payment by him of money due under this contract, the plaintiffs informed him that they had agreed to pay commission to the agent, and the defendant, after being so informed, paid them a small sum on account. The plaintiffs afterwards brought an action to recover the balance due to them. At the trial of the action it was held that, by reason of the plaintiff's secret agreement to give a commission to the defendant's agent, the contract was one which entitled the defendant to repudiate, but that by what had occurred at his interview with the plaintiffs he had confirmed the contract and debarred himself from repudiating it: (83 L. T. Rep. 286). On appeal: Held, that the plaintiffs had not shown that there had been a full disclosure to the defendant of all the circumstances in connection with the plaintiffs' agreement to pay commission to the agent, and that therefore there had been no such confirmation by the defendant of his contract as debarred him from repudiating it. (Bartram and Sons v. Lloyd.) ... 357
- Underwriter—Authority of underwriter to write names—Ordinary business at Lloyd's—Guarantee policy—Policy underwritten for private purposes and benefit of agent—Liability of principal.—When an agent, having express authority to make a particular kind of contract on behalf of his principal, makes such a contract in the name of his principal with a person who deals in good faith, the principal is liable although the agent in fact makes the contract for his own purposes and in his own interests, and not in the interests of his principal. (Hambro and Son v. Burnand and others.) ... 808
- PRINCIPAL AND SURETY.**
- Mortgage—Insurance of mortgage debt—Contract of insurance or suretyship—Covenant by surety with limited liability—Contribution.—By an indenture made between H. of the first part, D. of the second part, and a bank of the third part, H. mortgaged a public-house to secure £4000 and interest, and H. and D. covenanted to pay the £4000 and interest. There was a proviso that D., who was a surety, should not be liable for more than £1000 and interest. H. covenanted to insure the security in the name of the bank with an assurance company. In the proposal for a policy it was stated "D. will join in the mortgage for the purpose of guaranteeing £1000 of the mortgage money." An insurance was accordingly effected with the plaintiff company, and by the policy it was provided that the proposal was to be deemed to be incorporated with the policy, and the company agreed that if the mortgagor made default the company would pay the principal and interest; and it was provided that thereupon the bank (therein called the insured) should assign the mortgage debt and all securities to the company, and do all things necessary for the purpose of enforcing any rights or remedies, or of obtaining relief or indemnity from other parties to which the company should be subrogated upon payment under the policy. The mortgagor having made default, the company paid the mortgage debt, interest, and costs, and moneys expended in preservation of the property, amounting in all to nearly £5000. They realized £4000. and claimed the balance from D. Held, that the plaintiff company and D. were not co-sureties; that the company had guaranteed the payment of the money, and D. was liable for the amount claimed. (Re Denton; Licenses Insurance Corporation and Guarantee Fund Limited v. Denton.) ... 698
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- Colonial grant—Limited grant—Re-sealing.—If the proper conditions prescribed by the Colonial Probate Act 1892 have been complied with, a limited colonial grant may be resealed in the United Kingdom. (In the Goods of William Smith.) ... 169
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Limitation of action—Tramway acquired and worked by county council under statutory powers.—The London County Council by two private statutes were empowered to acquire and work a certain tramway. An accident having happened to a passenger on one of the tramcars owing to the alleged negligence of the council or their servants: Held, that the action must be commenced within six months, as sect. 1 of the Public Authorities Protection Act 1893 applied. (<i>Parker v. London County Council.</i>)	415	and determining an information or complaint under the Act must be constituted of two or more justices of the peace in petty sessions. A court of summary jurisdiction consisting of three justices in petty sessions made an order under sect. 96 of the Act on the owner of certain premises for the abatement of a nuisance on the premises. The order as drawn up and served on the owner was signed by one justice only. Held, that the order must be signed by two justices, and, having been signed by one justice only, was bad. (<i>Wing, app. v. Epsom Urban District Council, resps.</i>)... ..	543
PUBLIC HEALTH.			
Building by-laws—Deposit of plans—Change of by-laws after approval of plans—Row of houses—Part of work carried out—Right to complete according to approved plans.—Sect. 27 of the Harrogate Corporation Act 1893 provided that the deposit with the corporation of any plan of any street or building should be null and void "if the execution of the work specified in such plan should not be commenced within three years from the date of such deposit." In 1894 a builder deposited a plan showing thereon a number of houses which he proposed to erect, and which were in accordance with the building by-laws then in force in the borough. The plan was approved by the corporation. Some of the houses were built and completed, and certificates were given on their completion by the corporation. In Nov. 1901 the building by-laws in force in the borough were repealed "except as regards any work commenced before that date," and on the same day new by-laws came into force with which the plan that had been deposited by the builder in 1894 did not comply. Held, that the plan approved in 1894 was not merely the plan of one building, but was really a number of separate plans for the buildings shown thereon; that therefore the completion of some of the houses shown on the plan was not a commencement of the other buildings there shown, which were not in fact begun till after the new by-laws came into force, and the defendant was not entitled to go on with the work under the old by-laws. (<i>Harrogate Corporation v. Dickinson.</i>)... ..	41	London—By-laws—Lodging-house—Cleansing at stated times—Liability of "landlord"—No provision in by-law for notice to landlord—Validity of by-law.—Under the provisions of sect. 94 of the Public Health (London) Act 1891, by which sanitary authorities are enjoined to make by-laws for (amongst other things) "the cleansing and lime-washing at stated times of the premises"—that is, "of a house or part of a house which is let in lodgings or occupied by members of more than one family"—a metropolitan borough council made by-laws wherein "lodging-house" was defined as "a house or part of a house which is let in lodgings or occupied by members of more than one family." One of these by-laws provided that "the landlord of a lodging-house shall in the first week of the month of April in every year cause every part of the premises to be cleansed." The by-law contained no provision as to the giving of notice to the "landlord," who was defined as including the person who received or was entitled to receive the rack rent of the lodging-house or the profits arising from the letting. Held, that the by-law was unreasonable and bad, in that it did not provide for notice of the state of the premises to be given to the landlord, who was thereby made responsible, before making him liable for a breach of the by-law. Held, further, by Wills, J., that the by-law was also bad upon the ground that the work was required to be done in the first week in April, which frequently included the Easter holidays, when there would be a great difficulty in getting sufficient labour to do work which might require several days. (<i>Stiles, app. v. Galinski, resp.; Nokes and Nokes, app. v. Mayor, &c., of Islington, resps.</i>)	437
Dangerous structure—Costs incurred by authority—Costs of appellant where respondent does not appear—Practice.—Sect. 257 of the Public Health Act 1875 does not apply to sect. 75 of the Towns Improvement Clauses Act 1847, incorporated in the Act of 1875 by sect. 160. Expenses of putting up a hoarding under sect. 75 of the Act of 1847 can be therefore recovered, although three months have not elapsed since the demand. Costs may be granted in a proper case against a respondent, the defendant before the justices, even although he does not appear upon the appeal. (<i>Usk Urban District Council, apps. v. Mortimer, resp.</i>)	25	Nuisance—"Intimation" notice by inspector to abate—Compliance with "intimation" without statutory notice—Work which sanitary authority ought to have done—Compulsion—Right of owner to recover expenses as for work done under compulsion.—An owner of premises received a written intimation under sect. 3 of the Public Health (London) Act 1891, duly signed by the officer of the sanitary authority, making known to him the existence of a nuisance at his premises and requesting him to abate the same within seven days, otherwise the sanitary authority would commence proceedings against him by the service of a statutory notice. The owner, without waiting for the service of the statutory notice under sect. 4 of the Act requiring him to abate the nuisance, did the necessary works to abate the nuisance, in the course of which he discovered that the work was a sewer and not a drain, but without communicating with the sanitary authority he completed the work, and brought an action against the sanitary authority to recover the expenses as for work done by him under compulsion which the sanitary authority were legally compellable to do. Held, but only on the authority of <i>Thompson and Norris Manufacturing Company v. Hawes</i> (59 J. P. 580), that work done under an "intimation" given under sect. 3 is not work done under compulsion, and that as the owner had not waited for the statutory notice under sect. 4, but had done the work under the "intimation" notice, the work was not done by him under compulsion, and he was not entitled to recover the expenses of the work. <i>Quarre</i> , whether, if an owner wrongfully converts that which is properly a drain, for the repair of which	
Drain on private ground—Draining several houses—Drain or sewer—"Single private drain."—J. was the owner of twelve houses, at the rear of which runs a main or common drain with which each of the houses connects. The sewage is conveyed from the main or common drain through a branch drain into the public sewer. The sewage of four other houses, belonging to two other owners, is conveyed by the main or common drain, which also runs at the rear of those four houses, into the said branch drain. Both the main or common drain and the branch drain are constructed wholly on private property, and it was admitted that the branch drain was a "single private drain" within the meaning of sect. 19 of the Public Health Acts Amendment Act 1890. Held, that the main or common drain running at the rear of J.'s houses was a sewer and was not a "single private drain" within sect. 19 of the Public Health Acts Amendment Act of 1890. (<i>Jackson, app. v. Wimbledon Urban District Council, resps.</i>)	417	Justices—Abatement of nuisance—Order made by three justices—Order signed by one justice only—Validity of order—Necessity of signature by two justices.—By sect. 251 of the Public Health Act 1875 a court of summary jurisdiction when hearing	

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he would be liable, into a sewer, he could recover from the sanitary authority the expenses of work done by him to the sewer under compulsion of the sanitary authority. (<i>Oliver and another v. Camberwell Borough Council.</i>)	285	it out for sale, and any part found to have been unsound would have been removed. Held, that there was no evidence that the meat was deposited on the appellant's premises for the purpose of sale and intended for the food of man. (<i>Wieland, app. v. Butler-Hogan, resp.</i>)	588
Sewer or drain—"Single private drain."—T. was the owner of a block of seven houses in a street, and adjacent to these were two blocks of six houses each, belonging to another owner. There were two private passages between the blocks leading to the backs of the houses. A 6in. pipe passed through the two blocks and across the two passages, passing into a 9in. pipe passing through the block belonging to T., and out into the main sewer in a street running at right angles to the street in which the three blocks were situated. Held, that the 9in. pipe was a sewer and not a drain, and so was repairable by the local authority. (<i>Thompson, app. v. Mayor of Eccles, resp.</i>)	507	(See LOCAL GOVERNMENT.)	
Street not repairable by inhabitants at large—Expenses of sewerage and paving—Liability of owners of premises—Owner at date of completion of work not owner at date of demand—Liability of person not owner at date of demand.—Under sect. 150 of the Public Health Act 1875, notices were served by an urban authority upon the owners of premises fronting or abutting on a street (not being a highway repairable by the inhabitants at large) to sewer, pave, and make up the street. These notices not having been complied with, the urban authority executed the necessary works and apportioned the expenses upon the owners of premises fronting on the street. The appellant, both at the time of the notice to pave and at the time of the completion of the works by the urban authority, was the owner of premises fronting the street; but before the date of the notice of apportionment and of the demand upon him to pay the amount apportioned on his premises, he had ceased to be owner, having sold the premises, and upon the date of the demand of such amount he was not owner of the premises. Upon summary proceedings before justices to recover the amount apportioned on the premises, from the appellant as being the "owner in default" within the meaning of sect. 150: Held, but only upon the authority of the case of <i>Reg. v. Swindon New Town Local Board</i> (40 L. T. Rep. 424; 4 Q. B. Div. 305), that, notwithstanding the words in sect. 257 of the Act that such expenses may be recovered by the local authority "from any person who is the owner of such premises when the works are completed," the appellant not having been the owner at the date of the demand upon him to pay the apportioned amount, was not the "owner in default" within the meaning of sect. 150, although he was the owner of the premises at the time when the works were completed, and that therefore he was not liable to pay the expenses. To be the "owner in default" in such cases, a person must be the owner not only at the time when the works are completed, but also at the time when the apportioned amount is demanded from him. (<i>Millard, app. v. Balby-with-Hexthorpe Urban District Council, resps.</i>)	490	QUARTER SESSIONS. (See JUSTICES.)	
Unsound meat—Meat going bad while stored—Meat not set out or offered for sale—"Intended for the food of man."—On a Monday morning, shortly after twelve o'clock at noon, an inspector of nuisances visited the shop where the appellant carried on the business of a butcher. The shop contained a safe which the inspector found closed. It was opened by him and found to contain some meat which showed signs of decomposition. Business was carried on at the appellant's shop up to midnight on the previous Saturday, when all the meat remaining unsold was placed in the safe, and was then sound and fit for the food of man. On the Monday in question the safe had not been opened after midnight on the previous Saturday until the inspector's visit, a period of thirty-six hours. In the ordinary course of the appellant's business all the meat contained in the safe would have been examined before setting		RAILWAY.	
		Carriage of goods—Owner's risk—Over-carriage by mistake—Goods forwarded by another route to reduce damage—Liability of railway company.—Barrels of fish were delivered by the plaintiff to the defendants to be carried to J. <i>rid</i> S. upon the condition that the defendants were to be relieved from all liability for loss, damage, misdelivery, delay, or detention. At E., instead of transferring the barrels to another truck to go to S., owing to a mistake they were carried on to T. It being too late to return the barrels to E. and send them <i>rid</i> S. to J., the defendants, to save further delay, sent them <i>rid</i> W. Owing to this there was a delay in the delivery, and the fish was damaged. Held, that the defendants were not liable. (<i>Foster v. Great Western Railway Company.</i>)	779
		Rates—Carriage of non-perishable goods by passenger train—Absence of statutory duty to carry—Right of company to impose its own terms—Inclusive charge for collection, carriage, and delivery—Equality clause.—A railway company which is under no statutory obligation to carry non-perishable goods by passenger train is entitled to demand from all persons who wish to send non-perishable goods by passenger train a single rate including collection, carriage, and delivery. (<i>Stone and Co. v. Midland Railway Company.</i>)	194
		Rates—Undue preference—Shipment rate and works rate—Works rate for same services higher than shipment rate—Right of trader to apply for reduction of works rate—Right to make application where trader does not directly pay rate.—The mere fact that a railway company charge a higher rate for carriage of coal over the same length of line to traders' works—all traders being charged an equal rate—than they do for coal for shipment, is not of itself sufficient to give a trader a right to apply to the court for reduction of the works rate, and such difference between the works rate and the shipment rate does not necessarily show an undue preference or an undue prejudice within the meaning of the Railway and Canal Traffic Acts. A railway company carried from certain collieries to C. large quantities of coal, the greater proportion of which was for shipment from that port to places abroad and to ports in England, and the remaining part was for works in C., including the works of the applicants, who were large flour millers in C., and for home consumption. They carried the shipment coal at a low shipment rate, but all other coal, whether for works (including the applicants' works) or for home consumption, was charged a higher or works rate, the works rate being some 50 per cent. higher than the shipment rate, and being the same for all traders in C. It was proved that the low shipment rate was justified by necessity, and that owing to competition with other ports and to other causes it was practically impossible in the interests of the public for the company to raise the shipment rate; and further, that the works rate was a reasonable rate, and was in fact so low that it could not reasonably be made lower without reducing it to a non-paying rate, and though there was some slight competition, no real or substantial competition was proved between the two classes of coal. Upon a complaint by the applicants that the higher works rate charged for the carriage of their coal as compared with the low shipment rate was an	

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undue preference and an undue prejudice within the meaning of the Railway and Canal Traffic Acts: Held, that the mere difference in the two rates was not in itself sufficient to prove an undue preference or an undue prejudice, or to give the applicants a right to come to the court for relief; that, under the circumstances, within the meaning of sub-sect. 2 of sect. 27 of the Railway and Canal Traffic Act 1888, not only was the lower charge for the shipment traffic "necessary for securing in the interests of the public the traffic in respect of which it is made," but also "the inequality could not be removed without unduly reducing the rates charged to the complainant," and that therefore the applicants were not entitled to a reduction in the works rate charged to them. *Scoble*, in such case, the fact that the rates are charged by the railway company to and paid by the colliery company, and not directly charged to or paid by a trader himself in the first instance, does not prevent the trader from applying to the court under the Railway and Canal Traffic Acts, if in substance the charge is made so as to affect the traders' interest. (*Spillers and Bakers Limited v. Taff Vale Railway Company*)... 713

RATING.

General district—Sporting rights—Arable, meadow, or pasture lands and woodlands.—The lessee of sporting rights over arable, meadow, pasture grounds and woodlands, such rights being let apart from the occupation of the land, is not entitled to be assessed in the proportion of one fourth part only of the net annual value to the general district rate by virtue of sect. 211 (1) (b) of the Public Health Act 1875. (*Alton Urban District Council, apps. v. Spicer, resp.*) ... 576

House—Occupation—Caretaker.—By 51 Geo. 3, c. 150, after reciting an Act of 12 Car. 2, c. 37, whereby a yearly sum of 250*l.* was charged upon the houses of the inhabitants of the parish of St. Paul, Covent Garden, for the support and benefit of the rector, curate, clerk, and sextons for the time being of that parish, that charge of 250*l.* was repealed, and in lieu thereof a yearly sum of 520*l.* was charged upon all houses within the said parish to be assessed by the churchwardens and paid by the occupiers of such houses respectively. Held, that houses consisting of the offices, warehouses, store-rooms, and counting-houses of publishers, some rooms in which were occupied by caretakers and their families, such caretakers having internal access to the whole of the premises, were chargeable under this statute. (*Lewin and others v. Newnes Limited; Same v. Warne and Co.*) ... 160

Poor rate—Appeal against assessment—Appearance of assessment committee as respondents—Consent of guardians—Notice to guardians.—Sect. 2 of the Union Assessment Committee Amendment Act 1864 provides that the assessment committee of a union may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to an appeal to quarter sessions against a poor rate. Sect. 12 of the Divided Parishes and Poor Law Amendment Act 1882 provides that where under the Poor Law Amendment Act 1834, or any of the Acts amending the same, the consent in writing of a majority of the guardians of a union is required, a fourteen days' notice shall be given to each guardian of the meeting at which the resolution giving the consent is passed. Held, that sect. 12 of the Act of 1882 does not have reference to sect. 2 of the Act of 1864, and therefore it is not a condition precedent to the power of the guardians to give their consent under sect. 2 of the Act of 1864 that a fourteen days' notice should be given of the meeting at which such consent is given. (*Smith v. Leigh Union Assessment Committee*) ... 240

Poor rate—Application for distress warrant—Tender of part of rate—Jurisdiction of justices to issue distress warrant for whole rate—Jurisdiction to issue warrant of commitment for whole rate.—

Where upon a summons for a distress warrant for a poor rate the person liable to pay the same tenders a part of the rate in court before the justices, the justices have, notwithstanding such tender in court, jurisdiction to issue a distress warrant for the whole amount of the rate, and, in default of sufficient distress to satisfy the whole amount, to issue a warrant of commitment in respect of the whole amount, notwithstanding a subsequent tender of part. (*Ex parte Wiles*) ... 225

Poor rate—Distress—Sale—Charges in schedule—Further charges—Legality.—On a distress for poor rates the costs and charges are not limited to those provided by the schedule to 57 Geo. 3 c. 93, applied to a distress for such rates by 7 & 8 Geo. 4, c. 17, but the "reasonable charges of the taking, keeping, and selling the said distress" may be deducted as provided by 12 & 13 Vict. c. 14, s. 1. These "reasonable charges" may include a charge for the fee of an auctioneer on the sale. (*Hill, app. v. Pannifer, resp.*)... 511

Poor rate—Recovery—Distress warrant—Tender of part of rate in court—Refusal of magistrate to issue distress warrant for whole rate—Jurisdiction of magistrate so to refuse.—Where, upon an application by overseers to a magistrate under the Distress for Rates Act 1849 for a distress warrant for rates, the ratepayer against whom the application is made tenders in court before the magistrate a part of the rate, the magistrate is not bound to issue a distress warrant for the whole amount of the rate, but has a discretion to issue the distress warrant for the balance only, after deducting the amount so tendered in court. (*Rex v. Gillespie and others; Ex parte Overseers of West Ham*) ... 15

Volunteer drill hall and storehouse—Part occasionally let for other purposes—Exemption from rates—Crown premises.—Certain premises were used as a storehouse, drill hall, &c., for a volunteer battalion, the whole of the property being in the occupation of, and vested in, the commanding officer. Certain portions of the premises were occasionally let for lectures, balls, &c., but such letting was subservient to the use of the premises for military purposes. The appellant was the caretaker, and did not reside on the premises, but the musical and dramatic licences were taken out in the name of the appellant. The appellant was rated in respect of such portions of the premises as were let out for the above-mentioned purposes. Held, that, although the appellant was not the proper person to be rated, as he was only a servant, yet those portions of the premises which were let out were properly rateable. (*Lewis, app. v. Durham Union, resps.*) 383

REGISTRATION OF VOTERS.

(See VOTERS, REGISTRATION OF.)

REVENUE.

Estate duty—Gift *inter vivos*—Death of donor within twelve months—Release of donor from prior covenant for payment of gift after death—Liability of gift to estate duty.—In 1892 a person covenanted with trustees that within three months after her death her executors should pay the sum of £5000, free of all duties and deductions, to the trustees upon trust for a certain charity. Some eight years afterwards, the donor, with the object of giving the sum in her lifetime, executed another deed by which she covenanted to pay the £5000 at once, and by this deed she, her executors and estate, were relieved from payment of the £5000 under the former deed. The £5000 was paid over, and the donor died within twelve months from the execution of the deed and the payment. Upon her death the Crown claimed estate duty upon this sum of £5000. Held, that the payment of the £5000 was "an immediate gift *inter vivos*," within the meaning of sect. 38, sub-sect. 2 (a), of the Customs and Inland Revenue Act 1881; that it was none the less a gift because there was a release of the donor and her estate from the obligation under the prior deed, and that, as the

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- donor died within twelve months from the making of the gift, estate duty was payable under sect. 2, sub-sect. 1 (c) of the Finance Act 1894. (*Attorney-General v. Viscount Cobham and others.*) ... 816
- Estate duty—Mortgage by tenant for life and remainderman—Indemnity to tenant for life—Property passing on death of tenant for life.—The tenant for life of settled lands joined with the remainderman in creating a mortgage on the lands. The loan secured by the mortgage was entirely for the benefit of the remainderman, and the tenant for life did not covenant to pay either the mortgage debt or the interest on it. By an indenture of even date with the mortgage, and made between the remainderman and the tenant for life, the former covenanted to indemnify the latter against any loss of profits of the settled lands, and against any expenses or charges in respect of the mortgage, and assigned certain securities and charges on other lands as security for the performance of such covenants. The tenant for life was in fact kept wholly indemnified during her life. Held, that on the death of the tenant for life the estate duty should be assessed upon the whole value of the settled lands, and not upon the value after deducting the amount of the mortgage debt. (*Attorney-General v. Lord Montagu.*) ... 726
- Estate duty—Settlement estate duty—Precatory trust—Letter with wishes of testator.—N. C., by his will dated the 13th Dec. 1901, devised and bequeathed all his estate and effects of every description to his brother, C. T. C., absolutely, and he appointed his said brother, H. J. M., and C. G. executors and trustees of his will. On the 11th Jan. 1902 N. C. signed a document or letter (which has not been admitted to probate) which was headed: "Instructions to my executors Crawford, Morgan, and Gasquet.—Dear Brother Crawford (I dictated this to Gasquet).—Like many others who have gone before me, I have failed to make provision for the distribution of my property amongst my relatives and friends before it became too late to do it with care. For this reason I have left all my estate to you in the fullest reliance that you will, as far as possible and to the uttermost, carry out any wish that I may express in writing now or later, or which may be conveyed to you verbally by Gasquet or my good-hearted cousin Henry. I have made a settlement on P. D. which should suffice for him in the struggle of life which we all have to face. As regards our family, you will be the best judge how and when a suitable distribution should be made. I do not fetter your discretion in any way. You are an old man, and therefore do not delay the distribution." And then followed directions as to the disposal of certain property and amounts to be paid to certain persons. The document concluded: "Finally, these are the instructions referred to in my will. They are not in any way to fetter Crawford, and may probably be added to if I am spared, or I may carry some out in my own lifetime." A copy of this document was sent to C. T. C., who, on the 14th Jan. 1902, wrote to C. G. a letter in which he said: "All I wish to say now is that every wish expressed by my brother shall be carried out to the very fullest extent so far as I am concerned, and as far as all we three executors are concerned, for his wishes are sacred, every word." The effect of this letter was communicated to N. C. N. C. died on the 18th Feb. 1902, and his will was proved by all the executors, and estate duty and legacy duty was paid on his estate, including sums given or settled by the testator within twelve months of his death. C. T. C. took possession as beneficial owner of the residuary personal estate and of the freehold and leasehold estate of N. C., and he made on the 13th May 1902 (within twelve months next before his death) a settlement of 5000*l.* on each of his four nephews and niece. C. T. C. also gave and paid other sums to various persons in accordance with the instructions in the letter of the 11th Jan. 1902. C. T. C. died on the 13th Dec. 1902. Held, that no trust was created, and that the settlement of 5000*l.* so made was a gift made by C. T. C. within twelve months of his death, and so estate duty and settlement estate duty were payable in respect thereof. (*Attorney-General v. Chamberlain and others.*) ... 581
- Estate duty—Succession duty—Will charging residue with duties payable on testator's death on property of which he was tenant for life—Succession duty on proceeds of sale of timber cut by succeeding tenant for life—Heirlooms of national interest.—By his will, dated in 1900, a testator, who died in 1901, directed the trustees to pay out of the residuary proceeds of his estate (1) so much of the estate duty and other death duties which under the Finance Act 1894, or any amending statute, should become payable upon or by reason of his death in respect of all the estates and property of which he should immediately before his death be tenant for life under a certain will or resettlement as the capital moneys and investments subject thereto should be sufficient to pay; and (2) all such succession duty as should become payable upon his death in respect of the same estates and property. Held, that, as to the duty in respect of the sale of certain timber, the provision of the will was applicable to duty payable in respect of a succession on the death of the testator, which duty was payable out of his residuary estate. Held, also, that, as to certain heirlooms of national interest, the duty did not become payable upon the death of the testator, and would not until the happening of the event mentioned in sect. 20 of the Finance Act 1896. (*Re Leonfield; Wyndham v. Leonfield.*) ... 399
- Excise duty—Carriage—Motor bicycle—Necessity of excise licence for—"Carriage drawn or propelled upon road by any mechanical power.—A motor bicycle is, within the meaning of sect. 4 of the Customs and Inland Revenue Act 1888, a "carriage" for which a licence is required, as being a carriage drawn or propelled upon a road by mechanical power. (*O'Donoghue, app. v. Moon, resp.*) ... 843
- Income tax—Banking company—Purchase of business of another bank—"Succession."—A banking company with many branches, and having its head office in London, in Feb. 1899 purchased for 225,000*l.*, as from the 31st Dec. 1898, the premises, business, and assets of the S. Bank, which carried on business at W. only. The business of the S. Bank was carried on as usual until the evening of the 5th March 1899, when the premises were closed. On the following morning the same premises were opened by the company as their branch at W., the whole of the staff of the S. Bank being taken over, and business was thenceforward carried on there by the company. The accounts and profits of this branch were merged in and formed part of the general accounts and profits of the company which were dealt with at the head office. For each of the three years subsequent to 1898 assessments to income tax were made upon the company on their own returns based on the average profits of their whole business for the three years preceding the year of assessment. Additional assessments for each of the three years subsequent to 1898 were made upon the company on assumed profits of their branch at W., based upon the average profits of the S. Bank for the three years before the sale to the company, upon the ground that the company had "succeeded" to the business of the S. Bank, within the 4th rule applicable to the first and second cases in sched. D to sect. 100 of the Income Tax Act 1842. Held, that the company had "succeeded" to the business of the S. Bank, and were therefore liable to the additional assessments. (*Bell v. National Provincial Bank of England.*) ... 2
- Income tax—Company resident in United Kingdom.—The appellant company was registered as a joint stock company at Pretoria, in the South African Republic, but had never been registered in the United Kingdom. The business of the appellant company consisted in the purchase and prospecting

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of lands with mining possibilities, or the obtaining of options over such lands with the view to the formation and flotation of companies for the purpose of working the same and the making of a market for the shares. The profits made by the appellant company were directly obtained (<i>inter alia</i>) by the sale and realisation of shares in subsidiary companies. The bulk of the company's capital was invested in South African shares and in mining properties in South Africa. The evidence produced showed that with regard to the purchase and sale of shares by the company, 56½ per cent. of the purchases of shares, and 49 per cent. of the sale of shares by the company were carried out in London during the year in question. The first general meeting of the company was held in April 1899 in Johannesburg. The second general meeting was held in London in June 1901, subsequent to the year of assessment. With regard to the directors' meetings, the directors' minute-book kept in London, which was the only minute-book of the company, was produced and showed that almost every transaction of importance affecting the management, control, and direction of the company was dealt with, controlled, and decided at the board meetings of the directors in London. A considerable number of important matters requiring local management were carried out by the managing director in Johannesburg on behalf of the board under powers delegated by the board in London. A copy of the minutes of the board meetings in London were forwarded after each meeting to Johannesburg. With regard to the staff, the chairman and three of the nine directors were resident in England. The directors held monthly meetings at the company's office in London. Only one meeting was held out of England. The accounts of the Johannesburg, Paris, and Berlin offices were brought to London, where the balance-sheets and accounts of the company were made up and audited. The dividends were fixed and authorised by resolutions of the directors at meetings held in London for that purpose, and the dividend warrants in respect of certain registered shares were also issued in London. Held, that the appellant company was a person residing in the United Kingdom and liable as such to be assessed under sect. 2 of the Income Tax Act 1853, sched. D. (<i>A. Goers and Co. Limited, apprs. v. Bell, resp.</i>) ... 675		grant him (c); and in the event of death both (a) and (c) were to be paid to his legal representative. Masters of over ten years' service were to receive on retirement before the age of sixty the total sum due under (a) or (b) and (c) with accumulations, and in the case of death the same was to be paid to his legal representative. Masters removed for misconduct or, having been guilty of misconduct, allowed to resign were not entitled to (c). Held, that these increases of salary were sums really added to the salary, and were assessable to income tax under sect. 146, sched. E, of the Income Tax Act 1842. (<i>Smyth, app. v. Strutton, resp.</i>) ... 756	
Income tax—Deductions—Life insurance—Payment of annual premium.—The appellant insured his life with a registered insurance company. By agreement between himself and the company he only paid half the annual premium on the policy, the other half being advanced by the company, and the amount of such advances, with interest, being made a first charge upon the policy. He also made himself personally liable to repay these advances. The company gave him a receipt for the whole amount of the premium in each year. Held, that, in making his return of profits and gains liable to income tax, he was only entitled to deduct, under sect. 54 of the Income Tax Act 1853, that half of the nominal premium which was actually paid by him to the company. (<i>Hunter v. Attorney-General.</i>) ... 325		Inhabited house duty—Unoccupied furnished house.—The tenant of a dwelling-house which is kept furnished, although during the year of assessment it has not been used for the purposes of residence and no one has dwelt or slept therein, is liable to inhabited house duty under the House Tax Act 1831. (<i>Smith, app. v. Dauney, resp.</i>) ... 760	
Income tax—Master at school—Provident fund scheme—Additional allowance—Allowance to go to fund.—Under a provident fund scheme at D. College the following increases of salaries came into operation: (a) Assistant masters having not less than five, but less than fifteen years' service, an increase of 5 per cent.; (b) those having fifteen years' and over, 7½ per cent.; (c) a further addition equal to those sums subject to certain conditions. The whole of these increases were not to be paid to the masters, but were to be accumulated at compound interest to form the fund. The conditions above referred to were that masters of less than ten years' service who resigned or ceased to belong to the college from any other cause than ill-health were to be entitled to increase (a) and the accumulations thereof, but not to increase (c); if the master retired from ill-health, the governors in addition to (a) might		Inland revenue—Licence for "male servants"—Apprentice—Necessity of licence for apprentices as for "male servant."—An apprentice, who is serving a master under a contract of apprenticeship by which the apprentice is to serve the master as such apprentice for a specified term of years and the master is to teach and instruct the apprentice, is not a "male servant" within the meaning of sect. 19, sub-sect. 3, of the Revenue Act 1869, and the master is not required under sect. 18 of that Act to take out a licence for such apprentice as for a male servant. (<i>Horan, app. v. Hayhoe, resp.</i>) ... 12	
		Legacy duty—Part of reversion assigned—Assignees' liability—Covenant for further assurance—Right to indemnity.—A settlor assigned a sum of 10,000 <i>l.</i> , part of a mortgage debt of 15,000 <i>l.</i> to which he was entitled in reversion expectant upon the death of his father. Held, that the assignees were liable rateably for the legacy duty payable in respect of the whole upon the death of the tenant for life; nor could the assignees claim to be indemnified under a covenant for further assurance made by the settlor. (<i>Re Repington; Wodehouse v. Scobell.</i>) 663	
		Stamp duty—Company—English debenture—Colonial debenture—Substituted security.—A colonial company was formed for the purpose of taking over the assets and liabilities of an English company, and by agreement the holders of debentures in the English company delivered them up, and accepted in lieu thereof debentures of an equivalent amount in the colonial company. Held, that these debentures in the colonial company were not "given in substitution for a like security" within the Stamp Act 1891, schedule, "Marketable security" (4). (<i>Mount Lyell Mining and Railway Company Limited v. Commissioners of Inland Revenue.</i>) ... 579	
		Stamp duty—Purchase of property under statutory power—Duty on conveyance.—The Finance Act 1895 enacts by sect. 12 that where by virtue of any Act of Parliament any person is authorised to purchase property, he shall, within a certain time, produce to the Commissioners of Inland Revenue an instrument of conveyance of the property duly stamped with the <i>ad valorem</i> duty payable upon a conveyance on sale of the property. Held, that the "property" mentioned in the section means the property authorised by the Act to be purchased, both real and personal, and that <i>ad valorem</i> duty is payable in respect of the value of the whole of the property so purchased, and not only in respect of such part of it as consists of realty. (<i>Mayor and Corporation of Eastbourne v. Attorney-General.</i>) ... 99	
		Succession duty—Disentailing deed by tenant for life and tenant in tail—Joint power of appointment—Appointment to purchaser in fee—Alienation—Death of tenant for life—Liability to pay succession duty.—By a disentailing deed and settlement executed in 1868, the tenant for life and the tenant in tail in remainder of certain land conveyed the land to such uses as they should jointly appoint, and in default thereof to the use	

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of the tenant for life, with remainder to the tenant in tail for life, with remainder to his first and other sons in tail. In 1870 they sold and appointed the land to a purchaser in fee simple. In 1874 the purchaser died, having devised the land to his wife; she died in 1888, having devised the land to her daughter, who duly paid succession duty. In 1899 the tenant for life died. Held, that, upon the death of the tenant for life, succession duty became payable in respect of the succession of the tenant in tail; and that the duty must be calculated on the value of the interest of the alienee considered as an annuity. (<i>Attorney-General v. Duke of Northumberland.</i>)	630	circumstances were not sufficient to sustain an action by a remainderman to set aside the sale. (<i>Hurrell v. Littlejohn.</i>)	260
RIGHT OF WAY. (See EASEMENT.)		Settled Land Acts—Scheme for improvement— Capital money in hands of trustees—Approval of scheme by court—Evidence—Jurisdiction.—In a case in which the tenant for life submitted a scheme to the trustees of the settlement for the purposes of the Settled Land Acts for the expenditure of capital moneys in their hands on the improvement of the estate and the trustees sanctioned the scheme, but the next remainder- man objected to the same on the ground that it was improvident, while not alleging either that it was ultra vires of the powers of a tenant for life under the Settled Land Acts or conceived in bad faith, and the tenant for life applied for the sanction of the court under the Settled Land Act 1882, s. 26, sub-s. 2 (iii.): Held, that before making an order the court had a duty cast upon it under the Settled Land Act 1882 to satisfy itself that the scheme was such as could in the interest of the remainderman be reasonably sanctioned. (Re Keck's Settled Estates.)	113
SALE OF GOODS.		(See VENDOR AND PURCHASER.)	
Materials for ship in course of construction— Bankruptcy of shipbuilder—Property in goods.— A firm of shipbuilders contracted to build a ship for the respondents, to be classed 100 A 1 at Lloyd's, and built under their superintendence. The contract contained a clause to the effect that "The vessel as she is constructed, and all her engines, boilers, and machinery, and all mate- rials from time to time intended for her or them, whether in the building yard, workshop, river, or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase money." The contract further provided that in default of delivery it should be competent for the owners to take possession of the vessel, and of all materials intended for her, and to complete her themselves. Before the vessel was completed the shipbuilders became bankrupt. At the date of the bankruptcy there was in the shipbuilding yard a quantity of plates intended for use in the construction of the ship. They had been passed by Lloyd's surveyor at the makers' works, and had been marked with the number of the ship for which they were intended, and with the position which they were to occupy in her. They had been seen in the shipbuilding yard by the shipowners so marked, but had not been specially inspected or approved by them. Held, that the case was governed by the decision in <i>Seath v. Moore</i> (54 L. T. Rep. 690; 11 App. Cas. 350), and was not affected by the Sale of Goods Act 1893 (56 & 57 Vict. c. 71), and that the trustee in the bankruptcy was entitled to the plates as against the shipowners. (Reid v. Macbeth and Gray.)	422	SETTLEMENT. (See HUSBAND AND WIFE—MERGER.)	
(See CUSTOM.)		SEWER. (See PUBLIC HEALTH.)	
SECRET COMMISSION. (See PRINCIPAL AND AGENT.)		SHIPPING.	
SETTLED LAND.		Bill of lading—Construction—Bulk cargo—Un- divided portions of bulk—"Each bill of lading to bear its proportion of damage"—Error in appor- tioning—Short delivery.—Bills of lading for un- divided portions of a bulk cargo of grain con- tained the following clause and note in margin: "If the parcel herein signed for constitutes part of a larger bulk shipped without separation into parcels, as per bills of lading, each bill of lading shall bear its due proportion of shortage or damage and (or) sweepings, if any:" "Part of a parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any." By an error in appor- tioning damaged grain, one consignee received a full consignment of sound grain. One of the other consignees, refusing to accept more than his proportionate share of damaged grain, received a consignment which was 108 quarters short. Held, in an action for short delivery, that the error was caused by the consignees' agents, and that the clause in the bills of lading cast no duty on the shipowner to apportion the good and un- sound grain. (Grange and Co. v. Taylor.)	486
Settled Land Acts—Sale by tenant for life—Under- value—Action by remainderman to set aside sale. —The mere fact that, upon a sale by a tenant for life under the powers of the Settled Land Acts, the purchase is at an undervalue is not of itself sufficient to invalidate the sale. In 1902 a tenant for life, purporting to act under the powers con- ferred upon him by the Settled Land Acts, sold the freehold of certain public-house property to W. for the sum of 2000<i>l.</i> At the time of the sale the property was subject to a lease which had been granted as from Christmas 1892 for a term of twenty-one years at a rent of 63<i>l.</i> per annum. Within a few days after the sale W. contracted to resell the property for 3000<i>l.</i>, although it was doubtful whether 3000<i>l.</i> was not in excess of the true value of the property. W. had not, before making the original purchase, made any inquiry as to whether the trustees or tenant for life had had any valuation made. Held, that these		Bill of lading—Construction—Exceptions—Damage to goods—Unseaworthiness—Liability of ship- owner.—Frozen meat was shipped on a steamer under a bill of lading, which contained two clauses relating to exceptions. The first clause, printed in Roman type, provided: "Neither the ship nor her owners shall be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any cause whatsoever, whether existing at the commence- ment of the voyage or at the time of shipment of the goods or not." The second clause, printed in small italics, provided: "The act of God . . . and loss or damage resulting therefrom or from any of the following causes or perils are excepted—viz. . . . or from any accidents to or defects, latent or otherwise, in hull . . . or otherwise (whether or not existing at the time of the goods being loaded or the commencement of the voyage) . . . if reasonable means have been taken to provide against such defects and unseaworthiness." The vessel, being tainted with carbolic acid, was not in a fit condition to carry the meat when it was shipped, and the meat was	

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- thereby damaged during the voyage. If reasonable care had been taken to cleanse the ship before the meat was shipped the damage would not have occurred. Held, that, reading the two clauses together, the shipowner was not exempted from liability for damage caused by the unseaworthy condition of the vessel. (*Borthwick v. Elderslie Steamship Company.*) ... 187
- Bill of lading—Discharge of cargo—Goods to be taken "as fast as steamer can deliver"—Deficiency of railway waggons—Option of shipowner to discharge in other ways not exercised.—Goods were shipped under a bill of lading which provided: "The goods to be taken from the ship by the consignees (at their expense) immediately after arrival, and as fast as steamer can deliver, or the same will be transhipped into lighters, or landed, or warehoused at the expense and risk of the proprietors of such goods." On arrival of the vessel the consignees neither took delivery nor did the master exercise his option of landing or lightering the goods. In an action by the charterers against the consignees for damages for detention of the vessel: Held, that the plaintiffs were not deprived of their remedy because the master had not exercised his option as to landing or lightering the goods, and were entitled to recover. Held, further, that the plaintiffs having made out a *prima facie* case of delay in taking delivery by the defendants, the onus was upon the defendants to show that the delay arose from no default on their part, and was due to the want of appliances in the port, and that they had failed to do so. (*The Arne.*) ... 517
- Bill of lading—Liberty to over-carry goods if discharge cannot be effected without undue detention—Discharge prevented by delay at previous port—Delay caused by negligence of shipowner's agent—Remoteness of damage—Liability of shipowner.—A bill of lading contained the following clause: "If in the opinion of the master discharge cannot be effected without undue detention, the steamer shall have liberty to over-carry the cargo to London at merchant's risk, and deliver there to consignees or their assigns." The ship was delayed at a port of call in the course of her voyage by the negligence of the shipowner's agents, with the result that, on her arrival at the port where the goods were to be discharged, the master found that the discharge could not be effected without undue detention, and he therefore over-carried the goods to London. In an action by the consignees to recover damages for the over-carriage of the goods: Held, that the damage was not so remote from the negligence of the shipowner's agents as to disentitle the consignees from succeeding in the action. (*Searle v. Lund.*) ... 529
- Charter-party—Construction—Time for loading—Stoppage by strike—"Stoppage for six days from time of vessel being ready to coal"—Right to cancel charter.—By a charter-party it was agreed that a ship of the appellants should load a cargo of coal for the charterers "to be loaded in 140 running hours, commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds, and ready to load." The charter-party also provided that in the event of a stoppage caused by a strike "continuing for a period of six running days from the time of the vessel being ready to load, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage." Due notice was given that the ship was ready to load, and, after the expiration of the time allowed for loading, a stoppage caused by a strike commenced, and continued for six days. No cargo had been shipped, and the charterers gave notice that the charter-party was cancelled. Held, that the charter-party contemplated a stoppage in existence at the beginning of the loading time, and that the charterers were not entitled to cancel the charter on the occurrence of a stoppage at a later period. (*Steel, Young, and Co. v. Grand Canary Coaling Company.*) ... 720
- Charter-party—Detention at port—Loading—"Regular turn"—Custom of port—Delay caused by number of vessels chartered—Option.—A charter-party provided that a sailing vessel was to load a cargo of coal at N. "in regular turn" from B. Colliery or any of the collieries the freighters might name. No time for loading was fixed. At the port of N. it was necessary to obtain a loading order from the colliery before a loading berth was allotted. When the vessel arrived, a great many vessels were waiting to load from B. Colliery, and in consequence sixty-seven days elapsed before a coaling order could be given to the vessel. The charterers, who were the owners of B. Colliery, had sold a cargo of that coal to be shipped by this vessel. Held, that the words "regular turn" referred to the colliery turn as distinguished from the port turn both upon their proper construction and also having regard to the regulations and practice of the port. Held, also, that the defendants had not chartered an unreasonable number of vessels to arrive at the port about the same time so as to make it impossible that the vessel should be able to load within a reasonable time; and that the probability of delay was known to and contemplated by the shipowners when they entered into the charter-party. Held, therefore, that the charterers had not acted unreasonably, and were not liable for the detention of the vessel. (*Barque Quilpué Limited v. Brown.*) ... 765
- Charter-party—Freight at per ton shipped payable on right delivery—Lump sum freight—Loss of part of cargo by jettison—Payment by consignees of bill of lading freight—Rights of charterers against shipowners.—By a charter-party it was agreed that a ship was to load at Fiume a full and complete cargo of sugar in bags, and therewith proceed to Boston and there deliver the cargo agreeably to bills of lading, on being paid freight at the rate of 10s. 6d. per ton gross weight shipped, payable on right and true delivery of the cargo in cash; charterers' liability to cease when cargo was shipped and bills of lading signed, provided all the conditions called for in the charter had been fulfilled, but vessel to have a lien for freight, dead freight, and demurrage; the master to sign bills of lading at any rate of freight as presented, without prejudice or reference to the charter, any difference between the charter-party and the bills of lading freight to be settled at Fiume on clearance of vessel, if required by master. The charterers had previously agreed with an American company at Boston to ship by the vessel named in the charter-party a cargo of sugar in bags from Fiume to Boston at 10s. per ton. On the vessel being loaded, the difference between the charter-party and the bills of lading freight—i.e., 6d. per ton—was paid, and bills of lading were signed. In the course of the voyage the vessel went aground and part of the cargo was jettisoned. On the arrival of the vessel the remainder of the cargo was delivered, and the consignees thereupon paid to the shipowners the bill of lading freight payable on the gross weight shipped. In an action by the charterers against the shipowners to recover so much of the freight paid by the consignees to the shipowners as represented the freight upon the cargo which was not delivered: Held (by Lord Alverstone, C.J. and Collins, M.R., Romer, L.J. dissenting), that the charterers were entitled to recover the sum claimed. (*London Transport Company Limited v. Trechmann Brothers.*) ... 132
- Charter-party—Hire—Suspension of hire—Detention by ice "caused by breakdown of steamer"—Vessel detained owing to repairs made necessary by stranding.—By a charter-party it was provided by one clause that, in the event of loss of time from damage preventing the working of the vessel, the payment of hire should cease until she should again be in an efficient state to resume her service, and by another clause that "detention by ice should be for account of charterers, unless caused by breakdown of steamer." During the voyage the vessel stranded;

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- the necessary repairs were effected, and she resumed her voyage; owing, however, to the delay thus caused, she was unable to proceed to the destined port before it was closed by ice, and she was consequently detained at an intermediate port. Held, that there was a detention by ice "caused by breakdown of steamer," and that payment of hire ceased during that detention. (*Re Arbitration between C. Trane, for the Owners of the Steamship Rikard Nordraak, and Lennard and Sons Limited.*) ... 407
- Charter-party—Obligation of charterer to have cargo ready—No time fixed for loading—Cargo from specific source—Option of charterer—Knowledge of parties at time of contract.—A sailing ship was chartered to load at N. a "cargo of coals as ordered by the charterers," and they afterwards directed that it should be loaded with coal from W. Colliery. No time for loading was fixed. At the port of N. it was necessary to obtain a loading order from the colliery before a loading berth was allotted. The W. Colliery had a small output, and the coal was in great demand. These facts were known to the parties at the time of the contract. In consequence of the number of ships loading from W. Colliery, the ship did not obtain a loading berth for a long time, and, in addition to being delayed at N., lost a charter-party elsewhere, as she did not arrive before the cancelling date. The owners brought an action to recover damages for the loss thus occasioned to them. Held, that the charterers were not bound to have a cargo of coal ready for loading immediately on the arrival of the ship; that the vessel obtained a loading order in due course in her colliery turn and there was then no delay on the part of the charterers, and therefore the cargo was provided within a reasonable time; that the option to select the particular coal was an option for the benefit of the charterers, who were not bound, in exercising it, to consider the benefit or otherwise of the shipowners; and therefore, all parties being acquainted with the practice at the port and the charterers having acted reasonably, they were not liable for the delay. (*Jones Limited v. Green and Co.*) ... 768
- Collision—Both to blame—Damages—Payment by cargo owners to shipowners—Right of cargo owner to recover money so paid from wrong-doing vessel—Registrar and merchants.—A collision occurred between the steamship *U.* and the steamship *M.*, for which both vessels were found to blame. The *U.* had on board at the time a cargo of coals shipped by and the property of the Admiralty, and, in order to avoid probable expense, an agreement was come to by which the owners of the *U.* waived their right to carry the cargo to its destination, and the coals were discharged and sold. The owners of the *U.* recovered against the owners of the *M.* a moiety of their damages. A claim was made by the Admiralty, as owners of the cargo on board the *U.*, against the owners of the *M.* for their proportion of the sum paid to the owners of the *U.* Held, that they were not entitled to recover anything, as such a payment could not be said to be the natural result of the collision, and that, if the owners of the *M.* were liable, the sum recovered would be payable to the owners of the *U.*, who had already been paid a moiety of all the losses they had incurred by reason of the collision. (*The Minnetonka.*) ... 354
- Collision—Compulsory pilotage—Port of Liverpool—Vessel proceeding through the port to Manchester.—Pilotage is compulsory on a vessel inward bound from the sea through the port of Liverpool to Manchester until she enters the Ship Canal at Eastham. Sect. 128 of the Mersey Dock Acts Consolidation Act 1858 requires that "the pilot in charge of any inward bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool." The fact that a vessel anchors for the purpose of waiting for the tide does not put an end to the compulsory services of the pilot. *Seemle*, pilotage is also compulsory on vessels going out from Eastham through the port of Liverpool to the sea. (*The Mercedes de Larrinaga.*) ... 520
- Collision—Failure to stand by and give name—Compulsory pilotage—Limits of port of Liverpool.—The fact of a vessel after collision with another vessel not standing by and giving her name, as required by sect. 422 of the Merchant Shipping Act 1894, does not render her owners liable, if at the time she was compulsorily in charge of a pilot. A collision occurred in the estuary of the river Mersey between the steamships *G.* and *S.* By sect. 127 of the Mersey Dock Acts Consolidation Act 1858, "every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot such vessel so far to the westward as the ... Fairway Buoy of the Queen's Channel." Since the date of the Act the buoy has been removed, and for the purposes of pilotage the Bar Lightship, which occupies a position outside of that occupied by the buoy, is treated as the westward limit. The *G.* at the time of the collision was at anchor between the Bar Lightship and the place where the buoy used to be. The defendants pleaded that the *S.* was at the time of the collision compulsorily in charge of a pilot. Held, that, the Fairway Buoy having been removed, the Bar Lightship occupied the same place relatively for the purposes of sect. 127 of the Act of 1858, and that pilotage was therefore compulsory. (*The Sussex.*) ... 540
- Collision—Manchester Ship Canal—Fog—Application of sea rules—Duty to stop and reverse on hearing whistle of approaching vessel.—*Seemle*, the Regulations for Preventing Collisions at Sea do not apply to the Manchester Ship Canal. Even assuming that they do apply, a vessel coming down the canal in a fog is not necessarily to blame under art. 16 of the regulations if she does not stop her engines on hearing the whistle of an approaching vessel forward of her beam; for the approaching vessel must be in the canal, and it may be assumed that she is being navigated on her right side, and her position is therefore, under the circumstances, sufficiently ascertained. (*The Hare.*) ... 323
- Collision—River Mersey—Vessel coming out of dock—Duty to keep out of the way.—A steamship coming out of Prince's Dock into the river Mersey came into collision with another steamship coming down the east side of the river in tow of two tugs. Held, that art. 19 of the Regulations for Preventing Collisions at Sea did not apply, and that there was no duty on the down-coming vessel to keep out of the way. (*The Sunlight.*) ... 32
- Collision—Vessel "not under command"—Duty to keep course.—A vessel exhibiting two red lights under art. 4 (a) of the Collision Regulations as a signal that she is "not under command" ought to keep her course when approaching another vessel so as to involve risk of collision. A collision occurred between the brigantine *R.* and the barque *H.* The *R.* was at the time close-hauled on the starboard tack; the *H.* was sailing free, but, having been recently in collision with a steamship, was exhibiting "not under command" lights. The helm of the *R.* was put up in order to pass ahead of the *H.*, while the helm of the *H.* was ported. Held, that the *H.* ought to have kept her course and let the *R.* get out of her way. (*The Hawthornbank.*) ... 293
- Damage to cargo—Bill of lading—Exceptions—Marginal clause.—The plaintiffs were indorsees of bills of lading under which a cargo of maize, barley, linseed, oats, and wheat was shipped on the defendants' steamship. By the bills of lading it was provided that "the ... owners ... shall not be responsible for loss, damage, or injury arising from sweating ... or consequences arising therefrom ... or heat. That the ... owners ... shall not be responsible for any loss or injury to the said goods occurring from any of the causes above mentioned

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... whether any of the perils, causes, or things above mentioned ... or occasioned by any act or omission, negligence, default of stevedores ... or other persons in the service of the shipowners ... On the margin of the bills of lading under which the maize was shipped was stamped: "In no case is the steamship to be held liable for heating or any other damage occurring to the within mentioned goods." Part of the maize became heated on the voyage, and the other cargo was damaged through improper stowage. In an action by the plaintiffs to recover damages: Held, that the words "above mentioned" did not refer to the matters in the clause above or the marginal clause, and that the word "heat" referred to heat arising from some extraneous cause, and that the plaintiffs were entitled to judgment. Held, further, that if the owners desired to relieve themselves from liability for the negligence of their own servants there should have been express words. (*The Pearlmoor*.) ... 319

Damage to pier by ship—Action by owner of pier—County Court jurisdiction—Writ of prohibition.—By sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868 it is provided that County Courts having Admiralty jurisdiction shall have jurisdiction as to any claim for "damage by collision." The plaintiff was the owner of a pier, and brought an action in the County Court against the defendants for damage done by their vessel to his pier. The defendants moved for a writ of prohibition. Held, that there was no jurisdiction under sect. 3, sub-sect. 3, for the County Court judge to determine the action, and that a writ of prohibition must therefore go. (*The Normandy*.) ... 351

Pilotage—Port of Bristol—Compulsory pilot—Vessel bound from Newport to Bristol—Vessel in Newport pilotage district, but within port of Bristol—Necessity of Bristol pilot.—By the Bristol Wharfrage Act 1807 it was provided in sect. 9 that all vessels navigating or passing up, down, or upon the Bristol Channel to the eastward of Lundy Island, except coasting vessels and Irish traders, should be piloted and navigated by pilots licensed by the Bristol Corporation. By the Bristol Channel Pilotage Act 1861 it was provided in sect. 4 that so much of the 9th section of the Bristol Wharfrage Act 1807 as related to vessels navigating or passing up or down the Bristol Channel bound to or from either of the ports of Cardiff, Newport, or Gloucester should be repealed, and by the same Act pilotage boards and pilotage districts—which in some cases overlapped the port of Bristol—were created for the ports of Cardiff, Newport, and Gloucester, and power was given to these boards to license pilots for their districts. By the Pilotage Order Confirmation (No. 1) Act 1891 it was provided that, notwithstanding anything contained in the Bristol Wharfrage Act 1807, a vessel navigating or passing up or down the Bristol Channel to or from the port of Bristol should be exempted from all obligation to be piloted by pilots licensed by the Bristol Corporation, except when within the limits of that port, which were therein defined. Held, that the Act of 1861 was not intended to deal with and did not deal with or include vessels going to or from the port of Bristol, although such vessels were bound from or to one of the ports of Cardiff, Newport, or Gloucester, and that therefore in the case of a vessel which is not exempt from compulsory pilotage in the port of Bristol there is still the obligation under the Bristol Wharfrage Act 1807 to have a compulsory pilot licensed by the corporation of Bristol when the vessel, bound to the port of Bristol, gets within the limits of that port, although the vessel may be bound from Cardiff, Newport, or Gloucester, and may still be within one of those three pilotage districts which overlaps the port of Bristol. Consequently, when a vessel on the voyage puts into Newport, and then proceeds from Newport with a Newport pilot on board to the port of Bristol, as soon as the vessel gets within the limits of the port of Bristol

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the Newport pilot is bound to give up the charge of the vessel to a Bristol pilot demanding such charge, although the vessel is still within the Newport pilotage district, and within the district for which the Newport pilot is licensed. (*Reed, app. v. Goldsworthy, resp.*) ... 126

Salvage—Stranding of salved vessel—Value for purposes of award.—A steam trawler towed a disabled steamship into Aberdeen Bay, and signals were made for a pilot and a tug. A tug came up in response and offered to pilot and tow the vessel into harbour, but the offer was refused by her master, and the tug sent back for a pilot. In the meanwhile the hawser parted, and the vessel drifted ashore. Her value at the time the services of the tug were offered was 8500*l.* The costs of refloating were 1150*l.*, and of the repairs in consequence of the stranding 5600*l.* In an action for salvage by the owners, master, and crew of the trawler: Held, on the facts, that they were entitled to salvage, and to an award of 750*l.*, and that, for the purposes of arriving at a proper award, the value of the salved property must be taken at 8500*l.* Held, further, that the steamship ought to have taken the services of the tug when offered. (*The Germania*.) ... 296

Seaman—"Distressed seaman"—Provisions for relief—Evidence of distress—Receipt of wages by seaman.—The question whether a seaman who has been shipwrecked abroad is a "distressed seaman" within the meaning of sects. 190, 191, and 193 of the Merchant Shipping Act 1894 is a question of fact. A "distressed seaman" does not of necessity cease to be a "distressed seaman" on his being paid the wages due to him, when such wages are enough to pay the expenses of his maintenance abroad and passage home. *Quære*, whether the "sufficient evidence" of expenses incurred for his benefit which is provided for by sect. 193, sub-sect. 3, means "conclusive evidence." (*Board of Trade v. Sailing Ship Glenpark Limited.*) ... 360

SLANDER.

Accusation of bringing "blackmailing" action—Imputation of criminal offence—Action for slander maintainable.—An action for slander founded upon an accusation that the plaintiff had brought a "blackmailing" action was held to be maintainable on the ground that the words spoken might fairly be interpreted by hearers as imputing to the plaintiff an indictable offence. (*Marks v. Samuel.*) 590

SMOKE.

(See METROPOLIS.)

SOLICITOR.

Costs—Taxation—Commission—Collection of rents—Professional work—Professional charges—Items of professional charges in bill of costs.—The solicitors acting for the executors and trustees of the deceased owner of settled real estates charged with legacies and duties which his personality was insufficient to satisfy, having been accustomed to collect and receive the rents for him at an agreed charge until his death on the 7th April 1901, continued to collect and receive the rents for the executors and trustees without making any agreement as to their remuneration for so doing up to the 25th March 1902, when the succeeding tenant for life assumed the management of the estates, and in their bill of costs delivered to the executors and trustees inserted a charge of a lump sum, being a commission of 5 per cent. on the amount of the rents collected, as their remuneration for the work; but did not set out the items of that work as in the case of charges for strictly professional duties. The succeeding tenant for life obtained an order for taxation of the solicitors' bill of costs, and the taxing master on taxation allowed the charge of a lump sum by way of commission for collecting the rents, and overruled the objections of the tenant for life to that allowance. On a summons by the tenant for life for

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a review of the taxation: Held, that, if the charge was a charge for professional work, the solicitors ought to have delivered a bill of items in respect of it, and that, in the absence of any agreement to that effect, the taxing master was not entitled to allow the solicitors a lump sum by way of commission for it, while, on the other hand, if collecting rents was not professional work, the charge for it ought not to have been inserted in the solicitors' bill of costs; and that the proper order was to direct the master to treat the charge as struck out of the bill of costs. (<i>Re Shilson, Coode, and Co.</i>)	641	managing director of a company to whom he owes money, stating: "I am willing to sell the 5230 shares that I hold in the P. D. B. B. Company Limited for the sum of 816 <i>l.</i> 4 <i>s.</i> 6 <i>d.</i> , and in the event of my doing so I will with the money pay the 10 <i>s.</i> call due on 629 of the above shares, amounting to 314 <i>l.</i> 10 <i>s.</i> , and the balance in settlement of my amount with R. B. and Son Limited, amounting at December last to 501 <i>l.</i> 14 <i>s.</i> 6 <i>d.</i> ," is sufficient acknowledgment to take the debt out of the Statute of Limitations, even although the sale of the shares does not take place. A general acknowledgment of a debt with a conditional promise to pay, but without any distinct statement that except upon the performance of the condition the debtor will not or cannot pay, is sufficient to take a debt out of the Statute of Limitations. (<i>R. Barrett and Son Limited v. Davies. Same v. Withers.</i>)	460
Costs—Taxation—"Third party liable"—Taxation of mortgagee's solicitors' bill by mortgagor—Practice.—A mortgagor is entitled, under sect. 38 of the Solicitors Act 1843, to have taxation of the bill of costs of the solicitor acting for the mortgagee limited to the items of costs incurred by the mortgagee strictly in that capacity and not in his personal capacity. (<i>Re Longbotham and Sons.</i>)	538, 801	STATUTORY POWERS. "Damage sustained by reason or in consequence of the exercise of such powers"—Compensation—Negligence—Burden of proof.—Where a public body was empowered by statute to carry out certain works and it was provided in the same statute that compensation should be paid to any person sustaining damages by reason or in consequence of the exercise of such powers, it was held that if the public body relied on the negligence of its agents or contractors as relieving it from all liability under the statute, it must discharge the onus of proving such negligence. (<i>St. James' and Pall Mall Electric Light Company Limited v. The King.</i>)	344
Covenant in articles of clerkship not to practise within certain radius—Breach—Work usually done by solicitors.—The defendant had bound himself to a solicitor practising at M. by articles for a term, and covenanted that he would not at any time do any work or act for or on behalf of any persons usually done by solicitors within a radius of fifteen miles from M. without written permission. The defendant took proceedings to obtain probate of the will of a person within the prohibited radius, and corresponded from H. with a witness within the prohibited radius with a view to obtaining his evidence in order to enable probate to be obtained. He signed the <i>præcipe</i> directing a plaint note to be issued for a County Court summons at a court in the prohibited area on behalf of a plaintiff residing therein, and conducted the proceedings until receipt of the amount paid into court. He prepared the will of a testatrix residing within the area on instructions received outside the area, and received a small fee therefor, but was present when she executed it within the area; and, lastly, he advertised in a paper circulating within but published outside the area a farm for letting within the prohibited district. Held, in an action to restrain the defendant from practising within the prohibited limit, that the covenant might be broken although the defendant or his clerks did not go professionally within such limit. That therefore the proceedings in connection with the collection of the debt through the County Court infringed the covenant. Also the acts done in relation to the execution of the will, which must be held to have been done by the defendant in his character of a solicitor, constituted a breach of such covenant, but that those as to advertising the farm did not break it. <i>Quare</i> , as to applying for the proof of evidence infringing the covenant. (<i>Edmundson v. Render.</i>)	814	SUCCESSION DUTY. (See REVENUE.)	
SPECIFIC PERFORMANCE. (See VENDOR AND PURCHASER.)		SUMMARY JURISDICTION. Practice—Justices divided in opinion—Adjournment—Case reheard by further justices—Jurisdiction.—An information having been heard before two justices they retired to consider their decision. Upon their return to court they announced that they were divided in opinion, and they decided to adjourn the hearing to a future day to be heard before themselves and other justices. Held, that the intimation that they were divided in opinion did not preclude the justices from adjourning the hearing of the information. (<i>Bagg, app. v. Colquhoun, resp.</i>)	386
STAMP DUTY. (See REVENUE.)		TENANT FOR LIFE AND REMAINDERMAN. Authorised investment—Proceeds of realization of insufficient mortgage security—Arrears of interest—Apportionment of fund available.—The true principle of apportionment, as between tenant for life and remainderman, of a fund representing the proceeds of the realization of an authorised, but insufficient, mortgage security, upon which there are arrears of interest due, in order that there may be a rateable equality in the incidence of the deficiency, is to take the amount due to the tenant for life in respect of arrears of interest, and the amount due to the remainderman in respect of capital, and to apportion the fund, as at the date when the same is recovered, in proportion to those amounts respectively. (<i>Re Atkinson; Barbers' Company v. Grose-Smith.</i>)	825
STATUTE OF FRAUDS. Written contract—Parol variation of terms of—New agreement—Rescission—Specific performance.—Where a written agreement for a lease had been executed and one of the parties declined to execute the lease because a parol agreement had been subsequently come to between the parties: Held, that such parol evidence, though admissible on a claim for rescission, could not be admitted in variation of the original agreement, the terms of which must be carried out. (<i>Verzey v. Rashleigh.</i>)	663	TITHE. (See LANDLORD AND TENANT.)	
STATUTE OF LIMITATIONS. Letter to managing director of company—Acknowledgment.—A letter written by the debtor to the		TRADE MARK. (See PATENTS, DESIGNS, AND TRADE MARKS.)	
		TRADE UNION. Application of funds to provide benefits to members—Principal object of society—Divisibility of objects—Rules in restraint of trade—Illegal	

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society—Action by member to enforce benefit rules.—A society registered under the Trade Union Acts was governed by rules, some of which made provision for benefits to members, and the others were illegal as being in restraint of trade. A member brought an action against the officers of the society to enforce a rule of the society under which he claimed to be entitled to a superannuation allowance. Held, upon the consideration of all the rules of the society, that the main object of the society was illegal at common law as being in restraint of trade, and that those rules which made provision for benefits to members were merely ancillary to that main object, and could not be separated from it. Held, therefore, that under sect. 4 of the Trade Union Act 1871 the action must fail. (*Cullen v. Elwin and others.*) ... 840

TRAMWAY.

Purchase by local authority—Depot outside district of local authority—"Used with and suitable to" the undertaking—Liability of local authority to pay for.—By sect. 43 of the Tramways Act 1870 it is provided: "Where the promoters of a tramway in a district are not the local authority, the local authority . . . may" (within certain specified times) " . . . by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value . . . of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district." The tramway company was the owner of a large depot situated some distance outside the boundary of the district council, but found by an arbitrator to be "used with and suitable to" the undertaking of the tramway company within the council's district. The district council having given notice to the tramway company that they were required to sell to the council under the conditions and in the manner provided by sect. 43 of the Tramways Act 1870 so much of their works and undertaking as were within the council's district: Held, that the council were bound to pay for this depot. Held, further, that the words "within such district" applied to the "undertaking," and not to "all lands, buildings, works, materials, and plant of the promoters." (*Manchester Carriage and Tramways Company Limited v. Swinton and Pendlebury Urban District Council.*) ... 795

TRESPASS.

Ditch and fence—Presumption of ownership—Acts of ownership—Rebuttal of presumption.—The plaintiff and defendant were adjoining owners of land, the lands being bounded by a bank with a fence, with a ditch on the defendant's side. For nearly fifty years the defendant had trimmed the fence, pollarded the trees, and cleansed the ditch, but there was no evidence of knowledge on the part of the plaintiff. Held, that these acts of ownership did not rebut the presumption that the bank and fence were the property of the plaintiff. (*Henniker v. Howard.*) ... 157

Statutory right to erect post "in, over, or under any street"—Erection of electric post—Taking of land.—By sect. 51 of the Newport Corporation Act 1900, with which the Lands Clauses Act 1845 was incorporated, the corporation might, for the purpose of working their tramways, construct and erect "on, in, over, or under any street or road" poles and posts. For the purpose of working their tramways the corporation erected an iron pillar, about 10in. in diameter, upon the plaintiff's land, which by dedication, subject to a user by the plaintiff, formed part of the street, such pillar being sunk about 6ft. in the ground. Held, that this was not a "taking of land" within the Lands Clauses Act, but was an exercise of the statutory powers of the defendants under their private Act. (*Escott v. Mayor, &c., of Newport.*) ... 348

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VENDOR AND PURCHASER.

Goodwill—Sale of business with goodwill—Vendor interested in new business—Solicitation of old customers who have also become customers of the new business.—The vendor of an interest in a business which with the goodwill thereof had been sold by him to a company solicited on behalf of a competing business in which he was interested customers of the old business, who were also customers of the competing business. Held, that the vendor must be restrained by injunction from soliciting the customers of the business which he had sold, whether or not such customers were also customers of the competing business. (*Curl Brothers Limited v. Webster.*) ... 479

Outgoings—Paving and making up roadway—Charge on frontager's premises—Date from which charge takes effect—"Completion of works."—Expenses incurred by a local authority under the Public Health Act 1875 in the execution of works required to be done under sect. 150 become "a charge on the premises in respect of which they were incurred" within the meaning of sect. 257 as soon as the works have been completed. (*Re Allen and Driscoll's Contract.*) ... 637

Power of sale—Will—Executor—Constructive trustee.—A testatrix by her will dated the 3rd March 1849 appointed R. J. and U. M. executors, and gave them powers to apply income in maintenance and to sell certain hereditaments after the death of the survivors of her daughters. The testatrix died on the 25th Dec. 1850. R. J. alone proved the will and died, leaving J. W. and M. W. his executors. In 1873 a petition was presented by all parties beneficially interested, and new trustees of the will were appointed under the Trustee Act 1850. After the death of the survivor of the daughters the trustees contracted to sell the hereditaments. The purchaser required the concurrence of the beneficiaries. Held, that the concurrence of the beneficiaries could not be required. (*Re Perrott and King's Contract.*) ... 156

Sale by auction—Maintaining fences—Covenant—Form of conveyance to purchaser.—The object of having a deed of conveyance is not merely to vest the property the subject of it in the purchaser, but to embody covenants as to what must be done under the contract of sale after completion of the purchase. Therefore where a purchaser bought under a contract which made him liable to erect and for ever after maintain fences, as marked on the plan of property sold by public auction, the vendor was held entitled to have the obligations of the purchaser expressed in the conveyance to him of his lot. (*Re Cooper and Crondace's Contract and Vendor and Purchaser Act 1874.*) ... 258

Sale of land—Purchaser's interest before completion—Judgment creditor of purchaser—Receiver by way of equitable execution—Notice to vendor—Personal estate—Date of appointment—Effect of appointment.—The appointment of a receiver upon giving security does not, as regards personal property, become effectual until security is actually given, and does not refer back to the date of the original order. G. contracted to purchase land from the defendant, paid a deposit of 300*l.*, and received immediate possession. The plaintiff subsequently became a judgment creditor of G. and obtained a receiver in respect of G.'s interest in the land. Notice of the receivership was given to the defendant. G. failed to pay the purchase money, and the defendant gave notice of rescission to G., who thereupon commenced an action for the return of the deposit. That action was settled at a date subsequent to the order appointing the receiver, but anterior to security being given. By the terms of the consent order the defendant paid G. 110*l.*, and G. agreed to give up possession. Held, that G. never acquired the ownership in equity of the land, and that consequently the receivership did not create a charge or lien. With regard to the 110*l.* paid by the defendant to G., the receiver, not having given security at the date of the payment, had not

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been effectually appointed, and therefore had no claim to be paid that money. Further, even if the receivership had been in force, the order appointing a receiver having failed to constitute a charge or lien, notice of the appointment did not do so; and the defendant incurred no liability by paying the money to G. direct. (<i>Ridout v. Fowler.</i>) 147	might then be in a position to treat his claim as shadowy. (<i>George v. Thomas.</i>)... .. 505
Settled land—Original settlement—Compound settlement—Life estate under original settlement extinguished—Charge for jointure and portions under original settlement—Sale by tenant for life under powers of original settlement—Trustees of original settlement.—A testator settled his land on his eldest son for life, with remainder to the son's sons in tail male in strict settlement, with power for each tenant for life on his marriage to create charges thereon for jointure for his wife and portions for his younger children. Land was purchased by the trustees of the will and added to the settled land, and the tenant for life married and charged the land subject to the settlement with jointure and portions. By successive deeds of resettlement, family arrangement, and appointment, to which the tenant for life and tenant in tail male were parties, the life estate given by the testator's will was extinguished and a compound settlement was created; but the charge for jointure and portions made under the powers given by the testator's will still subsisted. The tenant for life with the concurrence of the tenant in tail, then agreed to sell part of the settled land in exercise of his power of sale under the original settlement created by the testator's will alone, the purchase money to be paid to the trustees of the will. On a summons by the purchaser for the determination of the question whether the tenant for life could sell under the original settlement created by the will alone, or whether trustees of the compound settlement created by the will and subsequent deeds must be appointed: Held, that, as the charge for jointure and portions made under the powers given by the will was still subsisting, the original settlement created by the will alone was still existing side by side with the compound settlement created by the will and subsequent deeds, and that the tenant for life could sell under the will alone, so that it was unnecessary to appoint trustees of the compound settlement. (<i>Re Lord Wimborne and Browne's Contract and Vendor and Purchaser Act 1874.</i>) 540	Specific performance—Vendors' possession—Receipt of rents due from tenants before date of contract after date for completion—Allocation of receipts.—Where a vendor remains in possession after the date fixed for completion of the purchase, the completion having been delayed by no fault on the purchaser's part, and receives interest in lieu of rents by his own choice after the date for completion but still receives the rents, he is not at liberty as against the purchaser to allocate any part of such rents so received to arrears of rents due to himself from tenants either before the date of the contract, or subsequently before the date fixed for completion of the purchase. (<i>Plews v. Samuel.</i>)... .. 533
	Voidable contract—Assignment of contract—Failure of consideration—Money had and received. (<i>Mackusick v. Fleming.</i>) 101
	VOTERS, REGISTRATION OF.
	Declaration by lodger claimant—Evidence—Personal attendance of claimant—Rateable value of house—Character of street.—A revising barrister by personal inspection satisfied himself that certain houses were very poor and small, and that it was very doubtful whether any lodgings in those houses were worth 10 <i>l.</i> a year unfurnished. J. duly sent in his claim as a lodger with his declaration attached. It was proved that the rateable value of the house, which was stated to be in as poor a street as any the revising barrister had inspected, was only 14 <i>l.</i> per annum, which was 6 <i>s.</i> less than J. claimed to pay as lodger. The revising barrister adjourned the hearing of the objection to J.'s claim, and sent him the following notice: "... your claim to vote as a lodger has been objected to ... your claim will or may be disallowed unless you produce or cause to be produced to me ... your rent-book or other sufficient evidence that your said lodgings are of the clear yearly value of 10 <i>l.</i> if let unfurnished." J. did not attend or make any communication, and his claim was disallowed. Held, that, as the revising barrister did not make the allowance of the claim dependent upon J.'s personal attendance, the court could not interfere, as there was evidence to support his decision. A revising barrister cannot make the personal attendance of a claimant a condition of the allowance of his vote. The right of a revising barrister to disallow a claim, when a claimant has by his declaration given <i>prima facie</i> evidence of his qualification, is not confined to the case of such <i>prima facie</i> proof of the ground of objection as is described in sect. 28 (10) of the Parliamentary and Municipal Registration Act 1878, but he may act on other evidence. (<i>Jenkins, app. v. Grocott, resp.</i>) 90
Specific performance—Threat of litigation.—At a sale by auction on the 21st July 1903 the defendant contracted to buy a secured profit rental of 550 <i>l.</i> per annum for 5500 <i>l.</i> This profit rental was secured upon two houses in Cheapside, the receipts from tenants amounting to 950 <i>l.</i> , the ground rent being 250 <i>l.</i> , and the rates and taxes on one of the houses being 150 <i>l.</i> No deduction was made in respect of the other house, of which W. was the tenant, as there was no covenant by the landlord to pay rates and taxes. As a matter of fact the landlord had from 1876 until 1903 paid the rates and taxes on the house let to W. On the 29th Sept. 1903 W. commenced an action for rectification of his lease, but the action was dismissed because he had granted an underlease of the term vested in him which amounted to an assignment. W. wrote that he intended to take proceedings to make the underlessee join, and bring a fresh action. The plaintiff said that, the action by W. having been heard and dismissed, the plaintiff was entitled to specific performance. For the defendant it was said that the plaintiff knew W. said that he was not liable to pay rates and taxes before the sale, and that the plaintiff was not entitled to specific performance. Held, that W.'s claim was an honest one, and that specific performance could not now be granted, because sufficient time had not elapsed to enable the court to say that no fresh action would be brought. The action was ordered to stand over till the 24th June, and, if W. had then taken no steps to obtain rectification, the court	WARRANTY. (See FOOD AND DRUGS.)
	WATER.
	Water company—Supply of water—Communication pipe belonging to occupier—Defect in—Leakage and waste of water—Non-repair by occupier—Right to cut off water—Right of occupier to demand supply.—An owner or occupier of premises in the metropolis, whose attention is called by the waterworks company, who are bound to supply him with water, to a defect under the street in the communication pipe belonging to him and connecting his premises with the company's main, and who has the opportunity of repairing the defect without opening the roadway, but does not choose to repair it, is not a person entitled to demand a supply of water under sect. 43 of the Waterworks Clauses Act 1847. A leak having been discovered under the roadway opposite certain premises in the metropolis, the waterworks company opened the street and found that

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the communication pipe connecting the premises with the company's main was defective and leaking, thereby causing a waste of water. The communication pipe was the property of the occupier, and the company at once gave him notice of the defect, stating that if it were not remedied forthwith the company would disconnect the pipe from their main, and would not allow it to be reconnected until the pipe was repaired. The occupier took no steps to repair his pipe, and it was disconnected from the main and the water cut off. The occupier could at the time have repaired the pipe without opening the street, as the street was then open. Held, that the duty of repairing the defect in the pipe was by sect. 28 of the Metropolis Water Act 1871 cast upon the owner or occupier, and that the owner or occupier who, after notice that the communication pipe belonging to him was out of repair, permitted the pipe to remain in its defective state in which it would cause waste of water, has wrongfully failed to do something for the prevention of the waste within the meaning of sect. 32, and that under the circumstances the company were entitled to cut off the water, and to cease to give a supply to the occupier so long as the pipe remained unrepaired. (<i>Grand Junction Waterworks Company, app. v. Rodocanachi, resp.</i>) ... 819	and the rest at $4\frac{1}{2}$ per cent. Held, that 5 per cent. and $4\frac{1}{2}$ per cent. respectively were the "prescribed rate" for this preference stock within the meaning of sect. 75 of the Waterworks Clauses Act 1847. (<i>Re Arbitration between the Chelsea Waterworks Company and the Metropolitan Water Board.</i>) ... 831
Water supply by corporation—Water for domestic use—"Water rate"—Right of corporation to charge at different rates—"Rate."—A municipal corporation acquired the undertaking of a waterworks company by a private Act, which authorised the corporation "to charge for the supply of water for domestic use to any dwelling-house a sum not exceeding $7\frac{1}{2}$ per cent. per annum on the net rateable value of such dwelling-house as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable." The company had statutory power to supply any person with water for any purpose for such remuneration as might be agreed under a special agreement; and the corporation succeeded to that power. The corporation charged for the supply of water for domestic use in one part of the borough 5 per cent., and in another part $7\frac{1}{2}$ per cent., upon the net rateable value of dwelling-houses. Held, that the corporation had power to charge at different rates, within the maximum, for the supply of water for domestic use to dwelling-houses. A provisional order provided that the general district rates to be levied in a district thereby added to the borough should not in any year for ten years exceed such an amount in the pound as, when added to the poor rate and borough rate "and any other rate made by the corporation" in the same year, would make a total rate of 5s. 6d. in the pound. Held, that the water rate was not a "rate" within the meaning of the words "any other rate" in the provisional order. (<i>Northampton Corporation v. Ellen.</i>) ... 71	Waterworks—Land compulsorily taken for reservoir—Assessment of compensation—Special natural adaptability of land for building a reservoir. (<i>Re Riddell and Newcastle and Gateshead Water Company.</i>) ... 44n.
Waterworks—Dividends—"Prescribed rate"—Preference shares issued under special Act—Rate of interest fixed by company—Profits divisible among ordinary shareholders.—The Waterworks Clauses Act 1847 enacts by sect. 75 that the profits of the undertaking to be divided among the undertakers in any year shall not exceed "the prescribed rate," or, where no rate is prescribed, the rate of 10 per cent. on the paid-up capital in the undertaking; and by sect. 2 "prescribed" means "prescribed for that purpose in the special Act." The Companies Clauses Act 1863 provides by sect. 13 that where a company is authorised by any special Act to raise money by the issue of new preference shares or stock, it may issue the shares or stock with a dividend or interest not exceeding the rate prescribed in the special Act, and, if no rate is prescribed, then not exceeding the rate of 5 per cent. per annum. A waterworks company whose Acts incorporated the above-mentioned enactments obtained power to raise additional capital by the issue of new preference stock, no rate of interest being named in their special Act. This stock was in fact issued, some at 5 per cent.	Waterworks—Lands compulsorily taken for reservoir—Assessment of compensation—Natural and peculiar adaptability of land for building a reservoir—Right of arbitrator to take into consideration.—In assessing compensation for land compulsorily taken by a water company for the purpose of building a reservoir thereon, the natural and peculiar adaptability of the land for building a reservoir is a fit and proper matter for consideration as an element in the value thereof, although there may be no evidence of any possible purchasers for that purpose besides the water company. (<i>Re Arbitration between Gough and Aspatia, Silloth, and District Joint Water Board.</i>) 43
	WEIGHTS AND MEASURES.
	Sale of coal—"Cause the weight of the vehicle . . . to be previously ascertained."—By sect. 22 (1) of the Weights and Measures Act 1889: "Where any quantity of coal exceeding two hundredweight is conveyed for delivery on sale in a vehicle in bulk, the seller of the coal shall . . . cause the weight of the vehicle to be previously ascertained. . . ." Held, that the true test was whether the vehicle had been weighed so recently and under such circumstances that its correct weight had been ascertained. <i>Semble</i> , that weighing at reasonable intervals was not the proper test, but that the waggon need not be weighed before every delivery. (<i>Bearisley, app. v. Pike and Sons, resps.</i>) ... 652
	WILL.
	Accumulation—39 & 40 Geo. 3, c. 98—Trust to pay debts—Debts paid out of capital moneys—Trust to recoup capital.—H., by his will made on the 22nd July 1881, gave certain annuities and devised and bequeathed the residue upon trust that the trustees should accumulate the rents and profits, until sufficient should be raised to pay off certain sums amounting in all to 116,000 <i>l.</i> , for twenty-one years from the death of the last surviving grandchild living at his death. Under the will A. was the present tenant for life, and B. was tenant in tail in remainder. The will provided that if the debts, directed to be paid out of accumulations, were paid out of capital moneys, the capital moneys should be recouped the sums so paid. Until 1903 the annuities had exhausted the whole of the income, but on the death of an annuitant there was now a surplus income of about 5000 <i>l.</i> per annum. One hundred thousand pounds of the debts directed to be paid out of accumulations had been paid out of the proceeds of sale of land sold under the Settled Land Acts, and 16,000 <i>l.</i> had been paid out of the proceeds of sale of land sold by the trustees under a power of sale contained in the will. It was submitted by A. that he was entitled to the whole income, as the trust was not one to pay debts, but to recoup capital. For B. it was said that the trust to recoup capital was in fact a trust to pay debts. Held, that, as to the 100,000 <i>l.</i> paid out of capital moneys arising under the Settled Land Acts, it was clear that there was no right of recoupment. As to the 16,000 <i>l.</i> , once debts were paid and satisfied out of capital moneys, a direction that capital should be recouped was not a direction for payment of debts. (<i>Re Heathcote; Heathcote v. Trench.</i>) ... 505
	Charitable gift—Ambiguity—Uncertainty of object—Erroneous recital in codicil.—A testatrix by will made in 1897, among other legacies to charitable

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| institutions, bequeathed to the British Home for Incurables, Streatham, S.W., mentioning accurately the name of its secretary and address of its office, £250. By codicil made in 1902, after reciting twice incorrectly that she had given by will £500 to the British Home for Incurables, Streatham, S.W. . . . and, amongst others, to St. M.'s Orphanage, Bayswater, £100, she revoked all the legacies, "and instead thereof" bequeathed £500 each to the Royal Home for Incurables, Streatham, S.W., and to St. M.'s Orphanage. The legacy of £500 was claimed by the Royal Hospital for Incurables and by the plaintiff institution, founded in 1861 by the name of the British Home for Incurables, and in 1899 incorporated by Royal Charter by its present name. Held, that, having regard to entries in a book kept by the testatrix containing particulars of her charitable contributions, she distinguished the two institutions as the "Royal" and the "British," and, therefore, on the true construction of the codicil, the Royal Hospital for Incurables was entitled to the legacy. (<i>British Home and Hospital for Incurables v. Royal Hospital for Incurables</i>) | 501 |
| Condition—Marriage against mother's wish—Consent given—Power of retraction.—By a codicil made in 1891 the testator directed that, in the event of his youngest daughter marrying against her mother's wish, a legacy of 500 <i>l.</i> and all her share of moneys from the estate were to be settled on her for life, with remainder to her children, and, failing children, were to be divided between her brother and sister. In May 1893 the daughter became engaged with the consent of her parents, their consent being given on condition that the marriage was put off for two years, as the intended husband was not at the time of the consent in a position, as the parents considered, to marry. The testator died in Feb. 1895. The engagement was still recognised by the widow, but she stipulated that the marriage should not take place until the following August, six months after the testator's death. To this the daughter agreed. Subsequently there were disputes between the daughter and the mother, mainly as to the form of the settlement. The daughter left her mother's house and was married in June. The day before the marriage the mother wrote withdrawing her consent. Held, that the consent to the marriage was given with full knowledge of all the circumstances, and nothing had occurred subsequently which justified its retraction; that the refusal of consent by the mother had reference to the date fixed for the marriage and not to the marriage itself; that the daughter had not married against her mother's wish, and that she was absolutely entitled to the legacy and to her share in the testator's residuary estate. (<i>Re Brown; Ingall v. Brown</i>) | 220 |
| Construction—Ambiguity—Referring to codicil to clear up ambiguity—Gift contingent on surviving tenant for life—Class gift—Gift to a class and a named person—Lapse.—A testatrix directed her residuary real and personal estate to be converted into money and the income to be paid to a niece for her life, and on the tenant for life's decease the testatrix directed her trustees to divide the trust estate equally between the brothers and sisters of the tenant for life living at the latter's decease and A., B., and C. in equal shares, "and should either of them be dead leaving children such children are to take the share their deceased parent would have been entitled to." By a codicil the testatrix recited that she had in her will directed her residuary estate to be sold and the proceeds divided between the persons therein named, and desired a great-niece to have a share in her residuary estate equally with the others named in the will and bequeathed her the same accordingly. The testatrix died in 1901, and the tenant for life in 1902. One brother only of the tenant for life, and no sister, was living at the tenant for life's death. Of A., B., and C., A. had predeceased the testatrix, and B., though he survived the testatrix, died before the tenant | 502 |
| for life. A. and B. were half-brothers of the testatrix, but C. was a stranger in blood. Upon an originating summons taken out for the determination of the questions who were the persons entitled to the residuary estate, whether A.'s share devolved upon the next of kin of the testatrix or became divisible between the other legatees, and whether the gift of a share to B. was contingent on his surviving the tenant for life. Held, that on the will alone there was an ambiguity as to whether the estate was divisible in moieties or in equal shares among all who took, but that the court was entitled to refer to the codicil to clear up the ambiguity, and that the codicil made it clear that the estate was divisible in equal shares. Held, also, that the gift of a share to B. was not contingent on his surviving the tenant for life, and that, in view of the judgments of the House of Lords in <i>Kingsbury v. Walter</i> (84 L. T. Rep. 697; (1901) A. C. 187), the gift could not be construed as a class gift, and that A.'s share therefore lapsed to the testatrix's next of kin. (<i>Re Venn; Lindon v. Ingram</i>) | 502 |
| Construction—Gift to daughter or her children—Attestation by daughter's husband—Failure of gift to daughter's children.—A testator who died in 1886 by his will, which was attested by the husband of one of his daughters, directed that after the death of his wife, which happened in the lifetime of that daughter, half of his freehold estate should go to that daughter or her children. Held, that as the gift to that daughter was void by virtue of sect. 15 of the Wills Act 1837, the gift to her children also failed. (<i>Aplin v. Stone</i>) | 284 |
| Construction—Gift to tenant for life with remainder to a class, their children to take by substitution—Occurrence of events not contemplated by testator.—A gift by will to a class to take effect after a life estate, with a substitutional gift to the children of deceased members of the class, expressed in words of futurity, does not let in the children of a member of the class in a case where, he having survived the tenant for life, both die after the date of the will during testator's life. (<i>Re Kinnear, deceased; Kinnear v. Barnett</i>) | 537 |
| Construction—Gift to the children of A.—"Die without leaving children"—Vested interests.—A testator gave his property in trust for his wife for life and upon her death to his daughter A., but if she should be then dead to any child or children of A., and "failing such issue of" A., to his daughter B., but if she should be then dead to any child or children of B.; but should A. and B. be then both dead "leaving no issue," then, in case of each or either of them being married leaving a husband or husbands then surviving, to the husbands or to the survivor of such husband. B. was dead, leaving one child. A. was still living, and had three children. Held, that the case fell within the rule that where a vested interest was given to children it was not to be divested by a gift over if the parent died without leaving children. (<i>Re Bradbury; Wing v. Bradbury</i>) | 824 |
| Construction—Gift "to the eldest son of my sister"—Intestacy.—A testator by his will made in 1822 devised real estate in strict settlement, and, in the event of the failure of the previous limitations, which happened, "to the eldest son of my sister, F. M. G., and his heirs for ever." The testator died in 1860. At the date of the will F. M. G. had two sons, both of whom died in the lifetime of the testator intestate and without issue. Two other sons, born after the date of the will, survived the testator. One died intestate and without issue before the failure of the previous limitations. The fourth born son of F. M. G. was her eldest surviving son at the time of the failure of the previous limitations. Held, that there was an intestacy. (<i>Amyot v. Dwaris and others</i>) | 102 |
| Construction—Limitations in strict settlement—Contingent remainders or executory devises— | |

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Failures for remoteness.—A will, dated in 1854, contained a series of limitations in strict settlement under which, on the death of A. without issue in 1891, B. became tenant for life in possession, with remainder to the plaintiff, his eldest son, an infant, as tenant in tail, with divers remainders over, including a remainder to C., the plaintiff's uncle, who was born in 1860, for life, with remainders over. By a codicil, dated in 1868, the testator directed and declared that no devise of any of his real estates devised under or by virtue of his will should have a vested interest therein or be entitled to the possession of the same until the attainment of the age of twenty-four years, anything contained in his will or any law or usage to the contrary notwithstanding. The testator died in 1879. Held, that, regard being had to the terms of the codicil, the limitations of the will took effect by way of executory devise and not by way of contingent remainder; and had failed for remoteness. (<i>Re Wrightson; Battie-Wrightson v. Thomas.</i>) ... 748		interest.—Interest upon surplus income.—Where there is a notional conversion of a wasting security, as in <i>Meyer v. Simonsen</i> (5 De G. & Sm. 723), interest thereon should now be allowed to the tenant for life at the rate of 3 per cent. only. The surplus income of the wasting security, after providing for the 3 per cent., goes to capital, but the interest thereon to the tenant for life. (<i>Re Woods; Gabellini v. Woods.</i>) ... 5	
Construction—Precatory trust—Gift absolute or on trust—Gift in default of disposition—Repugnancy.—A testator gave, devised, and bequeathed to his wife "the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be divided among the surviving said nieces." The testator's wife and seven nieces survived him. Held (by Williams and Stirling, L.JJ., Cozens-Hardy, L.J. dissenting), that there was an absolute gift to the widow unaffected by any precatory trust in favour of the nieces, and the words "in default of any disposition," &c., imposed a condition which was repugnant to the previous absolute gift and could not be construed as creating an executory devise or gift over after the absolute gift, and must therefore be rejected. Per Cozens-Hardy, L.J.: The widow took more than a life interest, and, should all the nieces predecease her, her absolute interest would remain; but the surviving nieces, if any, were sufficiently indicated as the persons to take after her death; and this overriding intention could be given effect to without unduly straining the language of the will. (<i>Re Hanbury; Hanbury v. Fisher.</i>) ... 66		Forfeiture—Endowment for national school—Gift over in event of school becoming subject to the control of a school board—Education authority.—A testator, who died in 1891, bequeathed certain shares in a bank to trustees "upon trust to pay and apply the interest or income thereof in or towards the annual expenses of" a national school so long as it was "supported by voluntary subscriptions as now and heretofore in addition to the Government grant," with a gift over in the event of the school "ceasing to be so supported or becoming subject to the control of a school board." Since the death of the testator the necessity for subscriptions had practically ceased owing to the bequest, but the managers were in debt to a small extent. By the Education Act 1902 school boards were abolished, and public elementary schools came under the control of the county council as the education authority. Held, that there had been no forfeiture on either of the grounds mentioned by the testator, and that the gift over did not take effect. (<i>Re Beard's Trusts; Butlin v. Harris.</i>) ... 274	
Construction—Settlement estate duty payable on personality.—Direction to pay testamentary expenses.—A testator who died in 1899, by his will made in 1895, bequeathed legacies to three sons "free of all duties," and then bequeathed legacies of larger amounts to his daughter and two younger sons without adding the words "free of all duties," and directed his daughter's legacy to be retained by the trustees and held upon the same trusts as her share of residue thereafter given to her. He then gave his residuary real and personal estate to his trustees upon trust for conversion, and directed that out of the proceeds of sale the trustees should pay his funeral and testamentary expenses and debts and legacies and the legacy duty thereon, and should stand possessed of the residue in trust for his daughter and his two younger sons. He afterwards settled the daughter's share upon trusts for the benefit of herself and issue. Upon an originating summons taken out by the trustees for the determination of the question whether the settlement estate duty payable on the daughter's settled legacy and settled share of residue was payable out of that legacy and share of residue or out of the general residuary estate: Held, that the settlement estate duty was not a testamentary expense, and was payable out of the settled property and not out of the general residuary estate. (<i>Re King; Travers v. Kelly.</i>)... 281		Forfeiture clause—"Shall thenceforth cease and determine"—Alienation or bankruptcy—Marriage within certain degree of kindred, or without consent of trustees—Marriage between date of will and death of testator.—A testator declared that certain benefits given by the will to his sons and daughters should "thenceforth cease and determine" on alienation or bankruptcy, or if they married within a certain degree of kindred, and as to his daughters without the written consent of his trustees. Between the date of the will and the death of the testator a daughter married within that degree. Held (Cozens-Hardy, L.J. dissenting), that there was sufficient in the context of the will to show that the testator intended the provision as to forfeiture to apply only to marriages which took place after his death. Per Williams and Stirling, L.JJ.: The decision in <i>Metcalf v. Metcalf</i> (65 L. T. Rep. 426; (1891) 3 Ch. 1), in which it was held that a forfeiture clause took effect in the case of bankruptcy or alienation between the date of the will and the testator's death, applies only to the particular acts of forfeiture there considered. (<i>Re Chapman; Perkins v. Chapman.</i>) ... 339	
Construction—Wasting security—Notional conversion—Tenant for life and remainderman—Rate of		Legacy—Intended satisfaction of an obligation—Legatee predeceasing testatrix—Lapse.—Where a testatrix, in exercise of a power of appointment, appointed a sum to her brother in satisfaction of certain over-payments received by her out of trust funds of which he was the sole trustee, it was held that, as the appointment was made with the intention of performing a moral obligation and not of conferring a bounty, the gift did not lapse through the testatrix being predeceased by her brother. (<i>Stevens v. King.</i>) ... 665	
		Power—Excessive execution— <i>Cy-pris</i> .—Hereditaments were limited to the use of B. R. for life, with remainder to the use of his children, or other issue born in his lifetime, for such estates and in such shares as B. R. should by deed or will appoint, and in default to the use of his children in fee simple as tenants in common. B. R. by his will appointed to his son W. for life, with remainder to his sons in tail male, with remainder to his daughters in tail male, with remainder to B. R.'s daughter for life, with remainder to her sons in tail male, with remainder to her daughters, with divers remainders over. Held, that W. did not take an estate in tail general or in tail male, and that all the remainders subsequent to the life estate	

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| appointed to him failed. (<i>Re Rising; Rising v. Rising.</i>) | 504 | WORKMEN'S COMPENSATION. | |
| Power of appointment and advancement—Hotchpot clause. —A testator gave his real and residuary personal estate upon trust for his wife for life, and after her death for his four children as his wife should by will appoint. In default of appointment the children were to take equally. The testator's will contained a power of advancement. Any child who had received any part of the funds under any appointment was, in default of appointment to the contrary, to bring the appointed funds into hotchpot. After the testator's death 705l. was advanced to R., one of his children. The widow subsequently by her will appointed one equal fourth part of the property of which she was tenant for life to each of two of her children absolutely, and one equal fourth part upon trust for each of her other children (of whom R. was one) respectively for life, with remainder to their respective children. No reference was made in the widow's will to the 705l. advanced to R. Held, that R. was not liable to bring into hotchpot or account for the 705l. advanced to him out of his expectant share. (<i>Re Fox; Wodehouse v. Fox.</i>) | 477 | Employer and workman—Injury by accident—Compensation—Accident arising "out of" employment—Injury by lightning—Risk incidental to particular employment. —A bricklayer employed upon the construction of a building exceeding 30ft. in height was killed by lightning when working upon a scaffolding at a height of 23ft. from the ground. Evidence was given that a man working in that position incurred a risk substantially greater than the normal risk of being struck by lightning, and the County Court judge found that the accident arose "out of" the employment. Held, that the County Court judge had properly found that the accident arose "out of" the employment. (<i>Andrew v. Failsworth Industrial Society.</i>) | 611 |
| Precatory trust—Absolute gift followed by expression of desire. —The decisions of the Court of Appeal in <i>Re Diggles</i> (59 L. T. Rep. 884; 39 Ch. Div. 253), <i>Re Hamilton</i> (72 L. T. Rep. 748; (1895) 2 Ch. 370), and <i>Re Williams</i> (76 L. T. Rep. 600; (1897) 2 Ch. 12) are not inconsistent with the rule laid down by Lord Alvanley in <i>Malim v. Keighley</i> (2 Ves. 333, 335) as to what creates a trust in the case of a gift, which was approved of by the House of Lords in <i>Knight v. Boughton</i> (11 Cl. & F. 513, 548). Testatrix devised and bequeathed all her real and personal property equally amongst her two daughters as tenants in common for their own absolute use and benefit, and appointed them her executrices. She then continued: "My desire is that each of my said two daughters shall during the lifetime of my son pay to him one-third of the respective incomes of my said two daughters accruing from the moneys and investments under this my will." Held, that the expression of the testatrix's desire was not sufficient to cut down the former absolute gift, and no trust was created in favour of the son. (<i>Re Oldfield; Oldfield v. Oldfield.</i>) | 307 | Employer and workman—Injury by accident—Compensation—Agreement for payment of weekly sum—Subsequent acceptance of work at reduced wages—Application by workman to have memorandum of agreement registered—"Genuineness" of memorandum. —A workman received injuries by accident which rendered him for a time totally incapable of work. He agreed to accept compensation under the Workmen's Compensation Act 1897, and an agreement was duly entered into between him and his employers, by which he was to receive half his average weekly earnings at the time of the accident. He partially recovered, and was offered and accepted from his employers lighter work at reduced wages. On his resumption of work at the reduced wages, he admitted that he was no longer entitled to the former weekly sum as compensation, and negotiations took place, but no new agreement was come to as to the weekly amount of compensation he was to receive in addition to his reduced wages. The workman subsequently applied to a County Court to have the memorandum of the agreement registered under sched. 2, clause 8, of the Workmen's Compensation Act 1897, but the County Court judge refused to register the memorandum of the agreement upon the ground that the memorandum was not then applicable to the facts of the case, and that therefore the agreement was not then "genuine" within the meaning of the rules. Held, that the word "genuineness" in clause 8 refers to the memorandum and not to the agreement, and that, as the memorandum accurately represented the agreement which had been come to, it was a "genuine" memorandum within the meaning of the clause, and ought to have been registered, although the agreement itself was no longer applicable to the altered circumstances of the case. (<i>Blake v. Midland Railway Company.</i>) | 433 |
| Probate—Action for revocation—Counter-claim propounding will—Notice by plaintiff to cross-examine—Costs—Practice. —The plaintiff brought an action for revocation of probate which had been granted in common form, and the defendant, by way of counter-claim, propounded the will. In his reply and defence to the counter-claim the plaintiff gave notice, under Order XXI, r. 18, of the Rules of the Supreme Court, that he merely insisted on the will being proved in solemn form, and that it was simply his intention to cross-examine the witnesses. Held, that in the construction of this rule the principle which guided the Ecclesiastical Courts and the Probate Courts ought to be considered; that there was a distinction between a party who sought a revocation of probate and one who entered a caveat and took the ordinary steps to oppose a will being admitted to proof; and that the present plaintiff could not secure the benefit of the rule as to costs, since the notice given by him was bad. (<i>Tomalin v. Smart.</i>) | 171 | Employer and workman—Injury by accident—Compensation—Employment—"Factory." —The Workmen's Compensation Act 1897, by sect. 7 (2), provides that "factory" has the same meaning as in the Factory and Workshop Act 1901, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Act of 1901 is applied. By sect. 105 (2) of the Factory and Workshop Act 1901 certain provisions of the Act are to "have effect as if any building which exceeds thirty feet in height, and in which more than twenty persons, not being domestic servants, are employed for wages, were included in the word 'factory.'" Held, that a building of the description specified in sect. 105 (2) of the Factory and Workshop Act 1901 is not a "factory," within the meaning of the Workmen's Compensation Act, merely because some provisions of the Act of 1901 are applied thereto. (<i>Dyer v. Swift Cycle Company Limited.</i>) | 613 |
| Probate—Corporate body—Grant to corporate body and to individuals—Jurisdiction—Practice. —The court will not make a grant of probate to a body corporate and to one or more individuals, all of whom have been appointed executors by a will. (In the Goods of Martin.) | 264 | Employer and workman—Injury by accident—Compensation—Employment—"Factory"—"Wharf"—"On or about." —Every wharf is a "factory" within the meaning of sect. 7 (2) of the Workmen's Compensation Act 1897. <i>Hall v. Snowden, Hubbard, and Co.</i> (80 L. T. Rep. 554; (1899) 2 Q. B. 136) is overruled by the decision of the House of Lords in <i>Raine v. Johnson and Co.</i> | |
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Employer and workman—Injury by accident—Compensation—"Factory"—Ship in a dock—"Workman"—Seaman.—A ship moored to buoys in a dock preparatory to proceeding to sea occupies part of a factory within sect. 104 of the Factory and Workshop Act 1901. An able seaman employed in the ordinary duties of a seaman on such a ship is a "workman" within sect. 7 of the Workmen's Compensation Act 1897 and, subject to the provisions of that Act, is entitled to be compensated by the shipowners for personal injury by accident arising out of and in the course of such employment. So held by Collins, M.R. and Cozens-Hardy, L.J., Mathew, L.J. dissenting. (Griffin v. Houlder Line Limited.)	142	Employer and workman—Injury by accident—Compensation—Scheme under Workmen's Compensation Act 1897—Bar to a right of action for damages for negligence.—By a scheme which had been duly certified by the Registrar of Friendly Societies under sect. 3, sub-sect. 1, of the Workmen's Compensation Act 1897, a society was established to raise funds by the contributions of the employers and the workmen at certain collieries to make provision for the workmen in case of accidents; and the rules of the society provided that the contributions made by the employers to the society were to be in lieu of, and to exempt them from, any further claims which otherwise the members of the society might be entitled to prosecute as the result of accidents occurring during their employment. A workman who had accepted this scheme and become a member of the society met with an injury by accident arising out of and in the course of his employment which resulted in his death. His widow, after receiving certain sums as compensation under the terms of the scheme, brought an action against the deceased's employers under the Employers' Liability Act 1880 to recover damages for the death of her husband. Held, that under sect. 1, sub-sect. 2 (b), of the Workmen's Compensation Act 1897 the acceptance of the scheme was a bar to her action for damages. (Taylor v. Hamstead Colliery Company Limited.)	363
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THE
LAW TIMES REPORTS:

COMPRISING

All the Cases Argued and Decided

IN THE

HOUSE OF LORDS, THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
THE SUPREME COURT OF JUDICATURE, AND THE
RAILWAY AND CANAL COMMISSION COURT.

FROM MARCH TO AUGUST 1904.

H. OF L.]

MONTGOMERY AND CO. v. WALLACE-JAMES.

[H. OF L.]

House of Lords.

Nov. 16, 17, 19, 20, 23, and Dec. 18, 1903.

(Before the LORD CHANCELLOR (Halsbury),
Lords SHAND, DAVEY, ROBERTSON, and
LINDLEY.)

MONTGOMERY AND CO. v. WALLACE-JAMES. (a)
ON APPEAL FROM THE FIRST DIVISION OF THE
COURT OF SESSION IN SCOTLAND.

*Practice—Appeal on question of fact—Concurrent
findings of two courts below.*

*There is no rule of practice in the House of Lords
that the House will not entertain an appeal on
a question of fact where there have been con-
current findings in the courts below.*

*Dictum of Lord Herschell, L.C. in The P. Caland
(68 L. T. Rep. 469; (1893) A. C. 207) explained
by Lord Davey.*

*Judgment of the court below reversed on the facts
and evidence.*

APPEAL from a judgment of the First Division
of the Court of Session in Scotland (Lords Adam,
McLaren, and Kinneir), reported 4 F. 771; 39
Sc. L. Rep. 517, who had affirmed a judgment of
the Lord Ordinary (Lord Kincairney).

The action was brought by the respondent, a
resident in the burgh of Haddington, for a sus-
pension and interdict to prohibit the appellants
from encroaching upon a piece of land alleged
to be part of a piece of common land used by the
inhabitants of the burgh for recreation and other
purposes.

The case is also reported in 2 F. 107; 37 Sc.
L. Rep. 83 upon a preliminary point as to the
title of the pursuer, as one of the public, to sue
under the circumstances of the case, but this
point was not raised in the House of Lords.

The main question was one of fact, whether the
piece of land in question was proved to be part of
the common.

The courts below gave judgment for the
pursuer.

Clyde, K.C. and Constable (both of the Scotch
Bar) for the appellants.

The Lord Advocate (Scott-Dickson, K.C.),
Wilson, K.C., and Lawrie (all of the Scotch Bar)
for the respondent.

At the conclusion of the arguments their
Lordships took time to consider their judgment.

Dec. 18. — Their Lordships gave judgment
as follows:—

The LORD CHANCELLOR (Halsbury). — My
Lords: I think that this appeal should be allowed.
It is simply a question of fact, and doubtless,
where a question of fact has been decided by a
tribunal which has seen and heard the witnesses,
the greatest weight ought to be attached to the
finding of such a tribunal. It has had the
opportunity of observing the demeanour of the
witnesses, and judging of their veracity and accu-
racy in a way that no appellate tribunal can do.
But where no question is raised as to truthfulness,
and the question is as to the proper inferences to
be drawn from truthful evidence, then the
original tribunal is in no better position to decide
than the judges of an appellate court. [His
Lordship then discussed the facts and evidence in
the case.]

Lord SHAND. — My Lords: I am also of opinion
that this appeal should be sustained, and the action
dismissed with costs. It is with great reluctance
that I come to the conclusion that an appeal
should be sustained against concurrent judgments
of the Lord Ordinary and the division of the
court on a question which is entirely one of fact.
The Lord Advocate pressed strongly upon the
House that the judgment should be affirmed,
because the case, which turns on fact, had been
decided by the Lord Ordinary, who saw the wit-
nesses, and himself heard their evidence, and his
judgment has been sustained by the unanimous
judgment of the learned judges of the division

(a) Reported by C. E. MANDEN, Esq., Barrister-at-Law,
Vol. XC., 2312.

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on appeal. No one is disposed to give greater importance to such circumstances than I am, but the facts of the case as proved seem to me clearly to show (1) a complete failure on the part of the complainer to establish the alleged immemorial possession for forty years, on which the case depends, and (2) that important facts in the evidence as to the character of the alleged public uses have been overlooked or disregarded in the matters to which I shall immediately refer, and that these uses are quite insufficient to establish the rights claimed, or any of them, to which effect has been given by the judgments complained of. [His Lordship went on to discuss the evidence.]

LORD DAVEY.—My Lords: Before I address myself to a consideration of the evidence in the case, I desire to make an observation of a general character. It was pressed upon your Lordships by the counsel for the respondent that this House would not disturb the concurrent findings of two courts below upon a question of fact, and reference was made to what was said in the cases of *Gray v. Turnbull* (L. Rep. 2 H. L. Sc. 53), *The P. Caland* (68 L. T. Rep. 469; (1893) A. C. 207), and *McIntyre v. McGavin* (69 L. T. Rep. 389; (1893) A. C. 268). But when these observations are carefully read it will be found that they do not lay down any rule of practice, such as is followed by the Judicial Committee, at any rate in Indian appeals, that this House will not entertain an appeal on a question of fact where there have been concurrent findings in the courts below. I do not disagree with what Lord Herschell, L.C. is reported to have said in the case of *The P. Caland* if it be regarded merely as a guide to the judgment of the tribunal, and not as a rule of law or practice. In all cases your Lordships should and would pay the greatest respect to the concurrent findings of two courts on a question of fact. When the question depends on the credibility of witnesses, the opinion of the judge who heard the evidence would in most cases be conclusive. In every case the appellant assumes the burden of showing that the judgment appealed from is wrong, and when it depends on an estimate of probabilities or inferences so nicely balanced that it is impossible to say that a decision either way would be wrong, every material fact having received due consideration, your Lordships would, I make no doubt, be disposed to affirm the concurrent decisions of the courts below. Some noble and learned Lords have lamented that an appeal lies to this House on questions of fact, but, so long as that is the law, I think that this House cannot decline the duty of forming and expressing its own judgment, after taking into account all the considerations to which I have referred. [His Lordship went on to discuss the evidence, and concluded as follows:] I am of opinion that the respondent has failed to sustain the issue tendered by him, and I agree that the appeal should be allowed.

LORD ROBERTSON concurred.

LORD LINDLEY.—My Lords: I also have carefully examined the evidence in order to see if it justified the inference that there had been forty years' user as of right of the piece of land in question as alleged by the respondent. I have come to the conclusion that the evidence falls far short of what is necessary to establish any

such user. I entirely concur in thinking that there is no law or settled practice of this House to prevent it from differing even from two concurrent findings of fact if, on a careful consideration of the evidence, this House comes to the conclusion that those findings are wrong. The appeal ought, in my opinion, to be allowed with costs in the usual way.

Interlocutors appealed from reversed, and appeal allowed with costs in this House and in the courts below.

Solicitors for the appellants, J. Kennedy, for T. S. Paterson, Edinburgh.

Solicitors for the respondent, A. and W. Beveridge, for Patrick and James, Edinburgh.

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 10 and 11, 1903.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

BELL v. NATIONAL PROVINCIAL BANK OF ENGLAND. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Revenue—Income tax—Banking company—Purchase of business of another bank—"Succession"—Income Tax Act 1842 (5 & 6 Vict. c. 35), s. 100, sched. D, first and second cases, rule 4.

A banking company with many branches, and having its head office in London, in Feb. 1899 purchased for 225,000l., as from the 31st Dec. 1898, the premises, business, and assets of the S. Bank, which carried on business at W. only. The business of the S. Bank was carried on as usual until the evening of the 5th March 1899, when the premises were closed. On the following morning the same premises were opened by the company as their branch at W., the whole of the staff of the S. Bank being taken over, and business was thenceforward carried on there by the company. The accounts and profits of this branch were merged in and formed part of the general accounts and profits of the company which were dealt with at the head office.

For each of the three years subsequent to 1898 assessments to income tax were made upon the company on their own returns based on the average profits of their whole business for the three years preceding the year of assessment.

Additional assessments for each of the three years subsequent to 1898 were made upon the company on assumed profits of their branch at W., based upon the average profits of the S. Bank for the three years before the sale to the company, upon the ground that the company had "succeeded" to the business of the S. Bank, within the 4th rule applicable to the first and second cases in sched. D to sect. 100 of the Income Tax Act 1842.

Held (reversing the judgment of Ridley, J.), that the company had "succeeded" to the business of the S. Bank, and were therefore liable to the additional assessments.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

APPEAL of Bell from the judgment of Ridley, J., upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts.

The facts stated in the case were as follows:—

1. At a meeting of the Commissioners for the General Purposes of the Income Tax Acts and for executing the Acts relating to the Inhabited House Duties for the City of London, held on the 12th July 1900, the 8th Nov. 1900, and the 1st May 1902, the National Provincial Bank of England Limited appealed against an assessment of 4818*l.* beyond their assessment on their own return of 228,493*l.* for the year ending the 5th April 1900, against an assessment of 3218*l.* beyond their assessment on their own return of 299,768*l.* for the year ending the 5th April 1901, and against an assessment of 1634*l.* beyond their assessment on their own return of 300,253*l.* for the year ending the 5th April 1902, under sched. D to the Act 16 & 17 Vict. c. 34 (copies of which assessments are annexed to and made part of this case), under the following circumstances:

2. The National Provincial Bank of England Limited, which was established in the year 1833, and is now registered under the Companies Acts with a nominal authorised capital of 15,000,000*l.*, on which 3,000,000*l.* has been paid, has since its foundation transacted and transacts banking business at the head office in Bishopsgate-street, in the city of London, and at a large number of branch establishments in London and various parts of England and Wales, such branch establishments now numbering 199.

3. The County of Stafford Bank Limited was established in the year 1836, under the name of the Bilston District Banking Company, with a deed of settlement. In 1873 the company was registered under the Companies Act 1862 as a company with unlimited liability, and the name of the company was changed to that of the County of Stafford Bank Limited, the registered capital being 800,000*l.*, divided into 20,000 shares of 40*l.* each. The head office and banking house of the company was at Wolverhampton, and, under the regulations registered as the articles of association, the business of the company was to be carried on there and at such other places as the board might from time to time appoint. The company was also empowered to establish such branch banks, agencies, and local boards in the United Kingdom as the directors thought proper. As a matter of fact, however, the business was only carried on at Wolverhampton, and the powers conferred on the company under these regulations of establishing other business branch banks, agencies, and local boards were not exercised.

4. By agreements dated respectively the 6th Feb. 1899 and March 1899, the whole of the business of the County of Stafford Bank Limited, which had carried on business for some sixty-two years previously on the same premises and without any branches, its business premises, furniture and fixtures, and such of its assets and liabilities as were and are provided by the said agreements and shown in the balance-sheets annexed to the latter of the said agreements, was and were, as from the close of the business on the 31st Dec. 1898, purchased by the appellant company for the sum of 225,000*l.* under and upon the terms of the

said agreements. Copies of the said agreements and of the said balance-sheets are annexed hereto and marked A, B, and C respectively, and form part of the case. The business of the County of Stafford Bank was carried on as usual for the benefit and at the expense of the appellant company until the close of the business at 4 p.m. on the 5th March 1899, when the premises were closed.

5. On the following morning—viz., the 6th March—the same premises were opened as their Wolverhampton branch by the National Provincial Bank of England Limited, who had never previously had any branch or carried on any business at Wolverhampton. The manager and the whole of the former staff were taken over by and have, subject to necessary and ordinary changes, since continued to remain there in the employ of the National Provincial Bank of England Limited. Business has since been carried on by the appellant company at the same premises; none of the books of the County of Stafford Bank Limited were taken over or continued in use by the appellant company except that the ledgers, being found to be in the same form as those used by the appellant company, were continued in use by them to the end of the current year. In such of the pass-books as were continued in use a notice was inserted by means of a rubber stamp to the effect that as from the 1st Jan. 1899 the account was with the National Provincial Bank of England Limited, but all new cheque-books and pass-books were issued in the name of the National Provincial Bank of England Limited. As provided by the latter of the said agreements, the County of Stafford Bank was not dissolved until six months after the date thereof; and the liquidators did not make up their final account or distribute the purchase money until a considerable period had elapsed.

6. From the 31st Dec. 1898 the profits (if any) earned at and by the appellant company's said Wolverhampton branch merged in and formed part of the general profits of the National Provincial Bank of England Limited without any distinction as to source or origin of profit, and there are no means for ascertaining whether there were any profits, or the proportion of increase or decrease (if any) in the profits of the bank which has arisen from the business, &c., so purchased as aforesaid.

7. The ultimate profits divisible among the shareholders of the National Provincial Bank of England Limited are the result of the trading of the company as a whole, including the head office and all the branches, irrespective of the profit and loss arising from the business done at the head office or any particular branch. At and from the head office of the appellant company the general affairs of the company are transacted, and the working of the branches is regulated and supervised by the board of directors and general manager through various departments, such as advance, security, law, inspection, registration, stock and share departments, and others. All profits are received and dealt with by the head office. There are many classes of expenditure which are not and cannot be definitely allocated in any way, such as general management and departmental and establishment expenses, which cannot be definitely attributed to any particular branch.

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8. The general assessments of the National Provincial Bank for the years ending the 5th April 1901 and the 5th April 1902 include some portions of the profit made by the Wolverhampton branch of the appellant bank, if any were made—viz.: The assessments for the year ending the 5th April 1901, the profits on average for the preceding year 1899, and the assessment for the year ending the 5th April 1902, the profits on average for the preceding years 1899 and 1900; but, as the accounts were merged in the general accounts of the appellant bank, it is impossible to differentiate between the profits made by the Wolverhampton branch of the appellant bank and the general profits of such bank from the time the County of Stafford Bank was taken over. There are no means or accounts which would enable the appellant bank to make a return under the Income Tax Acts of the profits of the said Wolverhampton branch (if any), or apply for the benefit of sect. 133 of 5 & 6 Vict. c. 35 in respect to such profits if less than the estimate.

9. Profits were made by the County of Stafford Bank Limited from the business at Wolverhampton for each of the three years ending the 31st Dec. 1896, 1897, and 1898 respectively, when the accounts were made up as follows: 1896, 4801l.; 1897, 4750l.; 1898, 4904l.; and the present assessments of 4818l., 3219l., and 1634l. respectively for the years ending the 5th April 1900, the 5th April 1901, and the 5th April 1902, appealed against, are assumed profits made by the National Provincial Bank, based on an estimate for the first year on the average of the profits of the County of Stafford Bank of the three preceding years—viz., 1896, 1897, and 1898—after the usual allowance for dividends, rents, &c., on which income tax had been paid by way of deduction; based for the second of the said years on one-third of the profits of the years 1897 and 1898; and based for the third of the said years on one-third of the profits of the year 1898. An assessment was made on the County of Stafford Bank Limited for the year ending the 5th April 1899, based on the average profits of the three preceding years ending the 31st Dec. 1897, and the duty was paid by the said company. There was no assessment for any one of the years ending the 5th April 1900, the 5th April 1901, or the 5th April 1902, on the County of Stafford Bank Limited.

10. Assessments on their own returns had also been made for the years ending the 5th April 1900, the 5th April 1901, and the 5th April 1902 respectively on the appellant company at its head office in London, on amounts based, subject to the statements above set out in par. 8, on the average of the profits of its whole business for the three years ending respectively on the 31st Dec. 1898, the 31st Dec. 1899, and the 31st Dec. 1900, as shown by the published accounts and balance-sheets for each period of three years respectively, and the duty on such assessments was duly paid by the appellant company.

11. The National Provincial Bank of England Limited duly appealed against such assessments to the Commissioners of Income Tax for the City of London. On the hearing of such appeals the surveyor of taxes contended that the appellant company was liable to the additional assessments in order to cover such estimated profits, and further contended that there was a succession on

the part of the appellant company to the business of the County of Stafford Bank Limited according to the terms of the 4th rule of the first and second cases, sched. D, of sect. 100 of 5 & 6 Vict. c. 35, and that, consequently, the appellant company should be assessed to include the estimated profits of the business purchased from the County of Stafford Bank Limited, estimated upon an average of the profits of the said periods of three years respectively of the said County of Stafford Bank Limited.

12. The appellant company contended that the profit (if any) of the business carried on at Wolverhampton during the period covered by such additional assessments could not be made or included in the basis of any assessment against the appellant company for that period, which was by the Act limited to the years 1896, 1897, and 1898, during none of which did the appellant company carry on any business at Wolverhampton; that such profits (if any) were merged in the general profits of the appellant company, and were liable to be extinguished or diminished by reason of losses elsewhere or general expenses, and in any event would, in due course, form part of the basis of assessment. Further, that, if the additional assessment was to be allowed, the bank would be doubly assessed on such portion of their profits (if any) as arose from the business purchased from the County of Stafford Bank. Further, in reply to the contention of the surveyor, they contended that the acquirement by purchase of the business of the County of Stafford Bank was not a succession or such a succession as was contemplated by the Income Tax Acts.

13. The commissioners were of opinion that there was no succession within the meaning of the said 4th rule; also that the said business when purchased was not sufficiently, generally or separately identified after merger in the appellants' business to render the profits (if any) properly subject to separate assessment; and that the appellants were or would be charged with a fair proportion of the profits, and were not liable to be additionally assessed over and above the ordinary assessment on the profits of the National Provincial Bank, and they discharged the assessment accordingly.

The Income Tax Act 1842 (5 & 6 Vict. c. 35) provides:

Sect. 100. The duties hereby granted, contained in the schedule marked (D), shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties, as if the same had been inserted under a special enactment.

Sched. (D). The said last-mentioned duties shall extend to every description of property or profits which shall not be contained in either of the said schedules (A), (B), or (C), and to every description of employment of profit not contained in schedule (E), and not specially exempted from the said respective duties, and shall be charged annually on and paid by the persons, bodies politic or corporate, fraternities, fellowships, companies, or societies, whether corporate or not corporate, receiving or entitled unto the same, their executors, administrators, successors, and assigns respectively.

Rules for ascertaining the said last-mentioned duties in the particular cases herein mentioned: First case.—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade

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not contained in any other schedule of this Act. First.—The duty to be charged in respect thereof shall be computed at a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years, ending on such day of the year, immediately preceding the year of assessment, on which the accounts of the said trade, manufacture, adventure, or concern, shall have been usually made up, or on the fifth day of April preceding the year of assessment, and shall be assessed, charged, and paid without any other deduction than is hereinafter allowed.

Rules applying to both the preceding cases.—Fourth: If amongst any persons engaged in any trade, manufacture, adventure, or concern, or in any profession, in partnership together, any change shall take place in any such partnership either by death or by dissolution of partnership as to all or any of the partners, or by admitting any other partner therein, before the time of making the assessment, or within the period for which the assessment ought to be made under this Act, or if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession within such respective periods as aforesaid, the duty payable in respect of such partnership, or any of such partners, or any person succeeding to such profession, trade, manufacture, adventure, or concern, shall be computed and ascertained according to the profits and gains of such business derived during the respective periods herein mentioned, notwithstanding such change therein or succession to such business as aforesaid, unless such partners, or such person succeeding to such business as aforesaid, shall prove to the satisfaction of the respective commissioners that the profits and gains of such business have fallen short or will fall short from some specific cause, to be alleged by them, since such change or succession took place, or by reason thereof.

Upon the argument of the special case before Ridley, J., the learned judge gave judgment in favour of the defendants: (88 L. T. Rep. 840).

The surveyor of taxes appealed.

Sir R. B. Finlay (A.-G.), Sir E. Carson (S.-G.), and S. A. T. Rowlatt for the Crown.—The learned judge was wrong in holding that there was not, in this case, a "succession" within the meaning of the 4th rule. Upon the facts stated in the case, it appears clearly that the respondents succeeded to the business at Wolverhampton of the County of Stafford Bank. A banking company just as much succeeds to the business of another bank which it purchases for the purpose of amalgamating with, and carrying on as a branch of, its already existing business as it would if it had been formed for the purpose of purchasing such a business and had no previously existing business. The contention of the respondents amounts to this, that for the first year after the purchase of the Stafford Bank they are to be assessed only in respect of their own profits for the preceding years, and that no income tax at all is to be payable by anyone in respect of the profits of the Stafford Bank during those three years. That would be quite contrary to the intention of the Act. It might be that, if such a business as this were purchased for the purpose of discontinuing and extinguishing it, and it was extinguished, there would be no succession within the 4th rule. This business, however, was from the moment of transfer carried on as before, as a branch of the respondents' business. The case of *Ferguson v. Aikin* (4 Tax Cases, 36) was not the same as the present case. There the distillery which was purchased was not being carried on as a business when it was purchased, and, the commis-

sioners having found as a fact that the business carried on at the distillery was a new business, the court refused to review their decision. In *Prescott, Dimsdale, and Co. v. Bank of England* (70 L. T. Rep. 7; (1894) 1 Q. B. 351) the question was a very different one from that in the present case, and was raised under an entirely different statute.

Danckwerts, K.C. and *Paget, K.C.* for the respondents.—The decision of the learned judge was right, and the respondents are not liable to these assessments. The question is really one of fact, and there is no appeal from the commissioners on a question of fact. This is really the case of one banking business with many branches, which is therefore liable to one assessment only in respect of the whole of its business:

Prince v. Oriental Bank Corporation, 38 L. T. Rep. 41; 3 App. Cas. 325;

London Bank of Mexico and South America v. Apthorpe, 65 L. T. Rep. 601; (1891) 2 Q. B. 378;

San Paulo Brazilian Railway Company v. Carter, 73 L. T. Rep. 538; (1896) A. C. 31.

Those cases show that the business carried on at a branch is not a separate business, but is only a part of the whole business of the company. An assessment must be upon the business of the person to be charged. The respondents must be assessed at their head office in London, and must be there assessed upon the whole of their business. The assessment is upon an estimated amount of profit by reference to the average profit of the three preceding years. The company is assessed because it is carrying on business in the year of assessment, and not because profits were earned in the previous three years. The respondents have been assessed in respect of the whole of their business, and, if this further assessment is made upon them, they will be assessed twice over upon a part of their profits. They did not succeed to the business of the Stafford Bank; that bank ceased to exist in 1899; the respondents did not carry on that bank at all, but really opened at Wolverhampton a new branch of their existing business. The commissioners have found as a fact that the respondents are not carrying on the old business; that the identity of the old business is not preserved in the new branch of the respondents; and their finding on that question is conclusive:

Ferguson v. Aikin, 4 Tax Cases, 36;

Watson Brothers v. Lothian, 4 Tax Cases, 441;

Ryhope Coal Company v. Foyer, 45 L. T. Rep. 404; 7 Q. B. Div. 485;

Prescott, Dimsdale, and Co. v. Bank of England, 70 L. T. Rep. 7; (1894) 1 Q. B. 351.

To constitute a succession there must be the same business carried on as a distinct business. The opening of a new branch business is not the carrying on of the old business, and is not the establishment of a new business:

Re Capital and Counties Bank, 61 L. T. Rep. 516.

Sir R. B. Finlay (A.-G.) was not called upon to reply.

COLLINS, M.R.—This is an appeal from the decision of Ridley, J. on a question of income tax. The facts which raise the question are shortly these: The National Provincial Bank of England in the year 1899 acquired by purchase the busi-

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ness of the County of Stafford Bank, and the question is, in respect of the assessment to income tax, whether under rule 4 of sect. 100, under sched. D, there was a succession brought about by that purchase so as to let in the provisions of rule 4 defining how the income tax is to be assessed upon such succession. The words of that rule are these, and perhaps I had better go back to the beginning and take the first case: "Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act." Then comes the 1st rule: "The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the fifth day of April preceding the year of assessment, and shall be assessed, charged, and paid without other deduction than is hereinafter allowed." Now, I come to the 4th rule: "If amongst any persons engaged in any trade, manufacture, adventure, or concern, or in any profession, in partnership together, any change shall take place in any such partnership either by death, or dissolution of partnership as to all or any of the partners, or by admitting any other partner therein, before the time of making the assessment or within the period for which the assessment ought to be made under this Act, or"—this is the case we have to deal with here—"if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession, within such respective periods as aforesaid, the duty payable in respect of such partnership, or of any such partners, or any person succeeding to such profession, trade, manufacture, adventure, or concern, shall be computed and ascertained according to the profits and gains of such business accrued during the respective periods herein mentioned, notwithstanding such change therein or succession to such business as aforesaid," unless some special reason is shown. That means, in the case of a succession, the ordinary three years' rule, to which I have referred, in rule 1 is to be applied. That raises a question upon the figures here, and an important question, because if there was a succession then the profits which had been made in the old business—that is, in the business of the Stafford Bank which was taken over—would have had to be assessed in the manner prescribed by rule 1—that is, upon an average of the three preceding years. If, on the other hand, there was no succession, which was the point taken for the bank, it would then have been entitled to treat, as it has treated in this case, the acquisition of the old bank, the Stafford Bank, as if it were merely an opening by them for the first time of a new branch, with the result that, when they came to deal with the income tax, they would treat the whole concern as one concern—that is, the National Provincial Bank—and they would make their assessment to income tax by reference to profits in the three preceding years; and, inasmuch as there would be no profits on that hypothesis made by the Stafford Bank, that figure would not come into

the calculation, and no figures antecedent to the actual purchase would come in. By that means, of course, the total upon which the income tax would be assessed would be reduced, and on division by three the amount would be considerably smaller than it would be had the three preceding years of business actually done at the Stafford Bank been taken into consideration. So far as the figures are concerned, that raises the point. The bank had been assessed on its own returns, leaving out of the calculation the profits made at the Stafford Bank antecedent to their acquisition of it, and consequently the Income Tax Commissioners have supplemented that assessment by an additional assessment, based upon the principle that the three previous years' profits of the Stafford Bank ought to be taken into consideration. The question, as I have said, is whether there was or was not a succession. If there was a succession, these three years, upon the terms of rule 1, which I have just read, must be taken into the calculation. If there was no succession, as the learned judge has held, then it may be that those years can be excluded, though I am not sure myself that it does follow, as I shall point out presently, that, even if there was no succession, the case must not fall under another provision of another rule which would have the effect of still introducing them into the calculation. The learned judge has held that there was in this case no succession, and he has held that the profits made in previous years by the Stafford Bank do not come into the calculation. On what grounds has he arrived at the conclusion that there was no succession? It seems to me that the words of the 4th rule are plain, and that, if the National Provincial Bank had not existed, but some new company had been formed to take over for the first time the business of the Stafford Bank, there would have been a case directly falling within the words of the 4th rule—"if any person shall have succeeded to any trade, manufacture, adventure, or concern." In the case I put of a new company formed for the first time and acquiring the Stafford Bank, that would clearly be a case of a person succeeding to a concern. What difference does it make that the person who succeeds to the concern should himself already have an existing business? Does he the less succeed to the new one because he had the old one? It seems to me certainly not. He had the old one before. He has the old one still and the new one in addition, and to that new one, it seems to me, he has succeeded. It might be, as I think was put by Mathew, L.J. in argument, that a person having an existing business might be desirous of annihilating another business simply to enable him to carry on his existing business with a better profit, and therefore it is conceivable he might take steps to cause the extinction of another business, and after that extinction it might be said that because he had extinguished it he had not succeeded to it. Nothing of the kind has taken place here. The National Provincial Bank acquired by purchase all the goodwill and assets of the old Stafford Bank, and continued to carry it on exactly as it had been carried on before, except, of course, that the accounts and the profits did merge into the main business of the National Provincial Bank. The finding of the commissioners upon that part of the case is this: "The commissioners were of

opinion that there was no succession within the meaning of the said fourth rule." That is, as my brother Mathew has pointed out, not a finding in fact that there was no succession, but that the particular kind of succession which took place in this case was not a succession within the meaning of the 4th rule. That is not a finding of fact, but a finding of law and construction based upon the fact that one existing bank did acquire and take over, not for the purpose of extinction, but for the purpose of development, the existing business of another bank existing in another place. It is not the case of forming for the first time a new branch at a place where they had not a branch before. That, I quite agree, would not alter the identity of the existing bank, and would not let in any rule for computing profits by reference to any possible, but absolutely unearned, profits at the new branch, which *ex hypothesi* could not have earned profits before, since it began its existence for the first time when they opened it. But I do not think that reasoning would apply to a case where there was heretofore an existing business which has somehow or other become the existing business now carried on by the acquiring bank. It seems to me to be absolutely inconsistent. The great point urged by Mr. Danckwerts, in a very elaborate argument before us, was that the question whether there was a succession or not must be a question of fact, and the commissioners must be taken in this case to have found as a fact that there was no succession; and he relied upon the authority of a case decided in Scotland, *Ferguson v. Aiken* (4 Tax Cases, 36), as showing that it is and must be a question of fact whether there has in point of fact been a succession or not. It may be in many cases, or in some cases at all events, a question of fact; but it seems to me, for the reasons I have already given, that if it was a question of fact for the commissioners in this case they have deliberately not decided it. They have presented to us a problem of law, and they have given us the benefit of their opinion upon it; and, if we do not agree with that, we are entitled to say so. In my view, if this is a finding, as I think it must be, of law that there is no succession within the meaning of the rule, I find myself unable to agree with it for the reasons I have given. The fact that in a particular case, which was a rather exceptional case, in Scotland, the court held that, the commissioners having found that there was no succession in point of fact, they were bound by that finding and disinclined to go behind it, in my opinion presents no difficulty in this case. We have also been pressed with one or two other cases. There was the case of *Prescott, Dimsdale, and Co. v. Bank of England* (70 L. T. Rep. 7; (1894) 1 Q. B. 351), which Mr. Danckwerts contended was an authority in his favour; but, when that case is looked at, the only point decided was whether the banks which were amalgamated and swept into the new company continued—that is, the separate banks which had been amalgamated in the company—to carry on business after the amalgamation. That was the only point, and it was held that they did not. It seems to me, therefore, that there is no authority which really interferes with our decision of this case upon the construction of the rule itself, and I do not feel myself able to agree with the decision of the

learned judge. In my opinion, therefore, this appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. It was suggested on the part of the respondents that the result of a decision against them would be that they would be taxed twice over. I am entirely unable to accept that suggestion, having regard to the terms of the special case before us. I understand that what has given rise to the question is this: The National Provincial Bank made returns and claimed to be assessed in respect of the business of the National Provincial Bank, excluding the business of the Stafford Bank. That was objected to, and further assessments were made in respect of the business of the Stafford Bank, and the question arose whether those assessments were properly made. It is clear that, if they were properly made, the case comes within the rule, and there has been a succession. How is it possible to put any other interpretation upon the facts than that there has been a succession to the business of the Stafford Bank? It was bought after an elaborate calculation of the profits made by the bank—profits which there was no difficulty in ascertaining from year to year before the agreement to purchase was made. What was handed over was the whole concern, the goodwill, and the right to carry on the business with the same customers as it had been carried on with by the Stafford Bank. I feel unable to follow the ingenious contentions which would alter the word "succession" somehow or other so as to bear such a meaning that this is not a succession within the meaning of the Act. It appears to me to be clearly within the terms of the rule, which is all that it is necessary for me to say. It has become impossible, it is said, to ascertain what the profits of the Stafford Bank ought to be estimated at. All I can say about that is that there was no difficulty in ascertaining the profits of that bank while it was still going, and, I should think, no difficulty in doing it now. It cannot be that, because the National Provincial Bank has not chosen to do that, there is such a merger, as is stated in the case, as to prevent this further assessment being made. The commissioners say there was no "succession within the meaning of the said fourth rule." That is the proposition of law we have to decide as distinguished from fact, and we are entitled to differ from their view. They further say: "Also that the said business when purchased was not sufficiently identified after merger in the appellants' business to render the profits, if any, properly subject to separate assessment." Again, it is contended that under the Act this is not a case in which profits can be ascertained, because there has been such a merger that it is difficult to follow and see what the profits were. The statute applies to an estimate of profits, and gets rid, it seems to me, of that difficulty. I agree that the appeal must be allowed.

COZENS-HARDY, L.J.—I agree, and I have very little to add. When we look at the agreement of the 6th Feb. 1899, what do we find? We find that the National Provincial Bank paid close upon a quarter of a million (225,000*l.* was the precise figure) for a freehold banking house, and for a particular banking business carried on there by the vendors. The agreement stipulates

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that the National Provincial Bank is to take over the assets and liabilities, and that the vendor company shall be dissolved as soon as may be; and then there is an important clause which is a covenant by each of the directors that they will not hinder or interrupt the person or persons who on the part of the purchasers shall conduct the said banking business at Wolverhampton. That is exactly and precisely what has been done. The National Provincial Bank have been conducting a banking business of the same nature as before on the same premises, with the same staff of clerks, subject only, as the case finds, to the inevitable necessary variations. It seems to me impossible to contend that that is not a succession within the meaning of the 4th rule, unless we are to say that that rule has no operation except in the single case where the successor was not and is not carrying on any other business of the same nature. In other words, we are asked to say that the 4th rule applies only where the business which has been taken over is isolated, separated, kept apart, and distinct from all other businesses of the successor. I can find no reason for putting that limitation into the words of the section. It seems to me that the National Provincial Bank are none the less successors to the Stafford Bank because they have a very large business of their own and the profits made in respect of or from this particular branch at Wolverhampton are ultimately transmitted to London and go to swell the aggregate profits of the bank. The case seems to me to fall plainly within the meaning of the 4th rule, and, that being so, the appeal must be allowed.

Appeal allowed.

Solicitor for the appellant, *Solicitor of Inland Revenue.*

Solicitors for the respondents, *Wilde, Moore, and Wigston.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 15 and 19.

(Before KEKEWICH, J.)

Re WOODS; GABELLINI v. WOODS. (a)

Will—Construction—Wasting security—Notional conversion—Tenant for life and remainderman—Rate of interest—Interest upon surplus income.

Where there is a notional conversion of a wasting security, as in Meyer v. Simonsen (5 De G. & Sm. 723), interest thereon should now be allowed to the tenant for life at the rate of 3 per cent. only.

The surplus income of the wasting security, after providing for the 3 per cent., goes to capital, but the interest thereon to the tenant for life.

MATHEW CHARLES WOODS, who died on the 20th July 1894, by his will, dated the 1st May 1893, devised and bequeathed all his real and personal estate not thereby otherwise disposed of to trustees upon trust to sell, call in, and convert the same, and after payment thereof of his funeral and testamentary expenses, debts, and legacies, to

stand possessed of the residue upon trust as to one equal third part for his only son Claude Charles Edward Woods absolutely, and as to another equal third part upon trust to invest the same in the mode provided by the will and stand possessed thereof for his daughter Mildred Sybella Woods for her life with remainders over in favour of her children as therein set out, and as to the remaining equal third part upon trust for his daughter Lucy Eva Woods upon the like trusts to those declared in favour of Mildred Woods and her children. There were also cross-remainders over between the beneficiaries as therein set out. And the testator directed that his trustees might postpone the sale and conversion of any part of his real and personal estate so long as they should think fit notwithstanding that the same might be of leasehold tenure or otherwise of a wearing out or perishable nature, and might retain any part of his estate in the same state of investment as the same might be at his death, and as regards any real or leasehold property remaining unsold might let and manage the same according to their absolute discretion. And the testator directed that all moneys liable to be invested under his will might, in addition to any other mode authorised for the investment of trust funds, be invested in the purchase of stocks, funds, or securities of any British colony or dependency, or in the purchase of debentures or preference or ordinary stock or fully paid-up preference or ordinary stock of any railway or other company in the United Kingdom, or upon the bonds and securities of any municipal or other corporation, commissioners, or other public body authorised by Parliament to borrow money, or upon deposit with any bank, or in the purchase of any freehold property of inheritance in England or Scotland, with liberty to his trustees to accept such title or evidence of title as they should think fit.

There was no provision in the will as to the payment of the income of the testator's property during the postponement of conversion.

The residuary estate of the testator included (*inter alia*) a share of mining royalties on coal received under mining leases of property in Durham.

Under the power of postponement given them by the will the trustees had not converted the same, and they periodically received the testator's share therein.

This was a summons taken out by the two daughters of the testator (to which the testator's son and the trustees of the will were made defendants) asking for a declaration that, according to the true construction of the will of the testator, each of the applicants was entitled for her life or until conversion to receive out of the mining royalties received each year 4 per cent. per annum on one-third of the estimated capital value, as at the date of the testator's death, of the mining royalties.

It was admitted that the trustees had acted properly in postponing conversion, and that the case fell within the principle of *Brown v. Gellatly* (17 L. T. Rep. 131; L. Rep. 2 Ch. 751) and *Meyer v. Simonsen* (5 De G. & Sm. 723)—viz., that when wasting securities are permitted to be retained they must be valued as at the testator's death, and a fixed rate of interest thereon allowed to the tenant for life, but the question was raised

(a) Reported by O. F. DUNCAN, Esq., Barrister-at-Law.

as to whether that rate ought to be 4 per cent. or 3 per cent. only.

Whinney for the plaintiffs.—We should be allowed 4 per cent. That was the rate in *Gibson v. Bott* (7 Ves. 97), in *Caldecott v. Caldecott* (1 Y. & C. Ch. Cas. 737), in *Meyer v. Simonsen* (*ubi sup.*), and in *Brown v. Gellatly* (*ubi sup.*), and the two latter cases were approved in *Wentworth v. Wentworth* (81 L. T. Rep. 632; (1900) A. C. 163). See also

Re Eaton; *Dzines v. Eaton*, 70 L. T. Rep. 761.

O. L. Clare for the testator's son.—The tenants for life should only be allowed 3 per cent. In *Re Lynch-Blosse*; *Rickards v. Lynch-Blosse* (1899) W. N. 27) future interest was reduced to 3 per cent. In the parallel class of cases, those concerning apportionment of recovered assets the rate formerly was 4 per cent.:

Re Chesterfield (Earl's) Trusts, 49 L. T. Rep. 261; 24 Ch. Div. 643.

But by the latest decision of *Rowlls v. Bebb* (82 L. T. Rep. 633; (1900) 2 Ch. 107) it has been reduced to 3 per cent. See also

Re Goodenough; *Marland v. Williams*, 73 L. T. Rep. 152; (1895) 2 Ch. 537.

Christopher James for the trustees.

Whinney replied.

KEKEWICH, J.—The question what rate of interest shall be allowed has in many cases been exercising the minds of many judges in recent years. Unfortunately, there is not at present any definite rule which guides the court, and I am afraid that cannot be obtained except by steps—that is to say, by one judge following another, or by some authoritative decision in the Court of Appeal. Unfortunately, the cases in which the question arises have so much differed one from another that it does not follow necessarily that, because one rate is adopted in one case, it should therefore be adopted in another. The class of cases in which it has generally arisen are cases that are often referred to as the *Chesterfield* cases, because there is a reported case of that name, *Re Chesterfield (Earl's) Trusts* (*ubi sup.*), before Chitty, J., in which he, not really giving a judgment himself, adopted a decision in *Beavan v. Beavan* (49 L. T. Rep. 263n; 24 Ch. Div. 649n), and, after all, as I have had occasion to point out before, the whole law is settled by a decision of Turner and Knight-Bruce, L.J.J. in *Turner v. Newport* (2 Ph. 14). Now, we call those the *Chesterfield* cases. That particular class of cases came before the Court of Appeal in *Rowlls v. Bebb* (*ubi sup.*), and, with regard to that, I must take it as settled and binding on me, even if I were disposed to differ from it, that in future 3 per cent., and not 4 per cent., should be allowed. I will read what Lord Lindley, then Master of the Rolls, said in giving the judgment of the court. I need not state the circumstances, because everyone now knows what is meant by a case coming within the *Chesterfield* case. Lord Lindley said: "The only other question is whether interest should be calculated at 3 per cent. or at 4 per cent. I have not looked at the Judgments Act, but I think I am right in saying that it provides that a judgment debt shall bear interest at 4 per cent. Of course, we cannot alter that. And I think the rules provide that legacies shall bear interest at 4 per cent." (He does not add that he cannot alter that.) "But I

know of no rule which applies in terms to such a case as this, or even to the making good of breaches of trust. Having regard to the rate of interest which can now be obtained on securities upon which trustees may invest, it appears to me that, in a case of this kind, even apart from the view taken by Kekewich, J. in *Re Goodenough* (*ubi sup.*), that 3 per cent., not 4, ought to be the rate of interest." That is a very strong expression of opinion on the part of the Master of the Rolls delivering the judgment of the Court of Appeal, not only that 3 per cent. ought to be substituted for 4 per cent. in that class of case, but he intimates in tolerably clear language, to my mind, that 3 per cent. should be substituted for 4 per cent. wherever the statute or rules do not interfere to prevent it. That seems to me to be founded on good sense for this reason. Mr. Whinney referred, as one of his first cases, to *Gibson v. Bott* (*ubi sup.*), which was decided by Lord Eldon in 1802. If 4 per cent. was right in 1802, it does not seem to me it can possibly be so now. If it was right and fair between the parties at that time to charge 4 per cent., it seems to me it must be right and fair to charge something less now. I think that might fairly be said with regard to the later times when *Brown v. Gellatly* (*ubi sup.*) was decided in 1867, for ever since then the rate of interest has fallen enormously. Perhaps it is an unhappy moment to discuss a question of that kind, for I cannot shut my eyes to the fact that everyone in court knows as well as I do—perhaps better—that during the last twelve months a very severe fall of first-class securities has taken place, with the result, as was pointed out by Mr. Whinney, that it is possible to purchase first-class securities now so as to yield a much greater rate of interest than was possible a little time ago. But one cannot vary the rate from day to day, or month to month, or year to year because trust securities happen to go up or down; you must have some general rule, and I venture to say, what no one can doubt, that there has been a great fall, and that, although there may be a temporary rise, the fall in the rate of interest at the present moment has taken place, and will in the future be maintained. If *Gibson v. Bott* (*ubi sup.*) and *Brown v. Gellatly* (*ubi sup.*) were rightly decided, that rate of interest must be wrong now, and some alteration should be made. Now, is there any such fair guide in cases of this kind as there is with regard to judgments and legacies—that is to say, any rule laid down by any statute, or by the actual written rules of the court found in the Annual Practice, or by any rule founded on decisions following one another and constituting what I may call the unwritten law of the court? I do not think there is. The only near approach to recognition of a rule is the passage which Mr. Whinney read to me out of *Wentworth v. Wentworth* (*ubi sup.*) before the Privy Council. There, no doubt, Lord Macnaghten, who gave, not his judgment, but the judgment of the Privy Council, says: "It has been the practice of the court . . . to allow the tenant for life . . . a sum equal to 4 per cent. on such value." But he was not discussing this question there; the Privy Council were not concerned whether it ought to be 3 per cent., 4 per cent., 5 per cent., or anything else; all they were discussing was what were the equitable terms as between a tenant for life and

remainderman, and Lord Macnaghten mentions 4 per cent. as being what followed from the judgments in *Brown v. Gellatly* (*ubi sup.*) and *Meyer v. Simonsen* (*ubi sup.*), which he adopted for the purpose of illustrating the principle with which the Privy Council were dealing, and that does not seem to me to be an authority on the point at all. Now, the case I have to deal with is this: A testator possessed of mining royalties, which are a wasting security and a security also realising, as they have in this case, very large profits, has directed them to be sold, but he has given power to his trustees of postponement; and the trustees are to be justified in every case in resting on their power of postponement and keeping the property in specie. Unfortunately, he has given no direction as to payment of the royalties until sale to the tenant for life or any portion of them. The result is that the trustees are unable by their own selves to give him anything; and in consequence of that the question has come before the court. It was decided in *Brown v. Gellatly* (*ubi sup.*) and in many other cases (I take *Brown v. Gellatly*, *ubi sup.*, only as an example) that the proper thing to do is to value such securities as at the time when they ought to have been converted, if the direction for conversion were peremptory, immediately after the testator's death if he so said, or at the expiration of a year if he said nothing, or probably some other convenient time; and, taking the value at that time, then to give the tenant for life interest on that value in lieu of royalty, and that is paid out of the royalty; he takes such proportion of the royalty as is equivalent to interest taken at a certain rate. That is what has been called in many cases a "notional conversion"—you do on paper what you cannot do in fact. After all, it is a mere estimate, because one of the reasons for not converting is because you cannot ascertain the real value. The market may at the moment be in a bad state for realisation, or there may be a proper anticipation of alteration of the market at a future time; but for some reason it is impossible for any careful man actually to convert. Therefore you must go through an estimating process, which is called a notional conversion, and find out, as far as you can, the value of the royalties for the purpose, and considering, of course, what is the length of the lease of the colliery, if it depends upon a lease, and also how long it will take to work it out, if it depends on that, and so forth; but you have to ascertain the amount of the royalties as corpus, and, having got that, you pay the tenant for life some rate of interest on the value so ascertained. How are you to do that? How are you to fix the rate of interest? It seems to me you have to do what is fair between the tenant for life and the remainderman. The tenant for life was not intended to have the whole royalty, and the remainderman was not intended to have the whole proceeds of sale. I have not been able to find any case in which any judge has said how he arrived at the 4 per cent., or any other rate, or perhaps I ought not to say "any other rate," because it has always been 4 per cent.; but if there had been conversion in fact, and the money had been well invested in trust securities, it would formerly have realised about 4 per cent. Of course it was impossible to say in what particular securities they would have invested. A judge

might have said, if it were right to condescend to such details: "The notional conversion would realise 10,000*l.*; invest 5000*l.* of that in one security, 3000*l.* in another security, and 2000*l.* in another security, with interest at $4\frac{1}{2}$ on one, 3*l.* 17*s.* 6*d.* on another, and so on"—and in that way work it out and bring out 4 per cent. or something less. But no judge has done that. The judge has struck an average (as I understand the cases, they must have done that), and said: "If you were to invest that sum in trust securities, you would be fortunate if you got 4 per cent." That is the rule. Now, if that is the principle on which judges have proceeded, it seems to me they ought now to say: "You must strike an average, and you will be as fortunate in getting 3 per cent. nowadays as in the past you would have been if you got 4 per cent." The only recent case within the principle of *Brown v. Gellatly* (*ubi sup.*) is the case of *Re Lynch-Blosse* (*ubi sup.*), before Mr. Justice Stirling, and that seems to me to hit this point exactly. There the learned judge had to determine not only what should be given in the future, but what should be allowed in the past. It was a matter entirely for his judicial discretion, and, if I may say so, I think he acted with great judgment in allowing 4 per cent. for the past. But when he comes to deal with the future, he takes a different line entirely, and says: "From this time forward you will only get 3 per cent., because there would be nothing beyond that if these were actual instead of notional conversion, and you had to take the income from actual investments on that conversion. Now, I find here that I am not hampered by any of the cases. They seem to me to point to an alteration of the old rule where the statute or rules do not prevent the alteration. So far as I have any authority at all, subject to one dictum of Lord Macnaghten which I think I have perfectly explained, everything seems to me to point to 3 per cent. instead of 4 per cent. I should be very glad if the matter could be discussed and some rule laid down; but the point having come before me, and it being my duty to decide it as well as I can, I think that, in cases within the rule which was laid down in *Brown v. Gellatly* (*ubi sup.*), 3 per cent. should now take the place of 4 per cent. I say nothing about special cases, or cases where 4 per cent. or more should be allowed—cases where there has been something more than innocent breach of trust, or where trustees have acted wrongly for their own benefit. Cases of that kind must be dealt with from an entirely different point of view. I am dealing with how those entitled to the corpus and those who are entitled to the income have to be provided for, and where there are innocent parties all round, and I have to do as well as I can between them, and I think the rate should be at 3 per cent. only. I am encouraged in that view by knowing, as I do, and as we all do, that in all large actuarial valuations at the present day 3 per cent. is taken as the proper rate of interest; and I should not have said so quite so strongly, if it had not been that only yesterday I was dealing with a very large estate which had been actuarially valued for the purpose of division, and in which all the calculations were based on that footing.

A further question was then raised as to the application of the surplus income of the royalties,

and the summons was amended to ask for a declaration that the surplus income of each year ought to be invested in securities authorised by the will, and that each of the applicants was entitled for her life to receive the income of such securities.

This came on to be heard on the 19th Jan.

Whinney for the plaintiffs.—We are entitled to the income of the invested surplus:

Meyer v. Simonsen (*ubi sup.*).

This result follows from the decision in *Wentworth v. Wentworth* (*ubi sup.*), although not expressly decided there. See also

Re Hill; Hill v. Hill, 45 L. T. Rep. 126.

O. L. Clare for the testator's son.—*Meyer v. Simonsen* (*ubi sup.*) is a different case. *Wentworth v. Wentworth* (*ubi sup.*) does not decide this question, nor does the result contended for by the plaintiffs follow from it. If their contention prevails, the tenants for life must get more than they would get if conversion had actually taken place, and a notional conversion is intended to place the parties in the same position as they would have been if actual conversion had taken place. Therefore not only the surplus royalties themselves, but also the income to be derived from them, should be invested as capital.

Jan. 19.—KEKEWICH, J.—This case was before the court last week on the question of whether 3 per cent. or 4 per cent. should be allowed to the tenant for life, the case being one of this character. The testator had directed the realisation of certain mining royalties, but he gave to his trustees ample power of postponement. The mining royalties could not conveniently be realised, and it was admitted on all hands that the trustees had exercised and were exercising discreetly the powers of postponement. The question then arose what ought to be given to the tenant for life—that is to say, to the person entitled to the actual income of the proceeds of realisation when realisation ultimately took place. It was admitted that there was no question as to whether the case fell within the well-known authorities of *Brown v. Gellatly* (*ubi sup.*) and *Meyer v. Simonsen* (*ubi sup.*) as applied by *Wentworth v. Wentworth* (*ubi sup.*) to property of this character; but the only question was whether 3 per cent. or 4 per cent. should be allowed, and I decided that the tenant for life was entitled to 3 per cent. only. Then arose this question: This is a notional conversion—that is to say, the royalties are directed to be valued as at the death of the testator, and, a certain sum being ascertained in that way, the tenant for life will receive interest at 3 per cent. on the sum so ascertained, and that will be paid out of the mining royalties received, leaving a large balance. That balance must be invested, and the accumulations of that balance will become capital of the testator's estate. About that there is no question, but a question does arise as to what is to be done with the income of the invested balance. It is contended, on the one hand, that that income is for the benefit of those who are entitled to the residuary estate itself, and, on the other hand, that it is income of the testator's estate and is therefore payable to the tenant for life. It is somewhat strange that the point has never been decided neatly and cleanly. Now, in the first

place I have to consider whether there is any distinction between a case where the testator has directed conversion and a case where, the testator having been silent on the point, but having settled a wasting security, that security must, according to the rule in *Howe v. Lord Dartmouth* (7 Ves 137), be realised and converted. I think there can be no logical distinction between the two. In this case the testator settled mining royalties, and they must be realised according to the rule in *Howe v. Lord Dartmouth* (*ubi sup.*) unless the testator has expressly directed that they are not to be realised. It is, of course, quite competent to a testator either to leave the court to act under the decision in *Howe v. Lord Dartmouth* (*ubi sup.*) or to direct a conversion himself. But, whatever is done, it comes round to this. If you have property which ought to be converted, but which, for reasons which convince everybody and which are for the benefit of the estate, you think ought not to be converted immediately, then, according to *Wentworth v. Wentworth* (*ubi sup.*), the tenant for life must have a fair equivalent, and that is done by valuing the estate and giving the tenant for life interest at a certain rate upon that valuation. Now, is that intended to be the whole of the benefit which the tenant for life is entitled to receive? If there is actual conversion, then the tenant for life is entitled to receive the income from the whole. But if there is postponement, is there not in substance a conversion from year to year? Is not that balance of the mining royalties which the tenant for life does not receive really a realisation from year to year of a part of the estate? Is not that balance received by the trustees from year to year a part of the capital of the estate? And, if that is so, ought it not to be treated as capital and to be invested, and in logic ought not the tenant for life to have the income of that? But this question must be considered, not only upon logical principle, but upon the authorities, and they, I think, seem to be in favour of the tenant for life's getting that advantage. *Brown v. Gellatly* (*ubi sup.*) was expressly decided upon the authority of *Meyer v. Simonsen* (*ubi sup.*), and in *Meyer v. Simonsen* (*ubi sup.*) the tenant for life did get interest on the invested surplus—that is to say, that part of the rents which were not received by him as income but was invested. In *Wentworth v. Wentworth* (*ubi sup.*) I think the same result follows, although the order of the Privy Council as set out does not give a direction to that effect. The will there is stated in the judgment of the Privy Council, delivered by Lord Macnaghten, at the beginning of the judgment. The will contained an elaborate settlement of the property. The testator directed accumulation for twenty-one years, and that accumulation stood. The question then arose as to what happened after the termination of the twenty-one years, and their Lordships held that, as regards that, there must be what is called a notional conversion in order to find out what was a fair equivalent to be paid to the tenant for life, and they directed the balance to be treated as part of the testator's residuary estate, and to be accumulated and invested accordingly. Their Lordships did not construe the rest of the will; they decided only the one question and they left the administration of that residue to the persons to whom according to law it was intrusted, as is set out in their judgment. According to that decision, if the

CHAN.] *Re KURTZ* (dec.); *EMERSON v. HENDERSON*—*HORAN* (app.) *v.* *HAYHOE* (resp.). [K.B.]

tenant for life was entitled to the income of the residuary estate, he would have the income of the invested balance. Their Lordships only said that it was to go into residue, but it follows that those who were to take the income of the residue would take the income of the invested balance which was to go into the residue. It was not necessary to give directions for that. There is nothing, therefore, in that judgment inconsistent with the contention that, if there were a tenant for life of the residue, he would be entitled to the income of the invested surplus. I think, therefore, that authority and principle coalesce, and that these tenants for life are entitled to the income of the invested surplus.

Solicitors: *Markby, Stewart, and Co.*; *Stibbard, Gibson, and Co.*, for *Gibson, Pybus, and Pybus*, Newcastle-upon-Tyne.

Wednesday, Jan. 13.

(Before EADY, J.)

Re KURTZ (deceased); *EMERSON v. HENDERSON*. (a)

Practice—Administration—Common order for administration against executor—Subsequent action by same plaintiff charging wilful default and fraud—No evidence of fresh information acquired since date of common order—Leave of the court.

A plaintiff who has obtained a common order for administration of an estate against the executor may obtain the leave of the court to bring a fresh action charging (inter alia) wilful default against the executor without proving that he did not acquire the information on which he founds his fresh action in time to utilise it in the former proceeding in which he obtained the common order for administration, proof of which was required in the case of *Laming v. Gee* (40 L. T. Rep. 33; 10 Ch. Div. 715), on the plaintiff, who was an undischarged bankrupt, giving security to the satisfaction of the master for the executor's costs of the fresh action.

ALEXANDER H. KURTZ, the testator in the proceedings, died on the 3rd July 1902, leaving the defendant Henry Wren Henderson his sole executor, who proved his will on the 1st April 1903.

The testator, who was in bad health, was at the date of his death, and had been for two years prior thereto, living with Edward Watts and Mary Elizabeth Watts, the latter of whom claimed that the testator was indebted to her for money advanced to him, and also that she was entitled to certain articles of furniture given her by the testator in his lifetime.

The defendant Henry W. Henderson also claimed to be a creditor of the testator for money due to him on mortgage of the testator's furniture.

On the 6th July 1903 a deed of compromise was made between Mary Elizabeth Watts, Edward Watts, and Henry W. Henderson whereby their claims were settled and certain articles of furniture, the property of the deceased, divided among them.

On the 10th July 1903 the plaintiff Horace Emerson, who claimed to be a creditor of the

estate of the testator, took out an originating summons against Henry W. Henderson, as the executor of the testator, for the administration of his estate, and obtained a common order for administration of the estate on the 10th Aug. 1903.

On the 29th Sept. 1903 the plaintiff Horace Emerson on behalf of himself and other creditors of the testator commenced an action by writ against Henry W. Henderson, Edward Watts, and Mary Elizabeth Watts, claiming (1) administration of the testator's real and personal estate; (2) that an account might be taken against the executor on the footing of wilful default; (3) that the deed of compromise might be set aside as fraudulent and void; (4) an injunction to restrain the defendants from dealing with any of the chattels mentioned in the deed; (5) a receiver; and (6) costs.

This was a summons taken out by the plaintiff Horace Emerson against the defendant Henry W. Henderson on the 10th Nov. 1903 asking for the leave of the court to bring the fresh action.

Eve, K.C., M.P., and *E. P. Hewitt* for the summons.—The plaintiff desires to bring the fresh action to charge the defendant executor with wilful default, and to have the deed of compromise entered into by him with the other defendants set aside as fraudulent and void.

Boome for the defendant Henry W. Henderson.—The plaintiff has already obtained a common order for administration against the defendant executor, and in such a case the court will not give him leave to bring a fresh action against the defendant executor charging him with wilful default, unless the plaintiff proves that he did not become aware of the facts on which he founds his fresh action in time to utilise them in his former proceeding:

Laming v. Gee, 40 L. T. Rep. 33; 10 Ch. Div. 715.

Besides, the plaintiff is an undischarged bankrupt.

EADY, J.—Will the plaintiff give security to the satisfaction of the master to cover the defendant executor's costs of the fresh action?

Eve, K.C.—Yes.

EADY, J.—On the plaintiff's giving security to the satisfaction of the master to cover the defendant executor's costs of the fresh action, I give him leave to proceed with it.

Solicitors: *Gregory and Co.*; *Champion and Henderson*.

KING'S BENCH DIVISION.

Tuesday, Dec. 15, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

HORAN (app.) *v.* *HAYHOE* (resp.). (a)

Inland revenue—Licence for "male servants"—Apprentice—Necessity of licence for apprentice as for "male servant"—Revenue Act 1869 (32 & 33 Vict. c. 14), ss. 18, 19, sub-s. 3.

An apprentice, who is serving a master under a contract of apprenticeship by which the apprentice is to serve the master as such apprentice for

(a) Reported by J. TRUSTAM, Esq., Barrister-at-Law.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

K.B. Div.]

HORAN (app.) v. HAYHOE (resp.).

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a specified term of years and the master is to teach and instruct the apprentice, is not a "male servant" within the meaning of sect. 19, sub-sect. 3, of the Revenue Act 1869, and the master is not required under sect. 18 of that Act to take out a licence for such apprentice as for a male servant.

CASE stated by justices of the peace for the petty sessional division of Newmarket, in the county of Suffolk, upon a prosecution for the recovery of a penalty of 20*l.* for employing eight male servants with licences for seven only.

An information was preferred on the 27th Feb. 1903 by Edward Horan (the appellant), an officer of Inland Revenue, who prosecuted by order of the Commissioners of Inland Revenue, under 32 & 33 Vict. c. 14 (the Revenue Act 1869), against Alfred Hayhoe (the respondent), of Newmarket, for that he the respondent, on the 22nd Jan. 1903, at Newmarket, did employ eight male servants, for the employing of each of whom a licence was required by the statute in that behalf, and being a greater number of male servants than he was authorised to employ by any licence or licences granted under the statute, the respondent being then and there authorised by a licence or licences under the statute to employ seven male servants only, contrary to the form of the statute, whereby the respondent had for such offence forfeited the sum of 20*l.*

The information was heard by the justices in petty sessions on the 10th March 1903, and upon such hearing they dismissed the information with costs against the appellant.

At the hearing before the justices no witnesses were called on behalf of the appellant or respondent, but the case was argued upon admissions signed by the solicitors of the parties.

The admissions were as follows: That of the eight persons described in the information and summons the seven persons first named (that is, all except Thomas Baldwin) were employed as stablemen, and that a male servant's licence was required in respect of each of them. That licences for seven male servants had during the present year and previously to the date of the information been obtained by the defendant and were applicable to these seven servants. That Thomas Baldwin was bound to the defendant for a period of seven years under a contract dated the 25th May 1897, of which a copy was annexed to and formed part of this case. That Thomas Baldwin was employed for the greater portion of each day in the performance of duties which would, if he were merely engaged otherwise than under the contract before mentioned, render a licence necessary for him as a male servant. That the terms and covenants of the contract had since the 25th May 1897 been faithfully and honestly carried out and fulfilled by the parties thereto respectively. That the defendant was the employer of all the persons above mentioned.

On behalf of the appellant it was contended: (1) That the contract, dated the 25th May 1897, had for its main and primary, if not for its sole, object the hiring and service of Thomas Baldwin the younger therein mentioned, and not his teaching, and, consequently, that Thomas Baldwin was a male servant within the meaning of the statute and not an apprentice. (2) That even if the contract was an indenture of apprenticeship,

Thomas Baldwin the younger was a male servant within the meaning of the statute.

On behalf of the respondent it was contended that the contract was an indenture of apprenticeship, and that Thomas Baldwin the younger was an apprentice, and was not a male servant within the meaning of the statute.

The justices found as a fact that the contract was one of apprenticeship, and they were of opinion that Thomas Baldwin the younger was not a servant within the meaning of the statute, but an apprentice, and that the contention of the respondent was correct, and they accordingly dismissed the information.

The question for the opinion of the court was whether upon the above facts the justices came to a correct determination in point of law, and, if not, what should be done in the premises.

The indenture was made on the 25th May 1897 between Thomas Baldwin the younger, son of Thomas Baldwin the elder, cabinetmaker (therein designated as the said apprentice), of the first part, Thomas Baldwin the elder (therein designated as the said father) of the second part, and Alfred Hayhoe, of Newmarket, trainer of horses (therein designated as the said master), of the third part, and witnessed that

In consideration of the covenants, agreements, and things herein contained he the said apprentice doth with the consent of the said father (testified by his executing these presents) hereby put, place, and bind himself apprentice to the said master to serve him from the twenty-fifth day of May, one thousand eight hundred and ninety-seven, for and during the term of seven years from thence next ensuing and fully to be completed and ended, during all which time he the said apprentice will faithfully, diligently, and honestly serve him the said master and obey and perform all his lawful commands whenever and wherever required to be performed and observe all reasonable regulations which the said master may from time to time deem necessary for the proper discipline of his business and establishment so far as such regulations relate to apprentices. And will not absent himself from the services of the said master without his leave nor divulge any of the secrets of the said master connected with his business or otherwise, but will keep and preserve the same. And will not unduly or negligently spend or waste any of the moneys, effects, goods, or chattels of the said master which shall at any time be intrusted or placed in his hands or custody either by the said master or by any other person or persons on his account during the said term. And will well and truly from time to time account for, deliver, or pay to the said master, his executors, administrators, or assigns, all such moneys and other things as the said apprentice shall receive, have, or be intrusted with, or which shall come to his hands or possession for or on account of the said master, or for or on account of the services of or work done by the said apprentice during the said term. And also will in all matters and things whatsoever during the said term demean and behave himself as a good, true, and faithful apprentice ought to do. And the said master doth hereby covenant with the said father in manner following—that is to say, that he the said master will at the request of the said apprentice and with such consent as aforesaid take and receive the said apprentice for and during the said term of seven years to be computed from the said twenty-fifth day of May, one thousand eight hundred and ninety-seven. And also will during the said term (provided always that and only so long as the said apprentice performs and observes all the promises, matters, and things hereinbefore contained to be performed and observed on his part) to the best of his power, know-

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ledge, and ability teach and instruct the said apprentice in the arts of a training groom which he useth and of riding as connected therewith and find and provide for him the said apprentice good, proper, and sufficient meat, drink, and lodging. And also will (subject to the same proviso) find and provide the said apprentice proper and sufficient clothing as and by way of wages during the first and second year of the said term, and will pay to the said apprentice as and by way of wages during the remainder of the said term after the rates following—that is to say, the sum of eight pounds during the third year thereof, the sum of ten pounds during the fourth year thereof, the sum of twelve pounds during the fifth year thereof, the sum of fourteen pounds during the sixth year thereof, and the sum of fourteen pounds during the last year thereof. And also will pay or allow to the said apprentice one half of any moneys which shall be received by the said master for fees earned by the riding of the said apprentice in races or trials after deducting a proportionate share of the expenses (if any) that may be incurred in collecting the same. . . .

And then there were certain covenants by the father.

The Revenue Act 1869 (32 & 33 Vict. c. 14) provides:

Sect. 18. On and after the first day of January 1870 there shall be granted, charged, levied, and paid, for the use of Her Majesty, her heirs and successors, in and throughout Great Britain, under and subject to the provisions and regulations in this Act contained, the following duties—that is to say: For every male servant 15s. . . . And such duties respectively shall be paid annually upon licences to be taken out under the provisions of this Act by the person who shall employ the servant. . . .

Sect. 10, sub-sect. 3. The term "male servant" means and includes any male servant employed either wholly or partially in any of the following capacities—that is to say: *Maitre d'hôtel*, house steward, master of the horse, groom of the chambers, *valet de chambre*, butler, under-butler, clerk of the kitchen, confectioner, cook, house porter, footman, page, waiter, coachman, groom, postilion, stable boy or helper in the stables, gardener, under-gardener, park-keeper, gamekeeper, under-gamekeeper, huntsman and whipper-in, or in any capacity involving the duties of any of the above descriptions of servants, by whatever style the person acting in such capacity may be called.

Sir Edward Carson (S.-G.) (*Rowlatt* with him) for the appellant.—The only difference between the seven persons employed as stablemen and Baldwin is that there was this contract in Baldwin's case and not in the case of the others. They were all equally performing the duties of stablemen, and therefore we have it that Baldwin was performing the duties of stableman, and the submission for the Crown is that under the Act, as he was performing the duties of stableman, he was a stableman, and a male servant within the definition in the Act. The Act does not refer to apprentices at all, but defines "male servant." At the very commencement of this apprenticeship contract it is said that this person shall faithfully serve the master in those capacities. What difference can it make as regards this Act that, in addition to serving him, he is an apprentice? If he serves him as an apprentice he is none the less serving him, and he is doing the work of a servant and receiving wages as such, although, no doubt, he may have become that servant for the purpose of learning his business, and although the master may have undertaken

to teach him that particular business. [Lord ALVERSTONE, C.J.—The doubt in my mind is that apprenticeships have been known for many hundreds of years, and I suppose there are stamps on apprenticeship deeds, and one wonders why the word "apprentice" was not used as well as "servant" if the Legislature meant to include apprentices.] It was unnecessary to do so, because "servant" includes apprentice. In books on master and servant, servants are treated in that class with apprentices. Thus in Blackstone's Commentaries (chapter on Master and Servant) it is said: "Another species of servants are called apprentices (from *apprendre*, to learn), and are usually bound for a term of years . . . to serve their master, and be maintained and instructed by them." This person is therefore a servant, and the case is covered by the Act. It was contended that in a previous Act (16 & 17 Vict. c. 90) apprentices were for the first time omitted, but, if we trace through the previous Acts in which they were mentioned, those Acts show that apprentices were servants within the meaning of the prior Acts, and they were specially mentioned to avoid coming under an exemption which is to be found in all the previous Acts for servants in trades or callings by which the master got his living; and when that general exemption was dropped it became unnecessary to put in the exception as regards the apprentices, and that is how they came to be left out subsequently. When the exception was removed, the Legislature no longer put in the word "apprentice" as well as "servant." The first Act dealing with this matter is 17 Geo. 3, c. 39, and sect. 1 of that Act imposes a duty in respect of servants generally, and sect. 2 provides certain exemptions in respect of certain servants. Sect. 4 refers to apprentices, and says that apprentices are not to be exempt as such from the tax on servants, except apprentices imposed upon masters by magistrates. That Act shows that the word "servant" was used in the broadest sense as including apprentices. Then the next Acts in order are 19 Geo. 3, c. 31; 21 Geo. 3, c. 31; 25 Geo. 3, c. 43; 38 Geo. 3, c. 41; 42 Geo. 3, c. 37; 43 Geo. 3, c. 161; 16 & 17 Vict. c. 90 (in which the term "apprentices" was for the first time omitted), and the present Act, 32 & 33 Vict. c. 14. These Acts all show that "servant" includes apprentices.

Scott Fox, K.C. (*T. F. Hobson* with him) for the respondent.—If the contention for the Crown is right, why was the word "servant" put in if it was intended to have no meaning beyond that of the word "person"? The old Acts, which have been referred to, taxed all sorts of persons, but generally excluded traders. The scope of the recent legislation is to tax merely servants who are employed, so to speak, as appendages of a household or establishment, while the former Acts included a number of servants as well as servants of this class. By the word "servant" it was intended to distinguish the status of the person, and the present Act imposes a tax merely on servants and not a tax upon apprentices. To bring the case within the Act, two qualifications are necessary. First, the man must be a servant; and, secondly, he must perform the duties which are enumerated or similar duties, by whatever name he may be called. In the earlier Act of 1853 the word "person" is distinguished from

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the word "servant" in sched. C, and when the Act means to include apprentices it uses the word "person." Here the justices have found in fact that this was a contract of apprenticeship, and the main object of such a contract is to receive instruction. This finding is most important, having regard to the contentions for the Crown before the justices. The criterion put forward by the Crown was whether this was *bona fide* for the purpose of teaching and learning or merely for the purpose of getting a stableman, and upon that question of fact the justices found in the respondent's favour. The meaning of the word "servant" in this Act is the ordinary meaning according to the use of the word in the English language—that is, a person whose business it is to serve, and towards whom the master has no business of teaching. Upon all the earlier Acts it was perfectly clear whether apprentices were intended to be taxed, and no doubtful question was left as to whether an apprentice who also did some service for the purpose of learning his trade was a servant within the meaning of the Taxing Act. There are two things which have to be determined—the nature of the duties to be performed, and the nature of the relationship to the master. In both respects the boy in question was an apprentice, and if there be any doubt, as this is a taxing Act, it ought to be in favour of the respondent.

Lord ALVERSTONE, C.J.—This case is not, in my opinion, sufficient to bring the particular *employé* in question within the Taxing Act. It is, I think, a wholesome principle, which has often been recognised, that Taxing Acts must be distinct and fairly reasonably clear as to what are intended to be taxed before such things can be taxed. The general impression produced upon my mind by the earlier statutes which have been referred to is that the Legislature did think it necessary to insert provisions to bring apprentices within an enumeration of servants practically identical with the enumeration of servants in this Act. For example, to cite an instance, one of the Acts says: "The aforesaid duties shall extend to apprentices other than apprentices who were compulsorily forced upon the masters." Therefore, as far as the earlier legislation helps us at all—and I do not think it helps us very much—it does not assist the contention of the Solicitor-General for the Crown. If we look at the statute of 16 & 17 Vict. c. 90 (the Land Tax Redemption (Investment) Act 1853), which is for this purpose practically the same as 32 & 33 Vict. c. 14, I think there was a reason for using the word "servant," and that under ordinary circumstances the person to be taxed was to have the relation of servant to the master. That, however, is not conclusive, because, as the Solicitor-General has properly pointed out, though the person may be called by another name, yet if he does wholly or partially perform those duties he may still come within the word "servant." That leads me to the final point as to what this contract was. The contract is not one which is necessary for the mere hiring of a groom, and although, as the Solicitor-General said, it was in the interest of the master, so that the boy might not go away if he became a good rider, there is quite as much to be said on the other side, that it was in the interest of the servant so that he might be kept a sufficient time to enable him to learn his

work properly, if he turned out to be slow to learn or not industrious, or not the most praiseworthy apprentice in the world. I think the way in which the magistrates have put the matter is right, that they regard this contract as a contract of apprenticeship, meaning that the real object of the contract was that the boy should be taught to be a riding groom, and not merely to be a stable boy, and to be employed for seven years as a stable boy. That being so, I think the decision is right, and that the words of this Taxing Act are not sufficient to bring a boy employed under this agreement within the charging section simply because in the ordinary course of his training he does what he must do in order to learn his business—namely, perform the duties of a groom for a considerable part of the day. I therefore think the appeal ought not to be allowed.

LAWRANCE, J.—I agree.

KENNEDY, J.—It seems to me that, on the whole, in construing this Taxing Act the contract of apprenticeship may not improperly be relied upon as supporting the decision of the magistrates. To bring a case within the statute we have to find a person who is a male, who is doing certain classes of work, and who is certainly doing that work as a servant to a master. Supposing one were to ask that question of an apprentice, he would say: "I am not a servant; I am an apprentice." He would not mean that as an apprentice he might not be doing this class of work to some extent, but he would mean that his relationship to his employer is one, not of service, but of apprenticeship, carrying with it special incidents and as a particular and distinctive incident that of being entitled to education as well as to nurture or wages which a master pays his servant. Unless the Act makes it clear that it not merely includes a male person who is employed in these capacities, but also includes a person who is an apprentice as distinguished from a servant by the nature of the contract between him and the master, I think it fails to include persons in the position of this young man in this case.

Appeal dismissed.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Solicitors for the respondent, *Ruston, Clark, and Ruston, for A. H. and A. Ruston, Newmarket.*

Dec. 11 and 14, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

REX v. GILLESPIE AND OTHERS; *Ex parte* OVERSEERS OF WEST HAM. (a)

Poor rate—Recovery—Distress warrant—Tender of part of rate in court—Refusal of magistrate to issue distress warrant for whole rate—Jurisdiction of magistrate so to refuse—Poor Relief Act 1601 (43 Eliz. c. 2), s. 4—Distress for Rates Act 1849 (12 & 13 Vict. c. 14), ss. 1, 5, 8, and forms in schedule.

Where, upon an application by overseers to a magistrate under the Distress for Rates Act 1849 for a distress warrant for rates, the ratepayer against whom the application is made tenders in court before the magistrate a part of the rate

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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the magistrate is not bound to issue a distress warrant for the whole amount of the rate, but has a discretion to issue the distress warrant for the balance only, after deducting the amount so tendered in court.

RULE calling on the stipendiary magistrate for the borough of West Ham and Messrs. Boardman and Sons to show cause why the magistrate should not issue his warrant to levy by distress and sale of the goods and chattels of Messrs. Boardman and Sons the sum of 441*l.* 8*s.* 9*d.*, being the amount of a certain rate duly made by the overseers of the poor of the parish of West Ham.

The rate in question was duly made, and was payable by the respondents, Messrs. Clement Boardman and Sons, in respect of certain premises in the parish of West Ham of which Messrs. Boardman and Sons were occupiers.

The facts were stated as follows in the affidavit made and filed by the learned magistrate.

A complaint by John Kendall, an assistant overseer of the parish of West Ham, was made to the magistrate on the 15th July 1903 that (amongst others) Messrs. Clement Boardman and Sons, being persons duly rated to the poor in a rate made on the 28th April 1903 in the sum of 441*l.* 8*s.* 9*d.*, had not paid that sum, but had refused and neglected to do so. Thereupon a summons was issued to Messrs. Boardman and Sons to appear at the West Ham Police-court on the 22nd July 1903 to show cause why they had not paid and neglected or refused to pay the rate.

On the 22nd July Mr. John Boardman on behalf of Messrs. Boardman and Sons appeared before the magistrate at the court. The assistant overseer produced the book containing the poor rate with the allowance by the justices, and proved the demand and nonpayment for seven days previous to the summons. No objection was taken to the rate or to the formalities, but in cross-examination the assistant overseer admitted that Messrs. Boardman had tendered 416*l.* on account of the rate by leaving that amount at the rate office, which amount was subsequently sent back to Messrs. Boardman.

The assistant overseer also stated that he did not think he ever refused part payment of a rate before; Messrs. Boardman's ground of objection to pay the balance was that they disapproved of the recent Education Act.

At the magistrate's suggestion Messrs. Boardman made another tender of the 416*l.* in court, but the assistant overseer refused to accept the same. Thereupon the magistrate refused to issue a distress warrant for more than 25*l.* 8*s.* 9*d.*, the balance.

Sect. 8 of 12 & 13 Vict. c. 14 (the Distress for Rates Act 1849) provides as follows:

And whereas it may be convenient, and save expense and litigation, if forms to be used for the purpose of levying the sums aforesaid should be given: Be it enacted, that the forms in the schedule to this Act contained, or forms to the same or the like effect, shall be deemed good, valid, and sufficient in law.

A reference to forms A (2), B, and C (1) shows that it is necessary to state in each that the respective persons "have not respectively paid the said sums or any part thereof, but have respectively refused so to do." The magistrate was of opinion that it was clearly contemplated by the

statute that a ratepayer "to save expense and litigation" might pay and the overseer receive a portion of the rate, and, further, that Messrs. Boardman and Sons had not refused payment of the rate, but only a part thereof, having in fact by their tender shown their willingness to pay the greater part thereof—namely, 416*l.*—which the overseers neglected and refused to accept.

The magistrate was further of opinion that, although acting ministerially, it was never contemplated that he should issue a distress warrant for 441*l.* 8*s.* 9*d.*, with the consequent increase of expense to the ratepayers (amounting to over 20*l.*) in executing it, when 416*l.* in cash was to be had for the lifting in court and outside the court; that this sum of 25*l.* 8*s.* 9*d.* was the only sum remaining unpaid, and, moreover, the only sum which Messrs. Boardman had neglected and refused to pay.

The magistrate deemed it his duty as a magistrate to ensure payment to the overseers of the full amount of their rate, and this he considered he did effectually by enabling them to take 416*l.* in cash and granting them a distress warrant for the balance of 25*l.* 8*s.* 9*d.* He at the same time avoided burdening the ratepayers with extra expense, which the statute seemed to him to enjoin.

The magistrate further stated that he had sat as deputy police magistrate and as police magistrate at that court for over fourteen years, and during that time had heard many thousands of poor rate summonses, and it was of very frequent occurrence that the assistant overseer had asked him to order distress warrants for less amounts than those for which the summonses were issued, payment on account having been accepted by the overseers. He had never personally known a single instance in which such payment had been refused, and he verily believed that until this question of the education rate arose payment on account of poor rates had always been accepted.

In the affidavit by the superintendent assistant overseer, at whose instance the rule was granted on behalf of the overseers of the parish, it was stated (amongst other things) that the rate in question included the education rate for the parish; that Mr. John Boardman had, for Messrs. Boardman and Sons, tendered the part of the rate before application was made for the summons, but refused to pay the balance as being the amount which they alleged represented the part of the rate applicable to non-provided or sectarian schools; that the overseers had at a meeting resolved not to accept part payment of the rates when such part payment was offered or tendered subject to deduction of the part deemed to be in respect of non-provided or sectarian schools; that this resolution was communicated to Mr. John Boardman, but he nevertheless tendered the portion of the rate and claimed to deduct the balance as being in respect of the education rate, but the tender was declined; that on the hearing of the summons before the magistrate Mr. John Boardman on behalf of his firm again tendered the same amount, but the assistant overseer again declined to accept the amount tendered and requested the magistrate to issue a distress warrant for the whole rate, but the magistrate declined to issue a distress warrant for the whole rate, and issued a distress warrant for the balance only; that the overseers were advised that

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the magistrate had no power to compel the overseers under the circumstances to accept payment of part of the rate from Messrs. Boardman and Sons or to refuse to issue a distress warrant for the whole amount of the rate, and they accordingly applied for the above rule for a *mandamus*.

In an affidavit by Mr. John Boardman as representing his firm he stated that he had a conscientious objection to voluntarily pay that part of the poor rate which was applicable to non-provided or sectarian schools in the parish, and that on that ground his firm had refused to pay the 25*l.* 8*s.* 9*d.*, the part of the rate which was so applicable; that he had tendered both before the summons and in court the 41*l.*, and that his firm were ready and willing to give all facilities to the overseers and their bailiffs in connection with the execution of the distress warrant ordered to be issued by the magistrate.

Robson, K.C. (Macmorran, K.C. and Artemus Jones with him) showed cause.—No order in the nature of a *mandamus* ought to go in this case. The magistrate offered to issue a distress warrant for the balance of 25*l.* 8*s.* 9*d.*, but he refused to issue the distress warrant for the whole amount. The question now is whether the magistrate had a discretion to offer to issue a distress warrant for the balance only, or whether he was bound to issue the warrant for the whole amount. It is submitted that he had a discretion to issue the distress warrant for the balance only—that is, for the amount over and above the sum tendered in court. By the Poor Relief Act 1601 (43 Eliz. c. 2) the refusal to pay the poor rate was a criminal offence, and the justices had power to commit to prison—in default of distress for the poor rate—the party against whom the distress warrant should have been issued. Then by the Distress for Rates Act 1849 (12 & 13 Vict. c. 14), s. 2, this imprisonment was limited to three months, so that this is a case falling within the criminal law, with the liability to imprisonment over and above the civil liability to pay the debt. Therefore if the magistrate is bound in such a case to issue a distress warrant for the whole amount, notwithstanding that the greater part of that amount has been tendered in court, it would impose upon a ratepayer a much greater punishment than that contemplated by the law. The contention on the part of the overseers is that they are entitled to have the whole rate, and, if they do not get the whole they are entitled to refuse the part tendered. The Act itself and the forms in the schedule show that that is not so, and that the magistrate has a discretion in the matter. The forms of complaint and warrant of distress given in the schedule to the Act—namely, A (1), A (2), B, C (1), and C (2)—all contain the words “hath not paid the same or ‘any part thereof,’ but hath refused to do so,” showing that the Act contemplated that there might be a payment of part of the rate, and a distress warrant for the balance unpaid. The duty of the overseer is to demand the whole rate, but, if he cannot get the whole rate, then he ought to demand a part of it, as he has to inform the magistrate in the complaint (form A 1) that the ratepayer has not paid any part of the rate. The question whether the act of the magistrate in

issuing a distress warrant is judicial or ministerial is considered in Archbold's Poor Law, 15th edit., p. 1056, and, although justices may be bound to issue a distress warrant in certain cases, they are not bound to issue the warrant for the whole rate when part has been tendered in court. If the distress warrant is issued for the whole amount when part has been tendered, the ratepayer suffers in two ways—first in being liable to larger costs, and, secondly, by having a larger quantity of goods sold by a forced sale than is necessary.

Danckwerts, K.C. (Edward Morten and Sturges with him) for the overseers in support of the rule.—The magistrate's duty was ministerial only, and he was bound to issue the distress warrant for the whole rate. Sect. 4 of 43 Eliz. c. 2 (the Poor Relief Act 1601) gives the overseers power, by warrant from two justices of the peace, to levy the sums and all arrearages of every one that shall refuse to contribute “according as they shall be assessed” by distress and sale of the offender's goods. Therefore the persons against whom the distress is to go are the persons who refuse to contribute “according as they shall be assessed.” There are a series of cases as to what the jurisdiction of justices is in such cases. The proposition of law to be deduced from the cases is that the justices, when they are called on to act in granting a distress warrant for rates, are entitled to say, “You must show us a legal rate”; but once the rate is legal on the face of it and is in other respects legal, then the duty of the justices is merely ministerial, the reason being that a distress warrant is a process of execution. It is for the overseers to determine whether they will accept part payment of the rate; the discretion to accept part payment rests with them and not with the justices. A question arose as to whether the Summary Jurisdiction Act 1879 applied to proceedings for the recovery of rates, and the case of *Reg. v. Price* (42 L. T. Rep. 439; 5 Q. B. Div. 300), which came after the Summary Jurisdiction Act 1879, decided that that Act did not affect proceedings for the recovery of poor rates, and that a distress warrant for such rates might be issued as before the Act. The reason why the justices were bound to see that the rate was legal on the face of it was for their own protection, as otherwise they might be subject to an action for trespass. That is very clearly put by Parke, B. in *Newbould v. Colman* (16 L. T. Rep. O. S. 488; 6 Ex. 189), a judgment which shows that the justices act ministerially. So, in *Southwark and Vauxhall Water Company v. Hampton Urban Council* (79 L. T. Rep. 512, at p. 514; (1899) 1 Q. B. 273, at p. 277), Smith, L.J. says: “The magistrates in granting the warrant of distress act ministerially, the rate itself being the order.” In *Reg. v. Handsley* (7 Q. B. Div. 398) Field, J. says: “The justices upon due application for a distress warrant are bound to grant it. . . . They themselves have nothing to do but to act ministerially. . . . I think they had no jurisdiction to impose any delay in the execution of the warrant”; and Huddleston, B. says: “There can be no doubt that the justices act ministerially, and not judicially.” The Act 12 & 13 Vict. c. 14 was careful not to change the Act of Elizabeth, except in the case of imprisonment. In sects. 1 and 2 there are provisions as to costs and as to the issuing a warrant of commitment.

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These are in the discretion of the justices, and and as to these they act judicially. In sect. 2 there are really two discretions, whether the person is to go to prison, and, if so, for what time; and a commitment under this section is a punitive order, and not merely a legal process to enforce payment :

Re Edgcote, 87 L. T. Rep. 108 ; (1902) 2 K. B. 403.

Contrasting the language of this statute with the statute of Elizabeth, it is clear that in granting the distress warrant the justices have no discretion. Where the Act intended to give a discretion it says so, as in sect. 1—"if in their discretion they shall so think fit" to make an order as to costs. By sect. 5 the summons "may" be in the form in the schedule, and therefore the forms are permissive, and the forms say "or" any part thereof, not "nor" any part thereof, so that the argument based on the words "or any part thereof" ought not to prevail. The liability to pay the rate is not a mere private debt, but is a public obligation : (per Mathew, J. in *Reg. v. Blenkinsop*, 66 L. T. Rep., at p. 188 ; (1892) 1 Q. B., at p. 46). In *Seaman v. Burley* (75 L. T. Rep. 91 ; (1896) 2 Q. B. 344) it was held that an application to enforce payment of a poor rate by distress warrant was a criminal cause for the purpose of an appeal to the Court of Appeal; but so long ago as *Reg. v. Governor of Whitecross-street Prison* (12 L. T. Rep., at p. 546 ; 6 B. & S., at p. 395) the commitment was considered to be under civil process. Then as to the question of tender, the rate was one entire sum, and the tender to be good must be the tender of the whole sum ; a tender of part of an entire demand is bad as a tender :

Searles v. Sadgrove, 26 L. T. Rep. O. S. 89 ; 5 E. & B. 639 ;

Dixon v. Clark, 5 C. B. 365.

It rests entirely with the overseers in the interests of the ratepayers to say whether they will require the whole rate or be satisfied with a part ; but it is not for the magistrate on an application for a distress warrant to say that. The Act compels the ratepayer to pay the whole, and it is entirely in the discretion of the overseers whether they will require the whole to be paid ; but as to that the magistrate's duty is wholly ministerial :

Reg. v. Boteler, 4 B. & S. 959 ;

Ex parte Bridgend Guardians, 9 L. T. Rep. 720.

The utmost to be recovered for costs is entirely independent of the amount of the rate.

LORD ALVERSTONE, C.J.—I am of opinion that this rule must be discharged. I wish it to be distinctly understood that nothing I say in this case must be supposed to give any countenance to the refusal of persons (I am speaking, of course, in a court of law) to pay rates that are justly due, and I desire to make that distinctly plain. I am dealing with this case as though it had arisen in any other ordinary case, and as though I had not known the motive which was set up as an excuse for not paying the whole of the rates. I am anxious to say that because it sometimes has been supposed that a judgment given in a case of this kind has countenanced or given support to matters with which it has nothing to do. As I pointed out, the question in this case which we have to decide is whether, when an application is made to a magistrate under the Distress

for Rates Act 1849 (12 & 13 Vict. c. 14) and the person against whom the application is made, who must be summoned and who must be there, says, "Here is a part of the money; you can take it to-day," the magistrate is bound to issue a distress warrant for the whole amount. With the greater part, I think I may say with all but one point, of Mr. Danckwerts' able argument I entirely agree. I entirely agree with all the subordinate and minor preliminary propositions that he laid down. I agree with him to this extent that the overseer is entitled to say, "I will not take less than the 441l." It seems to me, having got thus far, that we have only to consider what are the rights and duties of a magistrate asked to issue a distress warrant under the statute. I think it is quite right to say, broadly speaking, that the duty of the magistrate is ministerial, but that does not decide the question, because we have then really got to explain what we mean by the word "ministerial." I have no doubt, and not only have I no doubt, but I have decided in two or three cases in the last two years, that where there is a good rate, and where the magistrate is satisfied that the person is the proper person and has not paid, the grounds which he can consider as a reason for not issuing a distress warrant are very limited. It is not necessary to go through them again. I have never pretended, nor do I now pretend, to give a complete catalogue of them, as some new case may arise, but I am not aware of anything which has ever justified the view that a magistrate must issue a distress warrant if the person is prepared to pay there and then the whole amount. Nor do I know of any authority which suggests that he must issue the distress warrant for the whole if there and then the overseer can receive or has received a part of the money which was due to him. It seems to me that all these questions are really beside the question we have to consider. Nobody, I think, can read the Act of 12 & 13 Vict. c. 14 without being satisfied that the Legislature contemplated process for part of the rate and payment of part of the rate as well as process for and payment of the whole rate. I am not saying they did not contemplate that under many circumstances a distress warrant would ordinarily go for the whole amount. By sect. 5 the overseers are directed to summon the party before the justices. Therefore the party is to be there, and, although it is quite true that the section itself relates specially to cases where proceedings have been taken to compel payment with a view to a person being lodged in prison, sect. 6 says: "If at any time before such person shall be committed to and lodged in prison for nonpayment thereof, or for or by reason of its being returned to such warrant of distress aforesaid that there are no goods or chattels or no sufficient goods or chattels . . . such person shall pay or tender to the churchwardens or overseers of the poor or any of them, or to the surveyor of highways . . . the sum so sought to be recovered together with the amount of all costs and expenses up to that time incurred. . . ." Therefore it seems to me that the actual words of the statute clearly contemplate that there may be an application made for less than the full amount. I also wish to point out that the statute also contemplates an application being made for more than the amount of a particular rate, because it orders the justices in

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some cases to issue a distress warrant for the rate and all the arrears that there are, which would of necessity involve some inquiry as to what the real arrears were. When we come to look at the section, it is perfectly true that the forms as forms are only optional. It is perfectly true that the forms need not be exactly followed, because the words are "or forms to the same or the like effect," but still the forms indicate that the Legislature contemplated the Act being used where a part of the rate could not be recovered. Under these circumstances I must say, treating this as an ordinary case and nothing else, I am very much impressed with that which the magistrate has stated to be the practice which has existed now for over fourteen years. He says that he has heard many thousands of poor rate summonses, and it is a very frequent occurrence that the assistant overseer has asked him to order a distress warrant for less amounts than those for which the summonses were issued, payment on account having been accepted by the overseers. The point Mr. Danckwerts takes that impresses me, and the one point that has given me difficulty in this case, is that he says that the overseers need not accept less than the full amount, and the cases in which distress warrants have been issued have been at the request of the overseers. I think that is probably true, and to a very large extent true in those cases, but I think according to the principles of justice, when the statute contemplates process going for a part which is refused to be paid, there being a question of previous tender—I agree that no question of previous tender ought to be gone into, because that might necessitate a trial of what was a tender—and where in court the magistrate is satisfied that the money is to be had for the lifting or for the asking, and the process of the court is only required to enforce payment of the balance, then the magistrate has a right to issue a distress warrant for the balance. I pointed out when this rule was moved that it seemed to me extremely doubtful whether or not a *mandamus* ought to go, because on that day when the magistrate so acted the overseer could have had the 416*l.* in cash, and a distress warrant for the balance as on that day. I have listened with the greatest attention to the argument in support of this rule, and I am unable to see anything which prevents us from taking what seems to me to be the reasonable and proper course, that where a process is to be issued, it ought to be issued only for that which is really required to be recovered. I must point out that any other judgment would throw upon the recalcitrant debtor, who either was not able to pay or was not willing to pay, larger costs as between himself and the overseer, because the overseer or the other persons who levied would be entitled to recover larger fees in respect of levying a larger amount. I am therefore of opinion that the rule must be discharged. I understand that the respondents' undertaking to pay the amount tendered remains, and that, notwithstanding all that has been said, the respondents undertake to pay the 416*l.* so tendered.

LAWRANCE, J.—I entirely agree.

KENNEDY, J.—I also agree. I wish to associate myself in my judgment entirely with what my

Lord has said with regard to dealing with this case simply on general grounds. I can put my reasons very shortly, and I think, considering the importance of this case, I ought to do so. The question is whether we are by this procedure of *mandamus* to compel a magistrate to issue a distress warrant in respect of the whole of a rate when on the hearing of the summons an actual tender of a large portion of the rate is made then and there in court before him. *Prima facie* that would seem to be an unlikely course for the law to be compelled to sanction. It does involve, though without any gain to the overseers, greater cost to the ratepayers. But when we look at the question from the view which Mr. Danckwerts invited us to take, the view of authority, I see nothing in the authorities which compels this court, in obedience to the authority of previous decisions, to take the view that the magistrate ought in this case to be compelled by *mandamus* to issue the distress warrant for the whole amount. Persons, of course, must pay the rate as ordered by law, and must recognise that which this court has more than once laid down—namely, that a magistrate before whom the person, who ought to pay a rate, is brought for the nonpayment of that rate is acting ministerially and not judicially, in this sense, that if it is a valid rate, if, as, for example, in the case of *Reg. v. Bradshaw* (2 E. & E. 836; s.c. *Reg. v. Warwickshire Justices* (2 L. T. Rep. 233), the person summoned is in visible occupation of the property rated, the magistrate cannot go into any other question besides this: "Is there due and unpaid the rate which has been made according to law?" In that sense his duty is ministerial. But then the question arises, Is the magistrate—while accepting and being bound by the rate as being the basis of the amount for which he must put in force the powers intrusted to him by giving a distress warrant and being bound as regards the liability of the person sought to to be charged with the amount which he is to insert in the distress warrant—in issuing the distress warrant bound to overlook the fact that there is an amount as to which the ratepayer then and there in court says, "Here is the amount in part payment." I know of no authority obliging us to come to such a conclusion, and it would seem to me to be most unreasonable if it were so. A good deal of the argument of counsel in support of the rule seemed to me to be outside the real question for consideration, because nobody has suggested that the magistrate, when the person is brought before him by the overseers on a summons for non-payment of a rate, should go into the disputed question as to whether at any time the person who ought to pay the rate has tendered either the whole amount of the rate or any part of it. The magistrate is not there to try the question as to whether there has been a valid tender or not of the whole or of part of the rate. I quite agree that the duty of the magistrate in issuing the distress warrant is ministerial and not judicial. There is the rate and the ratepayer has to pay it, and the magistrate has to see at that moment what is the amount actually unpaid. But directly he does that, he must see that the money is, as in this case, actually produced, and that the ratepayer says that he is willing to pay it. Could it be argued that, supposing a ratepayer came to the court with the whole amount,

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never having paid up to that moment, the overseer could say, "I will not take the amount even now; I want a distress warrant for the whole amount of the rate." Surely that cannot be right. It would be issuing a distress warrant with all its circumstances of cost and of annoyance against a person who up to that time, no doubt, had not paid, but who then and there actually offers the money before the magistrate, and against whom I presume the magistrate's duty would be to order him to pay the cost so far incurred by the steps which had alone produced the money. It seems to me that while it is not in the least within the function of a magistrate to consider previous tenders, if the money is then and there offered in payment of the whole or any part of the rate, and while he looks at the amount of the rate as *prima facie* the amount absolutely due, which he must consider to be due as the legal rate, and while he cannot go into the question of the liability of the person who is visibly in occupation of the property rated—then it is not contested his duty is to say that, in using the machinery to get this rate, he must look at, and properly look at, the sum which is there in court, and which leaves him free to put in force that machinery only for the balance remaining unpaid. Therefore on these grounds it seems to me that it would not be right to compel the magistrate to issue a distress warrant for a rate when either the whole or a part of it is actually offered in court before him, and that the overseer as an official can only properly recover the balance, being already, without having recourse to any machinery of distress warrants, enabled there and then to receive that which is either the whole or a substantial part of that which he is entitled to claim.

Rule discharged.

Solicitors for the respondents, *Lloyd George, Roberts, and Co.*

Solicitors for the overseers, *Hillearys.*

Tuesday, Dec. 8, 1903.

(Before WRIGHT, J.)

DAWSON v. GREAT NORTHERN AND CITY RAILWAY COMPANY. (a)

Compensation—Leasehold—Subsequent acquisition of freehold—Assignment of claim for damage—No notice to treat—Assignment of tort.

A freeholder and leaseholder had notices to treat served upon them by a railway company in respect of their interests. The freeholder then agreed to give the leaseholder a new lease, and subsequently received compensation from the railway company in settlement of all claims under the notice to treat, except claims for damage by subsidence.

The freeholder then sold the freehold to the leaseholder.

During the new lease and after the acquisition of the freehold, structural damage was caused to the premises and to the stock and the trade.

Held, that the original leaseholder was only entitled to compensation in respect of such damage, if any, as occurred under the original

lease in respect of which the notice to treat was served.

The acceptance by the sub-lessee of a new sub-lease and the implied surrender of the original one after the notice to treat has been served in respect of the interest in the original sub-lease, the damage having been done during the continuance of the original sub-lease, does not preclude the sub-lessee from recovering compensation.

A claim for compensation under sect. 68 of the Lands Clauses Act 1845 is in the nature of a claim for damages for a wrong, and as such is not a legal chose in action within sect. 25 of the Judicature Act 1875 so that the assignee can sue in her own name.

ACTION brought to recover the amount of a verdict and judgment recovered by the plaintiff in an inquiry held before a judge and special jury under the Lands Clauses Act 1845 and the Regulation of Railways Act 1868, s. 41, for the purpose of assessing the compensation to be paid by the defendants to the plaintiff for damage caused to her premises and stock and trade as a result of subsidence, consequent on the construction by the defendants of tunnels for an underground railway.

The plaintiff's premises comprised certain freehold houses also some leasehold houses called the Hewitt and Berry and Vickery leaseholds respectively.

*The defendants' works were executed between April and Oct. 1901, causing damage which was assessed by the jury at 2100*l.* in respect of structural damage and 2000*l.* in respect of damage to stock and trade. All the structural damage occurred before Dec. 1901, and the other damage during 1902 while the repairs were executed.*

The plaintiff or her predecessor had been tenant of the freeholds till the end of 1899 under one Blake.

In March 1899 the defendants served on Blake the usual notice to treat in respect of his freehold interest, also a notice on the plaintiff in respect of her then interest.

*Blake agreed to settle his claim against the defendants for 850*l.**

In Oct. 1899 Blake agreed to give the plaintiff a fresh lease for twenty-one years, and in March 1901 he sold the freeholds to her, deducting a portion of the money paid by the defendants from the price.

The plaintiff from 1892 to Dec. 1901 was a sub-lessee of the Hewitt leaseholds for a term to end in 1913.

On the 31st Dec. 1901 the plaintiff accepted new sub-leases for an extended term.

In June or July 1899 notices to treat were served on the freeholder, on Hewitt, and on the plaintiff in regard to their respective interests.

The plaintiff acquired the Berry and Vickery leaseholds in March and May 1902 by assignments for long terms after the structural damage had been done.

Berry and Vickery assigned to the plaintiff their rights to compensation for the damage done to their interests, notice of which assignment was given to the defendants.

No notice to treat in respect of the Berry and Vickery leaseholds had been given to anyone.

(a) Reported by W. DE R. HERBERT, Esq., Barrister-at-Law.

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Sir E. Clarke, K.C. and Harry Dobb for the plaintiff.

McCall, K.C., George Cave, and C. E. Hutchinson for the defendant company.

WRIGHT, J.—This action is brought upon a verdict and judgment obtained by the plaintiff at an inquiry held before a judge and jury in lieu of a sheriff and jury under the provisions of the Regulation of Railways Act 1868, s. 41, for the purpose of assessing the compensation to be paid by the defendants to the plaintiff for damage caused to her premises, stock, and trade as a result of subsidence consequent on the construction by the defendants of tunnels for an underground railway. The plaintiff's premises comprised, firstly, certain freehold houses, Nos. 119 to 125, odd numbers, in the City-road, and Nos. 1 to 5, odd numbers, in East-road; secondly, certain leasehold houses, Nos. 127 to 133, odd numbers, in the City-road, and Nos. 7 to 13, odd numbers, in East-road, which I will call the Hewitt leaseholds; and, thirdly, certain other leasehold houses, Nos. 135 to 139, odd numbers, in the City-road, and Nos. 15 to 19, odd numbers, in East-road, which I will call the Berry and Vickery leaseholds. The defendants' works were executed between the beginning of April 1901 and the end of Oct. 1901. The structural damage which is now admitted to have been the result of those works occurred between the beginning of April 1901 and the 31st Dec. 1901. In addition to the cost of making good this structural damage, the plaintiff's stocks were damaged and her trade injuriously affected during repairs which were executed during 1902. The plaintiff's claim, dated the 25th June 1902, appears to be framed upon sect. 68 of the Lands Clauses Act. The jury found their verdict for 2100*l.* for structural damage and 2000*l.* for damage to stock and trade, and by agreement of the parties these sums are to be treated as respectively attributable as to one-third, or 700*l.* and 666*l.*, to the freeholds, one-third to the Hewitt leaseholds, and one-third to the Berry and Vickery leaseholds. The question in this action is whether the plaintiff can show title to the compensation the amounts of which have been so ascertained. I will consider first the freeholds. The plaintiff or her predecessor in title has been tenant of them from Blake under a lease which expired at the end of 1899. During the currency of that the defendants served on Blake in March 1899 the usual notice to treat in respect of his freehold interest, and on the plaintiff in July 1899 in respect of her then interest. Afterwards, in October of the same year, Blake agreed to give the plaintiff a fresh lease for twenty-one years. In Feb. 1900 the defendants and Blake agreed for the payment to him of 850*l.* in settlement of all his claims under their notice to treat, except claims for damage by subsidence. In March 1901 Blake sold the freeholds to the plaintiff, subject to the easements acquired by the defendants, deducting from the price payable to him by the plaintiff a portion of the 850*l.* Under these circumstances it seems to me to follow from the doctrine established in the decisions collected in *Mercer v. Liverpool, St. Helens, and South Lancashire Railway Company* (88 L. T. Rep. 374; (1903) 1 K. B. 652) that, whether the plaintiff's case depends on the notice to treat which was served upon her in July 1899 or on her

notice of claim under sect. 68, she is not entitled to compensation for damage except in respect of her interest in the residue of the old lease which still subsisted at the date of the notice to treat, and in respect of that interest she suffered no damage or disturbance. Before Blake agreed to give her a new lease or to sell to her the freehold, he had become bound, under the notice to treat which had been served upon him, to allow the defendants to execute their works and cause necessary damage in the execution of them on the terms of the defendants paying to him such compensation as the damage might require, and he could not, as against the defendants, create any new interest in the plaintiff which would subject the defendants to any new burden in her favour in respect of their works. The jury, therefore, in giving to the plaintiff 700*l.* for structural damage to the freeholds have given to her what the defendants were, by their notice to treat, bound to pay Blake, and the defendants cannot be under an obligation to pay her also for the same damage. This would be still more clear as regards any portion of the 700*l.* which the jury may have given for structural damage caused before the sale of freeholds by Blake in 1901. To compensation for such damage the plaintiff could not have any claim unless by virtue of some assignment of Blake's right, and no such assignment was made by him. A similar conclusion seems to me to be necessary in the case of the 666*l.*—that is, the one-third of 2000*l.* which the jury are to be taken to have given for damage to trade and stock in respect of the freeholds. Nothing was done during the old lease to cause any such damage, and the new lease must be regarded as a lease taken of premises which the defendants had acquired the right to damage upon the terms of compensating Blake. The subsidence being rightfully caused by the defendants, the plaintiff cannot charge them with the inconveniences of repair. As regards the Hewitt leaseholds, Hewitt was lessee of them for a long term from Blake, and the plaintiff was from 1892 until the 31st Dec. 1901 sub-lessee of them for Hewitt for a term to end in 1913. Notices to treat were served by the defendants in June or July 1899 on Blake and Hewitt and the plaintiff in regard to their respective interests. On the 31st Dec. 1901 (that is, after the damage had been done, the plaintiff accepted from Hewitt new sub-leases for an extended term. I think that she was entitled to recover compensation under this head, either under the notice to treat or under sect. 68. At the time of the notice her old sub-leases had still about thirteen years to run, and it is agreed that the whole of the structural damage is to be taken to have occurred before the old sub-lease was determined on the 31st Dec. 1901. At the time when she accepted the new sub-lease a right to compensation for the damage to her interest in the old sub-lease was vested in her, and that right would not, as I apprehend, be destroyed by her acceptance of a new sub-lease or the implied surrender of the old one. She is therefore entitled to maintain this action for the agreed proportions—namely, 700*l.* and 666*l.*—in respect of those Hewitt leaseholds. Lastly, the Berry and Vickery leaseholds were acquired by the plaintiff by assignments for long terms from Berry and Vickery in March and May 1902 after the structural damage had occurred,

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the assignments of the lease being accompanied by assignments from Berry and Vickery of their respective rights to compensation. Notices of the last-mentioned assignments were given to the defendants in supposed accordance with sect. 25 of the Judicature Act. No notice to treat has ever been given by the defendants to anyone in relation to the premises comprised in their leases, and the plaintiff's claim was founded on the assignment to the plaintiff by Berry and Vickery of their rights to compensation. The assignment by Berry recites that the premises have before the date thereof become damaged, and the assignment by Vickery is expressly limited to things done or omitted before its date. The question which arises upon the assignments is not whether the plaintiff is entitled to the benefit of them, nor whether she might not have proceeded in the names of the assignors to obtain an assessment of the compensation to which they were entitled, and which she might have claimed from them after assessment. The question is whether she could in her own name enforce payment of it as against these defendants. In considering this question, it is important to observe that the claims which Berry and Vickery purported to assign were founded on sect. 68 of the Lands Clauses Act, and not on any notice to treat. If the assigned claims had been claims arising upon a notice to treat, they might have been regarded as claims arising upon a contract, or as claims to something which might be considered as the price payable by the defendants for the right to exercise their powers in the assignor's lands, and therefore as property, and in either view as legal *choses in action*. But, in the absence of any notice to treat the element of contract or *quasi contract* or of proprietary right seems to be wanting, and the claim seems to be in the nature of a claim for damages for a wrong—a wrong, indeed, which cannot be stopped by injunction or otherwise remedied in an action, but which gives rise to a right to assessment of damages; and, in the apparent absence of authority, I think that such a claim is not a legal *chose in action* within the meaning of the Judicature Act 1875, s. 25: (see *May v. Lane*, 71 L. T. Rep. 869). There are, no doubt, some expressions in the judgments of the Lords Justices in the case of *Colonial Bank v. Whinney* (53 L. T. Rep. 272; 30 Ch. Div. 261) which seem to approve a statement in Williams on Personal Property, to the effect that a right to damages for a tort may be a legal *chose in action*; but the decision of the Court of Appeal in that case was reversed in the House of Lords, and it is difficult to suppose that it was intended by sect. 25 of the Judicature Act to make all rights to damages (for example, for libel or assault) assignable under that section. But, however this may be, there are other difficulties in the plaintiff's way. The assignments by Berry and Vickery of their claims could of course operate only as assignments of what they were entitled to. But the jury seem to have given compensation, not for the damages sustained by Berry and Vickery, but for the damage sustained by the plaintiff. This is clearly so as to the damage to trade and stock. The learned judge at the hearing directed the minds of the jury to nothing but the injury to the plaintiff's own trade and stock. Berry and Vickery were not shown to have suffered any damage to their trade or to their stock, and, as regards the structural damage also,

the jury seem to have been allowed to assess the compensation on the footing of what the damage was to the plaintiff, and the measure of that is not necessarily the same as the measure of what the damages would have been to premises as used for different trades and purposes which might require different degrees of repair. Without the aid of the Judicature Act it seems to me clear that the plaintiff could not take proceedings in her own name. All the damage was done before the assignments of the leases, and was damage done, not to her interest, but to the interests of Berry and Vickery, and could not be claimed by her in her own name. So far as I know, there is no principle of law which enables a purchaser of an estate or interest in land to maintain an action for a wrong done in relation to the land during the time when it belonged to his vendor, except where the wrong is a continuing one, as in the case of a permanent nuisance (see *Penruddock's case*, 5 Co. Rep. 100b; and per Parke, B. in *Thompson v. Gibbons*, 56 R. R. 762; 7 M. & W. 456), and I think that the law must be in the same relation to claims under sect. 68 of the Lands Clauses Act. The result of that, so far as I am concerned, is that the plaintiff gets judgment for the 700l. and the 666l. in respect of the Hewitt leases.

Judgment accordingly.

Solicitors: *White and De Buriatte; Le Brasseur and Oakley.*

Wednesday, Dec. 9, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

NOKES AND ANOTHER (apps.) v. ISLINGTON BOROUGH COUNCIL (resps.). (a)

Metropolis—By-law—Reasonableness—No provision as to notice—Insufficient water-closet accommodation—Public Health (London) Act 1891 (54 & 55 Vict. c. 76), s. 39 (1).

By by-law 26 made by the London County Council pursuant to sect. 39 (1) of the Public Health (London) Act 1891 it was provided that: "The landlord or owner of any lodging-house shall provide and maintain in connection with such house water-closet, earth-closet, or privy accommodation in the proportion of not less than one water-closet, earth-closet, or privy for every twelve persons."

The by-laws further provided a penalty upon any breach thereof.

There was no provision as to notice to the landlord or owner.

Held, that the by-law was bad on the ground that it was not reasonable.

CASE stated on a complaint preferred by a sanitary inspector on behalf of the respondents against the appellants for that they, being the owners, as defined by the by-laws of the London County Council made under sect. 39 (1) of the Public Health (London) Act 1891, of a certain lodging-house, did not from the 3rd March to the 20th April 1903 provide and maintain sufficient water-closet accommodation, contrary to the provisions of the by-laws and the Act.

At the hearing of the complaint it was proved that the appellants were agents for letting and

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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collecting and in fact collected the rent of the premises in question during the period mentioned in the complaint, and during such period the house contained nine rooms and one water-closet only and no earth-closet or privy.

In July 1902 the house was let out in tenements to members of more than one family, and the appellants collected the rents of the several tenements from the tenants thereof.

In Sept. 1902 the whole of the tenants of the house were ejected by the appellants. From Sept. 1902 to Jan. 1903 the house was unoccupied.

In Jan. 1903 the whole of the house was let to one tenant, C. Gates, at the rent (which was a rack rent) of 36l. per annum, payable 3l. per month in advance.

On the 5th Jan. 1903 three rooms only in the house were occupied by six people.

On the 3rd March 1903 the whole of the rooms in the house were occupied, and continued to be occupied till the 20th April 1903, by sixteen people, who constituted four separate families.

The rooms in the house not required by C. Gates for his own occupation were let by him to lodgers, from whom he received rent on his own account.

On the 11th March 1903 an intimation that the closet accommodation was insufficient was left on the premises and also at the appellants' office.

On the 25th March 1903 a letter was sent to the appellants calling attention to the matter, to which the appellants replied, saying that they were not the "landlords."

The appellants on the 26th March 1903 sent to the tenant of the house a letter advising him to reduce the number of tenants to avoid being summoned for not having sufficient closet accommodation.

It was objected on the part of the appellants (a) that the by-law No. 26 of the London County Council made under sect. 39 (1) of the Public Health (London) Act 1891, so far as it required the landlord or owner of any lodging-house to provide and maintain in connection with such house water-closet accommodation in the proportion of one water-closet for every twelve persons, was *ultra vires* and illegal, and that the magistrate had therefore no jurisdiction to deal with the complaint; and, further, (b) that, before any offence could be committed against the by-laws if valid, a notice from the sanitary authority was necessary; and also (c) that the by-law, if valid, did not apply to the appellants, as they were not the owners of the premises within the meaning of the by-laws.

The magistrate overruled the objection and convicted the appellants.

In the by-laws in question it was provided by No. 26:

The occupier of any premises shall cause every water-closet to such premises to be thoroughly cleansed from time to time as often as may be necessary for the purpose of keeping such water-closet in cleanly condition. The occupier of any premises shall once at least in every week cause every earth-closet, privy, and receptacle for dung belonging to such premises to be emptied and thoroughly cleansed. The occupier of any premises shall at least once in every three months cause every cesspool belonging to such premises to be emptied and thoroughly cleansed. Provided that where two or more lodgers in a lodging-house are entitled to the use in

common of any water-closet, earth-closet, privy, cesspool, or receptacle for dung the landlord shall cause such water-closet, earth-closet, privy, cesspool, or receptacle for dung to be cleansed and emptied as aforesaid. The landlord or owner of any lodging-house shall provide and maintain in connection with such house water-closet, earth-closet, or privy accommodation in the proportion of not less than one water-closet, earth-closet, or privy for every twelve persons. For the purposes of this by-law "a lodging-house" means a house or part of a house which is let in lodgings or occupied by members of more than one family. "Landlord," in relation to a house or part of a house which is let in lodgings or occupied by members of more than one family, means the person (whatever may be the nature or extent of his interest) by whom or on whose behalf such house or part of a house is let in lodgings or for occupation by members of more than one family, or who for the time being receives or is entitled to receive the profits arising from such letting. "Lodger," in relation to a house or part of a house which is let in lodgings or occupied by members of more than one family, means a person to whom any room or rooms in such house or part of a house may be let as a lodging or for his use or occupation. Nothing in this by-law shall extend to any common lodging-house.

Under these by-laws a penalty was provided upon breach, but they contained no provision as to notice to the landlord or owner.

Woodfin (Knight with him) for the appellants.—This by-law purports to be made under sect. 39 of the Public Health (London) Act 1891, but it is not one relating to water-closets, &c., as mentioned in the section, but with regard to lodging-houses. The present by-law is unreasonable and repugnant to the statute, for it does not require notice to be given, and sect. 37 of the Act of 1891 requires a notice. It is therefore *ultra vires* and void. It is also repugnant to the common law, because by its provisions the sanitary authority has power to compel a person who has no power to act to commit a tort.

Courthope-Munroe for the respondents.—The by-law is valid and reasonable even although notice is not required. Notice is only required to be given under sect. 37 of the Public Health (London) Act 1891. He referred to

Salt v. Scott Hall, 86 L. T. Rep. 868; (1903) 2 K. B. 245.

Lord ALVERSTONE, C.J.—I think the objection taken to this by-law by Mr. Woodfin in the way he has stated it is a good objection. In reply he summarised his argument very concisely and neatly by stating that it was objected before the magistrate that the by-law was unreasonable because in the analogous circumstances under sect. 37 it is contemplated that the sanitary authority shall give a specific notice; that this by-law contemplates none; and therefore the by-law is unreasonable. I think in substance that is a good objection. I have no doubt whatever as to the power of the county council to make these by-laws. I think the point taken by Mr. Woodfin originally—that this must be regarded as a lodging-house notice, and that, inasmuch as lodging-house water-closet accommodation is not governed by sect. 94, this lodging-house by-law for providing water-closets is bad—is not a good point. I agree with Mr. Courthope-Munroe's argument that sect. 39 is a re-enactment with some amendment of the old provision which now puts upon the county council the duty which was previously put

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upon certain other local authorities. I think, therefore, that under sect. 39 this is quite within that section. That these sanitary powers ought to be construed liberally, we have often pointed out. It is competent to the county council to make an order in connection with the water-closet by-laws that there shall be what they think at any rate a right and proper minimum of water-closet accommodation in respect of any tenement or any class of tenement, but that does not decide the question for reasons which I think will appear to be obvious. Sub-sect. 3 of sect. 39 imposes the duty upon the sanitary authority of observing and enforcing the by-laws under this section. The by-laws themselves contemplate that any person who offends against one of the by-laws shall be liable for every such offence to a penalty of 5*l*. This case illustrates the importance of there being some notice given to the person complained of. Nokes and Nokes collected the rent which Gates paid, and I agree with the argument of Mr. Courthope-Munroe that, having regard to sect. 141, they ought to be treated as standing in the position of their clients. There is no doubt about that. On the other hand, Gates is the responsible person for allowing more than the twelve persons to be in the house with one water-closet. Therefore it is a case in which injustice may be done if proceedings are taken against people who may have partly parted or wholly parted with the control of their premises, unless some notice is given to them before proceedings are taken, because they may attempt to put pressure on their tenants to reduce the number of such tenants, as was done here. But why I think the by-law, which does not contemplate any notice being given to the landlord or owner before he is proceeded against for a penalty, is bad is because I find—the sanitary authority being the persons who are to say what is the minimum number of water-closets which according to the circumstances are to be required, and the sanitary authority being the persons who have power with regard to any house, whether built before or after the commencement of the Act, to say what is a sufficient water-closet accommodation for a given number of people, and who have to give a statutory notice calling upon the landlord or owner to provide that the terms of sect. 37 shall be carried out, and that if not he shall be liable to a penalty of 5*l*.—sect. 37 contemplates that the authority shall give notice to the landlord or owner before proceedings are taken. I think, therefore, this objection to a by-law which imposes a penalty for the breach of it, especially when you remember it is intended to be put in force against people who are not in fact owners, but are put in the position of owners, is a good one, and that there should be the same kind of notice given to them before proceedings are taken as is contemplated by sect. 37. I think, therefore, this by-law, which provides that proceedings may be taken and that the landlord shall provide closet accommodation, and does not make provision for a notice to be given before proceedings are taken, is not a reasonable by-law.

LAWRANCE, J.—I agree.

KENNEDY, J. concurred.

Appeal allowed.

Solicitors: A. D. Levi; A. M. Bramall.

Wednesday, Dec. 9, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

McNAIR (app.) v. BAKER (resp.). (a)

Metropolis—Smoke—Chimney of club—Smoke from cooking ranges and heating apparatus—“Private dwelling-house”—Public Health (London) Act 1891 (54 & 55 Vict. c. 76), s. 24 (b).

The chimney of a club of 750 members, such club containing the usual club accommodation, emitting smoke from the cooking ranges and the furnaces of a vertical boiler used for heating the premises, is not the chimney of a “private dwelling-house” within the exception contained in sect. 24 (b) of the Public Health (London) Act 1891.

CASE stated on a complaint preferred by the appellant against the respondent for making default in complying with the requisitions of a notice requiring him to abate a nuisance arising from black smoke having been allowed to issue from a furnace chimney, and to prevent a recurrence of the same.

The appellant was a sanitary inspector of the city of Westminster.

The respondent was the secretary of the St. James' Club, situate at No. 106, Piccadilly, within the city of Westminster, and represented the club.

In consequence of information received by the appellant of the issue of black smoke from the premises of the club, the premises were watched by the appellant in October. Quantities of black smoke were in that month, and also in the months of November and December, observed to issue from the premises.

On the 1st Oct. an intimation notice was served by the appellant on the club.

The issue of black smoke did not abate, and on the 31st Oct. a statutory notice was duly served on the club, but the issue of black smoke continued.

The club is managed by a committee, and has occupied the premises for thirty or forty years past. Previously the premises were used as the French Embassy. The club consists of 750 members, and its premises comprise the ordinary accommodation of a West-end club. There are two dining-rooms for the general use of members, and there are also private dining-rooms which may be engaged by members without extra payment for special occasions. There are five bedrooms for the use of members, four of which may be hired by members respectively for a week only at one time, and one of which may at the discretion of the committee be hired by a member for three, six, nine, or twelve months at one time respectively. The use of the bedrooms is in these and other respects subject to the rules of the club and the regulations of the committee thereunder. There are eight other bedrooms for the use of the staff of the club. The club is open during particular hours according to the rules. The food is bought by the committee and sold to members.

In the basement of the premises there are several covered-in cooking ranges, a large roasting-grate, and a vertical boiler with furnace attached. The smoke from these various arrangements dis-

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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charges into one flue, which is the chimney complained of herein. The principal part of the smoke emitted from the flue, originated in the furnace and boiler. The furnace and boiler were used for the purpose of heating the premises.

On the hearing of the summons it was submitted by the respondent that the chimney was the chimney of a "private dwelling-house" within sect. 24 (b) and was therefore not liable to be dealt with under the provisions of the Public Health (London) Act 1891.

The appellant by his counsel contended that the words "private dwelling-house" meant a family residence or home, and that the use of the premises excluded them from the exemption of the section, and that as the chimney sent forth black smoke in such quantity as to be a nuisance it was liable to be dealt with under the Act.

The magistrate found as a fact that the respondent did not abate the nuisance or do what was necessary to prevent the recurrence of the same or otherwise comply with the statutory notice. He further found as a fact that the chimney of the club sent forth black smoke in such quantity as to be a nuisance. But he held, on the construction of the section of the Act, that the chimney was the chimney of a private dwelling-house, and that the premises as used by the club were a private dwelling-house within the meaning of the section, and he dismissed the summons.

The question upon which the opinion of the court was desired was whether, upon the facts set out, the chimney was the chimney of a private dwelling-house, and whether the premises of the St. James' Club, as used by the club, were a private dwelling-house within sect. 24 (b) of the Public Health (London) Act 1891.

Macmorran, K.C. (J. Hurst with him) for the appellant.—The magistrate was wrong in holding that this chimney was "the chimney of a private dwelling-house," and so was within the exception contained in sect. 24 (b) of the Public Health (London) Act 1891. In *German v. Chapman* (37 L. T. Rep. 685; 7 Ch. Div. 271) a building for the education and lodging of 100 girls in connection with a charitable institution supported by voluntary contributions was held to be a breach of a covenant to use any house or building erected upon certain land "for a private dwelling-house only," and in *Hobson v. Tulloch* (78 L. T. Rep. 224; (1898) 1 Ch. 424) using a house as a boarding-house for scholars attending a school in the neighbourhood kept by the owner of the house was held to be a breach of a covenant not to use the house "for any other purpose than a private residence." Again, where a landlord entered into an agreement to let a residential flat to a tenant under conditions and regulations which clearly showed that the building in which the flat was situated was intended to be used for residential flats only, he was restrained in *Hudson v. Cripps* (73 L. T. Rep. 741; (1896) 1 Ch. 265) from turning a large part of the building into a club. He referred to

Queen Anne Residential Mansions and Hotel Company v. Mayor of Westminster, 46 Sol. Jo. 70.

Boydell Houghton for the respondent.—This club was a private dwelling-house within the meaning of the section, and was not used in any sense for the purpose of trade. The cases quoted

are quite different from the present one, and, when one looks at sect. 24 (a), the magistrate arrived at a correct finding of fact so far as sect. 24 (b) is concerned.

Lord ALVERSTONE, C.J.—Mr. Boydell Houghton has argued this case in the only way it could be argued, supporting the view that the magistrate has taken a correct view of the section. The magistrate has not found a finding of fact binding on us, but has held, on the construction of the Act, that the chimney was a chimney of a private dwelling-house. He has found that this building was used for the residence of some 750 members, and that there was cooking going on for them when they came in, and that the warming of the whole club was done by the furnace, and that, in addition to the bedrooms for members which could be let out, there were the bedrooms for the servants. We have got to say whether this is a chimney of a private dwelling-house or not. Quite apart from the authorities, and the authorities Mr. Macmorran has cited are all in favour of his view, to my mind it is quite impossible to come to the conclusion as a matter of law that a chimney such as this is described to be is the chimney of a private dwelling-house. I am not dealing with the original construction of the building, nor how it might be used, but as it is to-day. After enumerating a number of furnaces and fireplaces that come within the Act, the section says, "Any chimney sending forth black smoke in such quantity (not being the chimney of a private dwelling-house) as to be a nuisance." In my opinion it cannot be contended that, looking at the fair construction of that section, this is the chimney of a private dwelling-house, and I think the magistrate ought to have convicted.

LAWRANCE, J.—I agree.

KENNEDY, J.—I agree.

Appeal allowed.

Solicitors: Allen and Son; Norton, Rose, and Norton.

Wednesday, Dec. 9, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

USK URBAN DISTRICT COUNCIL (apps.) v. MORTIMER (resp.). (a)

Public health—Dangerous structure—Costs incurred by authority—Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), s. 75—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 160, 257—Costs of appellant where respondent does not appear—Practice.

Sect. 257 of the Public Health Act 1875 does not apply to sect. 75 of the Towns Improvement Clauses Act 1847, incorporated in the Act of 1875 by sect. 160.

Expenses of putting up a hoarding under sect. 75 of the Act of 1847 can be therefore recovered, although three months have not elapsed since the demand.

Costs may be granted in a proper case against a respondent, the defendant before the justices, even although he does not appear upon the appeal.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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CASE stated on a complaint to recover the sum of 1l. 10s. 6d. for expenses incurred upon default of compliance with a notice under sect. 160 of the Public Health Act 1875.

At the hearing of the complaint it was proved on behalf of the appellants that on the 13th Nov. 1902 the surveyor to the appellants reported to them that the roof of a certain house (for which the respondent acted as agent) was in a dangerous state, and that on the 17th Nov. the surveyor, pursuant to sect. 75 of the Towns Improvement Clauses Act 1847, incorporated by sect. 160 of the Public Health Act 1875, served a notice personally upon the respondent calling upon him within three days to take down or repair the roof, and that in default of his so doing complaint would be made before two justices in accordance with the provisions of the statutes in that case made and provided.

The terms of this notice were not complied with, and the appellants, pursuant to the section, caused a hoarding to be erected in front of the house on the 31st Dec. 1902, and the charges of the person employed to erect such hoarding, amounting to the sum of 1l. 8s., had been paid by the appellants.

A summons had been applied for by the appellants against the respondent, but was not proceeded with as in the meantime the dangerous building had been made safe by the respondent.

On the 13th Feb. 1903 a formal demand for payment of 1l. 8s. and of 2s. 6d., the cost of the summons, was made by the appellants upon the respondent.

On behalf of the respondent it was contended that, inasmuch as the three months had not elapsed since the date of the demand upon him, as allowed in cases of apportionment by sect. 257 of the Public Health Act 1875, the complaint laid by the appellants was premature (the date of the complaint being the 6th May 1903), and that the respondent was entitled to go to arbitration as to the amount payable.

The justices upheld this contention and dismissed the complaint.

S. R. C. Bosanquet for the appellants.—In this case the work was done and the expense thereof was payable by the owner by sect. 75 of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), which is incorporated by sect. 160 of the Public Health Act 1875 (38 & 39 Vict. c. 55). Sect. 257 of the Act of 1875 does not apply to this case at all, and the justices were wrong in holding that it did. He referred to

Mayor of Folkestone v. Brooks, 69 L. T. Rep. 403; (1893) 3 Ch. 22.

The respondent did not appear.

Lord ALVERSTONE, C.J.—I think the view of the appellants is right. The Towns Improvement Clauses Act 1847 provides by sect. 75 that all the expenses of putting up the hoarding or fence shall be paid by the owner. There is no question as to joint owners here, or as to the liability of any other persons to pay. It is said that, because under sect. 257 of the Public Health Act 1875, where expenses have been settled and apportioned by the surveyor of the local authority as payable by the owner, such apportionment is to be binding and conclusive unless within three months he disputes them, the amount here is not payable as it can be disputed, and, as that section applies, the

respondent can go to arbitration as to what should be apportioned on him. That is not so. There is no question of apportionment here. All that might arise would be a question of amount.

LAWRANCE and KENNEDY concurred.

Bosanquet asked for the costs although the respondent did not appear.

Lord ALVERSTONE, C.J.—Although it is not the general practice of this court to give costs against a respondent who does not appear on an appeal and who was the defendant in the court below, the view of the court is that our discretion is not fettered by any rule. It is only the practice not to give costs in such cases in the absence of special circumstances. Here the application to the justices was in the nature of a civil proceeding to recover a debt, and, as the respondent saw fit to raise an untenable defence of this kind, I think here we can grant costs against him.

Judgment accordingly.

Solicitors: *Le Brasseur* and *Oakley*, for *Le Brasseur* and *Bowen*, Pontypool.

Dec. 9 and 10, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

GARBUTT (app.) v. DURHAM JOINT COMMITTEE (resps.). (a)

Police—Pension—Approved service—Continuous service—Break in service—Police Act 1890 (53 & 54 Vict. c. 45), s. 1.

The "approved service" referred to in sect. 1 of the Police Act 1890 must be continuous service to entitle a constable to a pension.

CASE stated by quarter sessions on an application made on behalf of the appellant, a retired police constable, by way of appeal against the refusal of the standing joint committee to admit his claim to a pension under the Police Act 1890.

On the hearing of the application the appellant relied upon a certificate of approved service for upwards of twenty-five years which was produced, and which (save for the objection hereinafter mentioned) was admitted to be a certificate duly given under the Act and to refer to the appellant.

The certificate showed service for twenty-five years and ninety-nine days, but also showed two breaks in the service of four and two months respectively, such breaks not being included in the above period.

The respondents tendered evidence to the effect that the service of the appellant during the period had not in fact been diligent and faithful service, and contended that the certificate related to the period of service and was not conclusive evidence, and that the acting chief constable could not certify as to character, which appeared from the police records, and that the joint committee were entitled to exercise their discretion as to granting or withholding a pension on the ground of misconduct.

The appellant contended that it was not open to the respondents to contradict the certificate,

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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and that such evidence was therefore inadmissible.

On this point the justices agreed with the contention of the appellant, and refused to receive evidence as to the character of the appellant.

The respondents further contended that, upon the true construction of the Act, it was necessary that the whole period of service of twenty-five years should be continuous in order to entitle the appellant to a pension in respect thereof.

The appellant contended that the period need not be continuous, and further contended that even so the certificate of approved service once given precluded the respondents from raising this point.

The Court of Quarter Sessions considered that the Act required that the whole period should be continuous, and, inasmuch as the certificate showed on its face that there had been two breaks in the period of service, they considered that it was open to the respondents to raise this point.

They accordingly dismissed the application.

Pickersgill (*Simey* with him) for the appellant.—At the end of the certificate showing the service, the chief constable states: "I certify that the term of approved service entered above has been diligent and faithful service within the meaning of sect. 4 of the Police Act 1890." Under that section the certificate by the chief officer of the police force as to the period of a constable's approved service is to be "sufficient evidence" thereof. The respondents therefore cannot go behind this certificate, and so the appellant here, having completed not less than twenty-five years' approved service, is entitled to his pension under sect. 1 of the Police Act 1890. Nowhere does it appear by that statute that this approved service must be continuous. That deduction cannot be drawn merely because in other sections of the Act a constable is allowed to include in the length of time of his service approved service with another police force or service with the army reserve when called out for war or training.

M. Shearman, K.C. (*Meynell* with him) for the respondents.—It is true that sect. 4 of the Act of 1890 says that the certificate of the chief officer of the police force shall be sufficient evidence, but it does not say that it shall be conclusive evidence. When the certificate is looked at it shows two breaks in the service. When the whole statute is looked at it is clear that approved service must be continuous service to entitle the constable to a pension. He referred to

Civil Officers' Pensions Act 1869 (32 & 33 Vict. c. 60);

Walker v. Simpson, 88 L. T. Rep. 306; (1903) A. C. 208.

By sect. 21, the police authorities, if the constable has not been dismissed, have power to return the deductions that have been made if the constable leaves without pension or gratuity. If the contention of the appellant is correct, a constable might get these deductions, rejoin again, and yet in the end get his pension, although he might have resigned and rejoined several times.

Pickersgill in reply.

Lord ALVERSTONE, C.J.—This case is not free from difficulty, and I certainly think it very desirable that the matter should be put beyond all question by some amending Act, or by some

regulation, if such can be made, which will produce that result. I am, however, of opinion that, upon the construction of the Act, the service referred to must be continuous service. I wish to say in this case, and I will deal with the matter in a moment, that there seem to be peculiar difficulties in the way that do not always arise. There is, as far as I can gather, no certificate of the police authority and there is no order of the police authority under sub-sect. 1 of sect. 4. I do not say that there was none in this case, but all I say is that none has been produced before us. The document that came before us was the certificate signed by the chief officer of the police under sub-sect. 2 of sect. 4, and I have no doubt that that is intended to be sufficient evidence of the period of the constable's approved service in any particular force. But that, of course, does not touch the question that we are dealing with, and whether or not that certificate could be gone behind is another matter which it is not necessary for us to consider. I should have thought that it would require a very strong case to go behind that certificate; but, be that as it may, I only desire to point out that we are not here dealing with the order of the authority, the standing committee of the quarter sessions and the county council, made under sub-sect. 1 of sect. 4. Therefore the case which comes before us is this: There is the certificate under sub-sect. 2 of sect. 4, which shows twenty-five years and ninety-nine days' service made up of three periods, there being a break of four months in 1881 when the constable resigned, he then being a first class constable, and he was afterwards reinstated as a second class constable. Mr. *Pickersgill* has said that he resigned of his own free will and was not dismissed. I will take it so, but, if that is so, it rather makes clear, what I think is the real construction of this certificate, that he re-engaged himself. Then he was called upon to resign in Feb. 1899, and he was reinstated as a second class constable in April 1899. In other words, there are two breaks, and I think it must be taken that either he was called upon to resign or that he did resign. Therefore what we have to consider is whether "approved service" in this Act means continuous service, or means service that may be made up of certain periods with breaks. I should like to say that it seems to me that the words taken by themselves do not in any way indicate the service might not be made up of several periods. If we take the case of *Walker v. Simpson* (*sup.*) to which Mr. *Shearman* called attention in the Privy Council, where they were dealing with the question of what was service, I can see no difficulty or doubt that under those circumstances, as Lord Macnaghten there pointed out, the service for a certain time may be a service made up of broken periods. But what we have to consider is what was meant in this Act, and, although I do not come to the conclusion without doubt, I think, looking at this Act, there are certain clauses which show that it must have been meant to have been continuous service, or else the clauses are absolutely unnecessary. The first section speaks of a man completing not less than twenty-five years' approved service and completing fifteen years' approved service. That of itself does not, to my mind, decide the case, but it rather points in the direction of the period

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being completed, I think, as a continuous period. But of course that might be very easily rebutted, because the transmission from it is so very small by the subsequent provisions. Therefore we have got to see what light is thrown upon it by the other provisions. Now, the first important provision is under sub-sect. 1 of sect. 4: "The service of a constable for the purposes of this Act shall be subject to such deductions in respect of sickness, misconduct, or neglect of duty as may be made therefrom in pursuance of the regulations of the force to which the constable belongs; and the expression 'approved service' shall for the purposes of this Act mean such service as may after such deductions as aforesaid (if any) be certified under the order of the police authority to have been diligent and faithful service." Again I think, to a certain extent, it rather supports Mr. Shearman's view, because it speaks of deductions in respect of sickness, misconduct, or neglect of duty, which would refer to the period when a man was, so to speak, serving, but it is not conclusive, because it is quite possible to apply those words to the several periods of service and to make a deduction for each period, and then the sum total of the various periods—the deductions having already been made—will come up to the twenty-five years. So that again you have got a section which is not a conclusive one, but which, I think, favours the view of the service being continuous. Sub-sect. 4, about the man shifting from one force to another, which was relied upon by Mr. Shearman, I do not think touches the question at all. That was necessary, because it might be thought that the man's service in one force would not be continuous service in another force, and therefore that was necessary to entitle men to count service in force A as being approved service in force B. But sub-sect. 5 does seem to be quite different. If Mr. Pickersgill's argument is correct, that all periods are to be added, then why should sub-sect. 5 be added, that where the constable with the knowledge of the police authority is called out for training or for permanent services, he shall be entitled after returning to the police force after the end of such training or service to reckon any approved service which he was entitled to reckon at the commencement. Now, if there was ever a case in which such a break as that ought not to make any difference and that therefore the man would be entitled to add together the pieces of service which he had performed, you would think that that would be the case, and yet you see that it has to be provided for by express enactment. Therefore that seems to point in the direction of absence from the force without such leave as not being considered part of the approved service, there being a direction that he shall be entitled to reckon what he was entitled to at the commencement of his absence as approved service in the force. Then, if you come to sect. 5, sub-sect. 5, which is the section which deals with disablement and incapacity during the service, we find a corresponding provision which again is, I think, absolutely unnecessary if Mr. Pickersgill's argument is right—namely, that all these periods may be added together. That says: "Where a constable so serves again, the provisions of this Act as to retirement and pensions, allowances, and gratuities shall apply as if he

had not previously retired, save that, except in the case of a pension for non-accidental injuries received in the execution of duty, he shall not reckon as approved service the time which elapsed between his former retirement and the commencement of his service again." That, again, may point to a case in which the break is especially provided for by allowing the provisions to apply as though the man had not previously retired. Now, I think it is a strong thing to say, in the face of those two provisions, that if a man chooses to absent himself from the force for however long a period or for whatever purposes he likes, he can claim that the twenty-five years' service can be made up of broken periods. There was one more section to which our attention was called by Mr. Shearman which shows what the scheme of the Act was. Sect. 21 refers to a man being retired without getting a pension, and again it says that: "If a constable not having been dismissed leaves a police force without a pension or gratuity, the police authority may, if it seems to them just, pay him the whole or part of the rateable deductions which have been made from his pay." Again, that is not conclusive, because Mr. Pickersgill would be entitled to say: "If a man does not claim any repayment of the deductions, he ought to be allowed when he goes on service at the latter period to add two, three, or four periods together." I agree that that is not conclusive, but it does seem to me to support the view that the Legislature was dealing with continuous service, and was therefore providing for a man going out of the service before the time when he was in a position to claim a pension. For these reasons I think that the decision of the quarter sessions was right, and that the appeal should be dismissed.

LAWRANCE, J.—I am of the same opinion, and it is impossible to say, reading these sections, that they are consistent with the argument that any number of periods of service may be added together for the purpose of ensuring the pension. It is one of numerous instances in Acts of Parliament where by the insertion of one word the framers of the Act might have made their meaning perfectly clear, whereas in this instance, in order to see what is the meaning of the Act, it is necessary to look through the whole of the sections to see whether the service is to be a continuous service or not. If the framers of the Act had used the words "continuous service," there would have been no difficulty whatever.

KENNEDY, J.—I think it is certainly strange and also very unfortunate that the Legislature in passing this important Act has left to the administrators of the Act, or those who have to deal with it judicially, to infer from the sections indirectly that which is obviously a most important part of the scheme—namely, whether the right to pensions is dependent upon a continuous and uninterrupted service, or, as was held by the Privy Council in the case of *Walker v. Simpson* (sup.), the service might be made up of various terms of service with interruptions or breaks between. I am afraid that I feel a good deal more doubt than my Lord and my brother Lawrance as to the right inference to be drawn from this section. I hope it is not unreasonable that, in construing an Act of this kind, where one

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is admittedly driven to an interpretation on an important point by inference from various sections up and down the Act, to say that it is not absent from one's mind that the decision, from which I am not going to dissent, certainly cannot tend to enhance the popularity of the service which is of the highest importance to the community. I approach the Act with a feeling that certainly, if a man has served creditably and with merit for twenty-five years to earn a pension, there may be cases in which—as to the merits of the present case I say nothing one way or the other—an officer who for a short time may have left the service and been invited by his superior to return to it would be, I think, perhaps hardly treated in the opinion of many if the ten years or so that he has first faithfully served should not form part of the consideration in the pension which the Act allows. I feel rather pressed also by this, that I think that the view which should be taken is the view which I understand Lord Macnaghten to have given his high authority to in the case of *Walker v. Simpson* (sup.)—namely, that *prima facie*, if you serve twenty-five years under a certain head or office, you should be entitled to a pension. It was for those who say that such services must be continuous to have inserted a word which would convey that, and it would have been simple to have said, as my brother Lawrance has pointed out, “continuous service.” The absence of a phrase to qualify what has *prima facie* a different meaning seems to me, reading the whole of the Act, to be at any rate an inference not unjustly to be drawn in favour of the view which the appellant takes here. But it is conceded that, in order to construe an Act of Parliament of this kind rightly, you must look at the whole Act. If I find distinct provisions which certainly I am not capable of explaining, except upon the basis that those who framed it had in view continuous service, I am not prepared to dissent. I entirely agree with my Lord that it is very difficult, reading sub-sect. 5 of sect. 5 and sub-sect. 5 of sect. 4, if it was to be the basis of the Act that the service need not be continuous, to see why these provisions should be inserted which provide for the treatment as continuous service of service with certain specified breaks, because, of course, otherwise such provisions would appear to be needless. I am not prepared to dissent, therefore, from the judgment which has been pronounced by my Lord and my brother Lawrance.

Appeal dismissed.

Solicitors: *Bell, Brodrick, and Gray*, for *A. Geipel*, West Hartlepool; *Simey, Son, and Iliffe*, Sunderland.

Wednesday, Dec. 16, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

BARNETT (app.) v. COVELL (resp.). (a)

Local government—Hoarding—“Abutting” on street.

A hoarding for advertisements 60ft. long and 12ft. above a hedge, no part of such hoarding being nearer to the street than 2ft. and having the hedge between it and the street, does not “abut” on the street.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

CASE stated on an information charging the respondent for unlawfully erecting a hoarding abutting on a street, contrary to sect. 87 of the Ilfracombe Improvement Act 1900 (63 & 64 Vict. c. cxxiii.).

Upon hearing the information it was proved that Slade-road is a street within the limits of the Ilfracombe Improvement Act 1900, and that the respondent had without the consent of the Ilfracombe Urban District Council erected a hoarding to be used for advertising purposes in the field adjoining Slade-road. The hoarding was erected on the centre of the hedge bank, so that, as the hedge was from 4ft. to 6ft. 8in. thick, the distance from the hoarding to the foot of the hedge bank varied from 2ft. to 3ft. 4in., and the boarded part was about 60ft. in length and about 12ft. above the top of the hedge.

The appellant contended that “abutting” meant “bordering,” and that the hoarding came within the section, and he cited the following cases in support thereof: *Wakefield Local Board of Health v. Lee* (35 L. T. Rep. 481; 1 Ex. Div. 336) and *Newport Urban Sanitary Authority v. Graham* (47 L. T. Rep. 98; 9 Q. B. Div. 183).

The respondent contended that for the hoarding to abut on the street there must be a contact with the street, and that, as the hoarding was at its nearest point 2ft. away from the street, no such contact existed, and that consequently the hoarding did not abut on the street, nor did it adjoin the street, and he quoted the cases of *Rex v. Hodges* (Mood. & M. 341), *Vale and Sons v. Moorgate, &c., Buildings Limited* (80 L. T. Rep. 487), and *Ind Coope v. Hamblin* (84 L. T. Rep. 168).

The justices found from the evidence that the respondent had erected a hoarding for advertising purposes inside a field fronting the street known as Slade-road and parallel therewith; that about half the thickness of the hedge in the field was between the hoarding and the street, and that no part of the hoarding was nearer than 2ft. They therefore were of opinion that the hoarding did not abut on the street.

By sect. 87 of the Ilfracombe Improvement Act 1900 (63 & 64 Vict. c. cxxiii.) it is enacted:

(1) Every hoarding or similar structure in or abutting on or adjoining any street shall be securely erected and maintained. (2) It shall not be lawful, after the passing of this Act, to erect any hoarding or similar structure to be used either wholly or partly for advertising purposes in or abutting on or adjoining any street without the consent of the council, and such consent may be given subject to such conditions as to the submission of a plan and elevation and as to the maintenance of such hoarding as the council may determine. (3) The owner or other person using any hoarding, wall, or similar structure for advertising purposes, whether erected before or after the passing of this Act, shall at all times hereafter keep and maintain the same in proper and safe repair and condition, and in the event of any papers affixed for advertising purposes to such hoarding, wall, or other structure falling off or becoming detached shall forthwith remove and clear away such papers. (4) Any person who acts in contravention of any of the provisions of this section, or who violates any conditions or the terms of any consent given in pursuance of such provisions, shall be liable to a penalty not exceeding 5s. and to a daily penalty not exceeding 20s. (5) Any consent or condition made under this section may be under the hands of the clerk or surveyor.

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Graham Campbell for the appellant.—The word “abut” goes further than “adjoin,” and means bordering upon, and the justices ought to have convicted the respondent under sect. 87 of the statute. In *Wakefield Local Board of Health v. Lee* (35 L. T. Rep. 481; 1 Ex. Div. 336), where the respondent’s premises were divided from a street by a small stream, but by two bridges over the stream their premises were connected with it, it was held that the premises fronted and abutted upon this street. In *Newport Urban Sanitary Authority v. Graham* (47 L. T. Rep. 98; 9 Q. B. Div. 183) at the rear of the premises in question was a footpath at the end of a street which formed a *cul de sac*. The ground at the back of these premises was 5ft. above the level of the footpath and street and there was a wall 12ft. high, and no access existed to the footpath or street from the premises. It was, however, held that the premises adjoined or abutted on the street.

Kimber for the respondent.—This hoarding does not abut, for the word means “coming to the end or edge of,” which the case finds the hoarding does not. In order to abut on a street there must be contact with the street, but here no part of the hoarding comes within 2ft.

Lord ALVERSTONE, C.J.—I am very anxious not to say anything which may be construed as laying down any general rule as to the meaning of the word “abut,” for it is really a question of fact. We must take it here that a licensee has erected a hoarding on another man’s land, and that there is a continuous strip of land between the street and the support of the hoarding. Now, the Act says that no hoarding is to be erected for advertising purposes abutting on a street without the consent of the council, and it is a penal statute that must be construed strictly. No doubt if the hoarding was put back 10ft. it would be equally unsightly, but no one could contend that it abutted on the street. Here a strip was left between the hoarding and the street, and, that being so, the hoarding does not abut, for, in speaking of land, abutting means touching and adjoining. When you contrast the hoarding and the land, the land is touching and therefore abutting on the street, and the hoarding, being some way back, does not touch the street and so does not abut.

LAWRANCE and KENNEDY, JJ. agreed.

Appeal dismissed.

Solicitors: *J. H. Brewer, Ilfracombe; White-lock and Storr, for A. R. Whitelock, Birmingham.*

Wednesday, Dec. 16, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

DICKINSON (app.) v. FORSYTH (resp.). (a)

Local government—By-law—Erecting shed—Neglecting to comply with notice—Sufficiency of notice.

By certain by-laws Nos. 53 and 96 it was provided that if any person should erect new domestic buildings certain open space was to be provided, and anyone who was intending to erect a building was to give notice to the council and deliver plans thereof, a description of the materials to be used, and other details.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

By by-law No. 98, where a person who has erected a building or done any other work to which the by-laws apply receives a notice in writing specifying any matters in respect of which the erection or the work is in contravention of any by-law, such person must cause anything done in contravention to be amended.

A notice was served stating: “I am directed . . . to call your attention to the fact that a wooden erection has been made . . . contrary to Nos. 53 and 96 of the by-laws. . . .”

Held, that such notice was sufficient.

CASE stated on an information preferred by the appellant against the respondent for having erected a shed contrary to a certain by-law No. 53, and, having had notice requiring him to remove the same, unlawfully neglected to comply with the notice, contrary to by-law No. 98.

The following is a copy of the notice, dated the 2nd Dec. 1902, served by the surveyor of the district council and referred to in the information, and service of which on the respondent was admitted:

I am directed by this council to draw your attention to the fact that a wooden erection has been made in the back yard of your property situate at No. 20, Avondale-terrace, Chester-le-Street, contrary to Nos. 53 and 96 of the by-laws relating to new streets and buildings in force in this district, and you are hereby requested to cause the erection above referred to to be removed within twenty-one days from this date. I would further respectfully remind you that you are required by law to let me have a notice in writing if the work above referred to is completed.

The shed complained of in the information was built by the respondent, and it was also proved that the shed, which was 7ft. in height, caused the open space in the rear of the respondent’s dwelling-house to the boundary wall opposite to be less than 15ft., contrary to the by-law No. 53. It was also admitted that the shed was erected after the building of the dwelling-house had been completed, and that no plan for its erection had been previously submitted to the surveyor for the approval of the district council. And the surveyor stated on oath that he did not discover that the shed had been erected until the month of Nov. 1902, and it was further admitted that between the service of the notice of the 2nd Dec. 1902 and the laying of the information depositions from the respondent had waited on the district council, and negotiations had taken place with reference to the notice that had been served, but no conclusion had been arrived at.

It was alleged on behalf of the respondent, although no evidence was called to prove it, that the shed had been built several months prior to the notice of the 2nd Dec. 1902, and, further, that, notwithstanding the erection of the shed, there still remained an aggregate open air space at the rear of the respondent’s dwelling-house of 259 square feet, being 109 square feet beyond the requirements of by-law No. 53 in that behalf.

The respondent’s solicitor took the following objections—namely, (a) that the proceedings were not duly authorised by the district council pursuant to sect. 259 of the Public Health Act 1875; (b) that the notice of the 2nd Dec. 1902 was not given by the surveyor of the council within a reasonable time after the erection of the building as required by by-law No. 98; (c) that the notice was bad in law in that it did

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not, as required by by-law No. 98, specify the matters in respect of which the erection of the building was in contravention of by-laws Nos. 53 and 96, such by-laws being capable of contravention in various matters.

With regard to objection (a) the appellant stated on oath that the proceedings were authorised by the council held on the 26th Feb. 1903, at which the report of the buildings committee recommending that proceedings be taken against the respondent for breach of the by-laws was read and adopted by the council. Neither the minute-book of the council nor anything in writing was produced, but, as the proceedings were instituted by the appellant as clerk of the council, the justices were of opinion that they were duly authorised.

With regard to objection (b) there was no formal evidence given as to when the building complained of was erected by the respondent, and as the justices had decided to dismiss the case upon the point raised by the respondent's objection (c) they did not express any opinion as to whether the notice was given by the surveyor to the respondent within a reasonable time after the erection of the building, as required by by-law No. 98.

With regard to objection (c) the justices were of opinion that the notice of the 2nd Dec. 1902 was bad in law in that it did not, as required by by-law No. 98, specify the matters in respect of which the erection of the building contravened the provisions of by-laws Nos. 53 and 96 referred to in such notice, and they dismissed the information.

By the by-laws in question it was provided :

53. Every person who shall erect a new domestic building shall provide in the rear of such building an open space exclusively belonging to such building and of an aggregate extent of not less than 150 square feet and free from any erection thereon above the level of the ground except a water-closet, earth-closet, or privy and a sahpit; and he shall cause such open space to extend laterally throughout the entire width of such building, and he shall cause the distance across such open space from every part of such building to the boundary of any lands or premises immediately opposite or adjoining the site of such building to be no less in any case than 10ft. If the height of such building be 15ft. he shall cause such distance to be 15ft. at the least. If the height of such building be 25ft. he shall cause such distance to be 20ft. at the least. If the height of such building be 35ft. or exceed 35ft. he shall cause such distance to be 25ft. at the least. A person who shall make any alteration in or addition to such building shall not, by such alteration or addition, diminish the aggregate extent of open space provided in pursuance of this by-law in connection with such building, or in any other respect fail to comply with any provision of this by-law. For the purposes of this by-law the height of such building shall be measured upwards from the level of the ground over which such open space shall extend to the level of half the vertical height of the roof or to the top of the parapet, whichever may be the higher.

96. Every person who shall intend to erect a building shall give to the council notice in writing of such intention, which shall be delivered or sent to their clerk at his or their office, or to their surveyor at his or their office, and shall at the same time deliver or send or cause to be delivered or sent to their clerk at his or their office, or to their surveyor at his or their office, complete plans and sections of every floor of such intended building, which shall be drawn to a scale of not less than 1in. to every 8ft. and shall show the position, form, and dimensions of the several parts of such building and of every water-closet, earth-closet, privy,

sahpit, cesspool, well, and all other appurtenances, and in which the building shall be so described as to show whether it is intended to be used as a dwelling-house or otherwise. Such person shall at the same time deliver or send or cause to be delivered or sent to the clerk of the council at his or their office or to their surveyor at his or their office a description in writing of the materials of which it is intended that such building shall be constructed and of the intended mode of drainage and means of water supply. Such person shall at the same time deliver or send or cause to be delivered or sent to the clerk to the council at his or their office or to their surveyor at his or their office a block plan of such building, which shall be drawn to a scale of not less than 1in. to every 44ft., and shall show the position of the buildings and appurtenances of the properties immediately adjoining, the width and level of the street in front and of the street (if any) in the rear of such building, the level of the lowest floor of such building, and of any yard or ground belonging thereto. Such person shall likewise show on such plan the intended lines of drainage of such buildings and the intended size, depth, and inclination of each drain; and the details of the arrangement proposed to be adopted for the ventilation of the drains.

98. In every case where a person who shall lay out or construct a street or shall erect a building, or shall execute any other work to which the by-laws relating to new streets and buildings may apply, shall at any reasonable time during the progress or after the completion of the laying out or construction of such street, or the erection of such building or the execution of such work, receive from the surveyor of the council notice in writing specifying any matters in respect of which the laying out or construction of such street, the erecting of such building, or the execution of such work may be in contravention of any by-law relating to new streets or buildings and requiring such person within a reasonable time, which shall be specified in such notice, to cause anything done contrary to any such by-law to be amended or to do anything which by any such by-law may be required to be done, but which has been omitted to be done, such person shall within the time specified in such notice comply with the several requirements thereof so far as such requirement relates to matters in respect of which the laying out or construction of such street, the erection of such building, or the execution of such work may be in contravention of any such by-law. Such person within a reasonable time after the completion of any work which may have been executed in accordance with any such requirement shall deliver or send, or cause to be delivered or sent, to the surveyor of the council, at his or their office, notice in writing of the completion of such work, and shall at all reasonable times within a period of seven days after such notice shall have been so delivered or sent afford such surveyor free access to such work for the purpose of inspection.

Simey for the appellant.

The respondent did not appear.

LORD ALVERSTONE, C.J.—We think that the justices ought to have entertained this information. By-law No. 98 says that the notice in writing must specify any matters in respect of which the work is in contravention of any by-law. The respondent was told by the notice that the erection had been made in his back yard contrary to certain specified by-laws. I think that that notice is sufficient, as it specifies the matters in respect of which the erection is "in contravention of any by-law."

LAWRANCE and KENNEDY, JJ. concurred.

Appeal allowed.

Solicitors: *Dangerfield and Blythe, for J. Turnbull, Durham.*

[ADM.]

THE SUNLIGHT.

[ADM.]

PROBATE, DIVORCE, AND ADMIRALTY
DIVISION.

ADMIRALTY BUSINESS.

Dec. 3, 4, 5, and 10, 1903.

<Before BUCKNILL, J. and TRINITY MASTERS.)

THE SUNLIGHT. (a)

*Collision—River Mersey—Vessel coming out of dock—Duty to keep out of the way—Regulations for Preventing Collisions at Sea, art. 19.**A steamship coming out of Prince's Dock into the river Mersey came into collision with another steamship coming down the east side of the river in tow of two tugs.**Held, that art. 19 of the Regulations for Preventing Collisions at Sea did not apply, and that there was no duty on the down-coming vessel to keep out of the way.*

ACTIONS for damage by collision brought by the owners of the steamship *Maiorese* against the owners of the steamship *Sunlight*, and for negligence by the owners of the *Sunlight* against the Mersey Docks and Harbour Board.

About 11.15 p.m. on the 22nd Sept. 1903 a collision occurred in the river Mersey, off the north end of the Liverpool landing-stage, between the steamships *Maiorese* and the *Sunlight*.

The *Maiorese* was a screw steamship of 1739 tons gross register, and at the time was being moved from the Herculaneum Graving Dock to her loading berth at the Wellington Dock in charge of the two tugs *Stormcock* and *Fighting Cock*, she herself having no steam.

The *Sunlight* was a screw steamship of 388 tons gross register, and at the time had just left Prince's Dock, being about to proceed on a voyage from Liverpool to Swansea with a general cargo on board.

The weather was fine and clear, the wind moderate from the S.E., and the tide flood, and of the force of four to five knots an hour.

The plaintiffs' case was that the *Maiorese* was proceeding down the river, keeping well to the eastward of mid-channel, and making about three to four knots over the ground, both her tugs at intervals, as they passed the entrances to the various docks, sounding their whistles. The regulation lights were being duly exhibited, and the *Maiorese* was in charge of a duly qualified pilot.

Under these circumstances, when the *Maiorese* was about off the north end of the stage, and about 300 to 400 yards from it, the masthead light of a steamship, which proved to be the *Sunlight*, was seen in the Prince's Half Tide Dock entrance.

The *Sunlight* was immediately afterwards heard to blow a long blast, and rapidly came out from the entrance, showing her red light and heading about west.

As soon as the masthead light was seen, both tugs were ordered to stop their engines, and the helm of the *Maiorese* was put hard-a-port, but the *Sunlight* came on, and, although the hawsers of the tugs were slipped, struck the starboard side of the *Stormcock* with her stem, and then cleared her and struck the stem of the *Maiorese* with her port side.

The plaintiffs charged the defendants (*inter*

alia) with failing to give proper and sufficient notice of their intention of coming out of the dock, and with failing to keep clear of the *Maiorese* and her tugs. They also charged them with breach of art. 29 of the Collision Regulations.

The defendants' case was that between 10 and 11 p.m. the *Sunlight* was being undocked under the direction and control of the servants of the Mersey Docks and Harbour Board, and was brought from her berth in the Trafalgar Dock to the entrance to Prince's Dock, where she was directed to wait. She was shortly afterwards ordered by the dock officials to let go and come ahead so as to proceed into the river. The ropes were therefore let go, and a long warning blast was sounded on her whistle, and she proceeded out at full speed under a hard-a-port helm. As she cleared the entrance the towing lights and green lights of the two tugs that were towing the *Maiorese* were seen broad off on the port bow, and about 200 to 250 yards off. As she was unable to do anything to avoid a collision, the *Sunlight* kept her course and speed, blowing a short blast to indicate how her helm was, but the tug *Stormcock* and *Maiorese*, instead of keeping clear of her, collided with her.

The defendants charged the plaintiffs (*inter alia*) with neglecting to keep clear, not stopping and reversing, with improperly attempting to cross ahead of the *Sunlight*, and with navigating too close to the dock entrances. They also charged them with breach of arts. 19, 22, and 23 of the regulations, and counter-claimed for the damages suffered by their own vessel.

Arts. 19, 22, and 23 of the Regulations for Preventing Collisions at Sea are as follows:

Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

By their statement of claim in the action against the Mersey Docks and Harbour Board it was alleged that those on board the *Sunlight* were bound to and did obey the orders of the dock officials, and that they had been under their orders throughout the operation of undocking; that they were bound to obey those orders, and that the collision was caused by the negligence of the officials in ordering her to proceed out into the river when they knew, or ought to have known, that it was not safe for her to do so.

The Mersey Docks and Harbour Board denied in their defence that the *Sunlight*, at the time in question, was acting under the orders of the dock officials or other of their servants, and pleaded that if any such orders as alleged were given, they were not within the scope of the authority of their servants. They also alleged that if it was not safe for the *Sunlight* to proceed out into the river, those on board of her were guilty of negligence which caused or contributed to the collision by casting off and proceeding out,

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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although warned by the dockmaster to look out for the *Maiorese* and her tugs, and by failing to take any, or timely, or sufficient steps to avoid the collision.

Sect. 49 of the Mersey Dock Acts Consolidated Act 1858 (21 & 22 Vict. c. 92) is as follows:

Any harbour-master, dockmaster, or piermaster may direct the time and manner of any vessel coming into or going out of any dock, and also the time of opening or shutting the dock gates; and if the master of any vessel shall act contrary to the directions or neglect to obey the orders of such harbour-master, dockmaster, or piermaster, in relation to the manner of coming into or going out of such dock, or shall obstruct or hinder him in the opening or shutting of any dock gate, such master shall for every such offence be liable to a penalty of not exceeding twenty pounds.

By sect. 53 power is also given to the harbour-master to remove vessels from the entrances to the dock.

Pickford, K.C. and Glynn for the plaintiffs.

Laing, K.C. and Bateson for the owners of the *Sunlight*.—It was the duty of the *Maiorese* and her tugs to keep out of the way of the *Sunlight*. She was on their starboard hand, and art. 19 applied.

Aspinall, K.C. and Maurice Hill for the defendants the Mersey Docks and Harbour Board.

Dec. 10.—BUCKNILL, J.—On the 22nd Sept., between eleven and twelve o'clock at night, a collision occurred in the river Mersey between the steamships *Maiorese* and *Sunlight*. An action was commenced on the 27th Sept. by the owners of the *Maiorese* against the *Sunlight*, and on the 28th Sept. an action was begun by the owners of the *Sunlight* against the *Maiorese*. Those actions were consolidated. On the 20th Oct. a statement of claim was delivered by the owners of the *Maiorese*, and on the 27th Oct. a defence and counter-claim were put in by the owners of the *Sunlight*. On the same day a letter was written by the solicitors for the owners of the *Sunlight* to the solicitor for the Mersey Docks and Harbour Board, drawing attention to the fact that it was alleged that improper orders had been given by the dock board's officials to those on board the *Sunlight* to proceed into the river, and asking what course the Mersey Docks and Harbour Board proposed to take in the matter. That was answered the next day by the solicitor to the harbour board denying liability. On the same day that that letter was received the owners of the *Sunlight* commenced an action against the Mersey Docks and Harbour Board. The case of the *Maiorese* is that she was being moved by two tugs, the *Stormcock* and the *Fighting Cock*, from the Herculeum Graving Dock to her loading berth at the Wellington Dock. The tugs were on either bow, the *Maiorese* herself having no steam up, and the tide was flood of the force of about five knots. The pleaded case is that the *Maiorese* was being towed down well to the eastward of mid-stream, making about three to four knots over the ground. Then the pleadings allege that when the *Maiorese*, in charge of a compulsory pilot, was about off the north end of the Liverpool landing stage, about 300 to 400 yards off it, the masthead light of the *Sunlight* was seen in the Prince's Half Tide Dock entrance; that then a long blast was heard from the *Sunlight*, whose red light was seen, and which rapidly came out

from the dock entrance, heading about west, that the tugs of the *Maiorese* were told to stop, and they did so and cast off, but a collision took place between the *Sunlight* and the *Stormcock*, and then the port side of the *Sunlight*, about in the way of the engine-room, was struck by the stem of the *Maiorese*, which penetrated so far into her as to leave her in a condition in which she might soon have sunk had she not been towed ashore. The defence set up by the owners of the *Sunlight* is that the *Sunlight* was in the entrance to the Prince's Dock, having been stopped there by the dock officials; that she was ordered by the dock officials to let go and come ahead; that she thereupon blew a long blast, and under a hard-a-port helm proceeded out into the river at full speed; that as soon as she cleared the entrance the towing and green lights of the tugs towing the *Maiorese* were seen broad off on the port bow, and about 200 to 250 yards distant; that the *Sunlight* kept her course and speed, blowing a short blast to indicate how her helm was, and the collision took place. In the defence the charges made against the owners of the *Maiorese* are that the *Maiorese* and her tugs neglected to keep clear of the *Sunlight*, and also to slacken their speed or to cast off the tow ropes or stop or reverse their engines. Then it is charged that the *Maiorese* and her tugs neglected to avoid crossing ahead of the *Sunlight*, and negligently navigated too close in to the dock entrances. It is further said that if the *Sunlight* came out of dock improperly, it was in obedience to the orders of the dock officials, whose orders those on the *Sunlight* were bound to obey. Now, as to the claim by the owners of the *Sunlight* against the docks and harbour board. The statement of claim alleges that the *Sunlight* was stopped by the authorities in the place where we know she was lying; that throughout the operation of undocking she was acting under the orders of the dock officials, which orders those on the *Sunlight* were, pursuant to the Mersey Dock Act, bound to obey; and that the collision was caused by the negligence of the dock officials in ordering the *Sunlight* to proceed out into the river at a time when they knew, or ought to have known, that it was not safe for her to do so. That is denied by the docks and harbour board in their defence. The first question I have to decide is, Where in fact did this collision take place in regard to mid-channel? The river off the landing-stage may be said, roughly, to be 1100 to 1200 yards wide, and on the part of the *Maiorese* it is said that she was proceeding down the river—that is to say, to the northward—in tow of these two tugs, which were ahead of her, about 300 yards off the eastern shore, or off the stage. I find as a fact that this vessel was going down with her tugs, I will not say exactly 350 to 400 yards, but very much further off the stage than the witnesses of the *Sunlight* allege they were. If I may put it roughly, I should say they were going down about one-third of the width of the river off, perhaps a little less, from the stage—that is to say, I believe the story told by the *Maiorese*. It is also probable that the hopper went down about ahead of the *Maiorese*, or, putting it in another way, the *Maiorese* went down in the wake of the hopper, which was said to have been 300 yards off the landing-stage, and that has not been denied.

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THE SUNLIGHT.

[ADM.]

But there is a stronger point than that which leads me to this conclusion, and that is that the hopper had rounded and gone down inside the *Maiorese* and then got ahead of her. All this shows that there was much more room than the *Sunlight* alleges between the *Maiorese* and the landing-stage. The second question is, Where was the collision with regard to the bearing of the dock gates? Now, the dock gates are not in a line with the landing-stage, because at the northernmost part of the landing-stage the jetty runs N.E., and inside the line of the landing-stage and not quite N.E. of this line are the so-called two islands at the entrance to the Prince's Half Tide Dock. I am satisfied on the evidence that the collision took place about off the north end of the landing-stage, and a little northerly of that—that is to say, if a line is drawn from the jetty about one-third of its way up and taken about west, that would be about the place where the collision happened. The third question is this: Could those on the *Sunlight* have seen the lights of the tugs or tow whilst the *Sunlight* was still in the half-tide gateway? This has been a very important question to decide—one not free from difficulty, and one upon which a great deal depends. The matter stands in this way: The *Sunlight*, which is 194ft. long or thereabouts, had been stopped by the dockmaster in what I may call the first position—that is to say, she would be further in, or further from the river, than in the second position. Could those on the *Sunlight*—that is, anybody in authority at the moment for the purpose of looking out—the master on the bridge, or the look-out man forward—have seen in the first position the lights either of the tugs or one of them, or of the tow, or the lights of all three? If either the master on the bridge or the man forward could have seen the towing lights of one of the tugs, or the side-lights of one of the tugs, or the starboard side-light of the *Maiorese*, that would be quite enough, because he would be able to see there were moving lights in the river coming towards the north. In spite of what has been said by the dockmaster, who was not sure whether in the first position the look-out man on the fore-castle head, or the master on the bridge, could have seen these lights, I am of opinion that one of them could have seen them; in other words, I find that in position No. 1 all the lights of the tugs and tow would not be concealed from both the look-out man forward and the master on the bridge. They might be concealed from one, but they would be open to the other, and it must be remembered that the lights on the jetty, &c., which have been referred to, would be stationary, and these lights of the tugs and tow were all moving; and it is clearly the duty of the master or the look-out men of a vessel which is in dock and about to go out into the river to watch for moving lights. But that does not conclude the case at all, because there is the position No. 2 of the *Sunlight*, when the *Sunlight* had come more towards the river, but not into it, with her starboard check-rope made fast to the third or fourth bollard, and there was a moment when that rope led aft. If the *Sunlight* is put into that position and is stationary, with her engines still at rest, I am satisfied beyond all doubt that then the look-out man on the *Sunlight* must have seen, if he had looked, the lights of the tugs, or, at all

events, of the *Stormcock*, and, I believe, the starboard light of the *Maiorese*. He saw nothing. I find as a fact they could have been seen. They were seen by others. The dockmaster says he saw them himself, but he is not quite certain of the position in which he was when he saw them, and therefore I do not place much weight upon his evidence on that point. But I find as a fact that the man who was placed on the corner of the knuckle to the northward of the dock entrance did see, and did report, not only the lights of the hopper, but the lights of the vessels which were coming down astern of her. The master of the *Sunlight* said that if the down-coming ship, the *Maiorese*, and her tugs were where it is alleged by the plaintiffs they were—that is to say, not 150 yards, but between 300 and 400 yards off the landing-stage—those on the *Sunlight* ought to have seen them. Finding, as I do, that these vessels coming down were from 300 to 350 yards off, and that their lights were reported by the look-out man on the knuckle, I have come to the conclusion of fact that those on board the *Sunlight* could have seen the lights of the down-coming ship. It does not follow that they did not see them, though they said they did not. The next question is, Could the *Sunlight* have avoided the collision after she was in the river? This is a question with regard to which I rely upon the judgment of those who sit here to assist me on nautical matters. I have asked the Elder Brethren this question, Could the *Sunlight*, by the exercise of reasonable care and skill, have avoided this collision? I am advised by them, and I have no doubt of it myself, that by the exercise of reasonable skill the *Sunlight* might have avoided the collision after she got into the river. There was, in my opinion, and I am so advised, ample room and opportunity for the collision to have been avoided if, instead of keeping on full speed ahead under hard-a-port helm, the engines had been stopped and reversed, and the helm not kept hard-a-port, but eased off, so that she would have been then drifting up, broadside, to the southward. There would have been plenty of room between her and the down-coming ships. I am also advised that she might have done something else. After she came out into the river her head was N.W. by W., and when she struck the *Stormcock* her head was W. by S., so that she had altered four points. If, instead of keeping on under hard-a-port helm, she had hard-a-starboarded her helm and had altered two or three points, she would have been able to have gone, the tide being with her, up river to the southward, and in all probability clear of the *Maiorese* and her tugs. But I am not so firm on this point as I am on the first. I am advised that there were two ways in which the collision could have been avoided; but I prefer to put my judgment upon the first. Not taking such steps was negligence on the part of the master of the *Sunlight*, who in all probability thought that the starboard-side rule applied, and that he was justified in keeping on full speed ahead under hard-a-port helm, and that it was the duty of the other vessel to keep out of his way. I do not consider that art. 19—that is, the starboard-side rule—applied. I find that the *Sunlight* was negligently navigated, and had a bad look-out, which contributed to the collision. But did it not cause it entirely? I am of opinion that it

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[CT. OF APP.]

did. It is alleged in the pleadings that the *Maiorese* might have done something to avoid the collision, but I find as a fact that she could not have done anything more than was done. Those in charge of the *Maiorese* ordered the tugs to stop, and they did stop as soon as they saw this other vessel coming down. The next question I have to determine is whether the excuse pleaded by the *Sunlight* is good in law or in fact. The owners of the *Sunlight*, having made the dock board defendants to the action brought by them, allege that if the navigation of the *Sunlight* was negligent it was the fault of the dockmaster in ordering the vessel out into the river at a time when he ought not to have done so. That is a mixed question of fact and law. I have no doubt that the dockmaster had, under the Act of Parliament, power to order a ship, which has paid her dues and is ready to go, to leave the premises of the dock board. But, though that is the legal position, looking at it generally, one must apply the facts in each particular case. First of all, as a fact, did he order the *Sunlight* out? I am satisfied that the dockmaster did not order the vessel out, or say anything which amounted to an order. I find that, in fact, no order was given by the dockmaster to the *Sunlight* to go out, and that the master of the vessel went out at his own risk, and navigated his own ship out—not against the order of the dockmaster, the dockmaster could not stop him; but he cast off his own rope, by his own men, who were there for the purpose, by his order; and I find as a fact that the dockmaster did point out to him and warn him of the lights of the down-coming ship. The probable solution of this case is that the master of the *Sunlight* wanted to get to sea and miscalculated the strength of the tide, and, having cleared the hopper, satisfied himself that he could clear the other vessel too, and so ran the risk. The result must be that the *Sunlight* as against the *Maiorese* is solely to blame, and that the owners of the *Sunlight* must lose their case against the dock board because they have not made good the allegations contained in their statement of claim.

Solicitors for the plaintiffs, the owners of the *Maiorese*, *Hill, Dickinson, Dickinson, Hill, and Roberts*, Liverpool.

Solicitors for the defendants, and plaintiffs in the second action, the owners of the *Sunlight*, *Collins, Robinson, and Driffield*, Liverpool.

Solicitors for the defendants in the second action, the Mersey Docks and Harbour Board, *W. C. Thorne*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 25 and 26.

(Before WILLIAMS, STIELING, and COZENS-HARDY, L.JJ.).

Re GIST. (a)

APPEAL FROM THE MASTER IN LUNACY.

Lunacy—Administration of lunatic's property—Permanent additions to and improvements of freehold estates—Orders for payment of expenditure out of personal estate—Jurisdiction—Lunacy Act 1890 (53 Vict. c. 5), s. 118.

Sect. 118 of the Lunacy Act 1890 gives the court jurisdiction to make a charge upon the real estate of a lunatic for the whole or any part of any moneys expended under a previous order for the permanent improvement, security, or advantage of such property, unless in making the previous order the judge had that section before his mind and deliberately exercised the jurisdiction conferred by it. If the jurisdiction has been exercised once when the original order was made it cannot afterwards be exercised a second time.

Decision of Master Fischer reversed.

SAMUEL GIST, a person of unsound mind, whose property was being administered in Lunacy, was tenant in tail in possession of certain estates situate in the counties of Gloucester, Worcester, Oxford, Warwick, and Northampton.

He was also absolutely entitled as owner in fee to an estate called the Alston estate; and was possessed of certain personal property.

The lunatic had not any child.

The estates having fallen into a bad state of repair, a survey was directed, and it appeared that it was desirable to effect various repairs and permanent improvements of the estates.

Accordingly by an order dated the 4th June 1877 (reported *sub nom. Re Gist*, 5 Ch. Div. 881) it was (amongst other things) ordered that the amounts (not exceeding 5726*l.*) to be expended in the permanent improvement of the estates of which the lunatic was tenant in tail in possession were to be a charge with interest on the particular estate so improved, and that such charges were to be made by way of mortgage for a term of years, without power of sale or foreclosure during the lifetime of the lunatic, to a trustee or trustees for securing to the personal estate of the lunatic the amounts to be so expended, together with a moiety of the surveyor's charges, and the costs, charges, and expenses therein mentioned.

By another order dated the 3rd June 1886 it was (amongst other things) ordered that, for the purpose of the charges by the order of the 4th June 1877 directed, the same should, notwithstanding the directions of such order, be made by way of mortgage of the entirety of the freehold estates of which the lunatic was seised for an estate tail for a term of years, without power of sale or foreclosure during the lifetime of the lunatic, to a trustee or trustees for securing to the personal estate of the lunatic the sum of 12,453*l.* 7*s.* 10*d.*

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

Pursuant to the last-mentioned order a mortgage was executed on the 7th Sept. 1886 whereby the estates whereof the lunatic was tenant in tail in possession were mortgaged to certain persons for a term of 1000 years for securing payment to them as trustees for the lunatic as part of his personal estate of 12,453*l.* 7*s.* 10*d.* with interest from the death of the lunatic.

Pursuant to orders made on the 20th Jan. and the 20th March 1888 in that behalf the estates were, by an indenture of mortgage dated the 25th Nov. 1890, further mortgaged to the same persons as such trustees as aforesaid for the further sum of 524*l.* 12*s.* 9*d.* with interest from the death of the lunatic, being the further amount expended upon the permanent improvement of the estates and a moiety of the costs, charges, and expenses as therein mentioned.

By an order dated the 14th March 1894 it was (amongst other things) ordered that the then committee of the estate of the lunatic should be at liberty to execute the proposed repairs to the several farmhouses and buildings specified in his affidavit sworn in the matter, the cost of which repairs was estimated to amount to about 521*l.* 18*s.* 6*d.*

This expenditure was by the same order directed to be paid out of the proceeds of the sale of timber thereby authorised to be felled.

By an order dated the 20th June 1896 the committee was (amongst other things) authorised to expend the further sum of 466*l.* 13*s.* upon the repairs and for the new fencing specified in the schedule thereto; and by another order dated the 25th June 1897 the committee was (amongst other things) authorised to expend the further sum of 305*l.* 15*s.* 6*d.* upon the repairs specified in part 1 of the 1st schedule thereto. This order authorised the felling and sale of timber by the committee.

By an order dated the 12th May 1898 the committee was (amongst other things) authorised to expend a sum not exceeding 140*l.* in substantially repairing or rebuilding the cattle sheds upon a farm which formed part of the lunatic's estate. This expenditure was by the same order authorised to be paid out of the proceeds of the sale of timber thereby authorised to be felled.

By an order dated the 1st Aug. 1900 it was (amongst other things) ordered that the then committee should be at liberty to expend a sum not exceeding 1400*l.* in carrying out the repairs and improvements referred to in his affidavit sworn in the matter. The order contained no express direction in terms as to the application of any particular fund for the purposes of the order, but it directed payment to the committee of amounts out of funds in court more than sufficient for the expenditure authorised.

On the 9th July 1901 directions were given to the committee authorising the expenditure of the further sum of 478*l.* 0*s.* 6*d.* for certain improvements and repairs upon the estate of the lunatic specified in the summons issued in the matter and dated the 6th July 1901.

All of the above-mentioned orders were made in the presence of the next of kin and the heir-at-law of the lunatic (the heir-at-law being also the next tenant in tail of the settled estates), and had hitherto been acquiesced in by the next of kin.

The orders of the 14th March 1894 and subsequent thereto were not made under the jurisdiction conferred by sect. 118 of the Lunacy Act 1890; and no mention was made therein that they were to be without prejudice to the question as to how the expenditure was ultimately to be borne as between the real estate and the personal estate.

The moneys which appeared from the committee's accounts to have been actually expended upon the repairs and improvements authorised by the orders and directions of the 14th March 1894, the 20th June 1896, the 25th June 1897, the 12th May 1898, the 1st Aug. 1900, and the 9th July 1901 amounted in the aggregate to the sum of 3010*l.* odd, all of which moneys had been paid out of the personal estate of the lunatic.

The moneys which similarly appeared to have been actually expended under the orders and directions of the 14th March 1894, the 12th May 1898, the 1st Aug. 1900, and the 9th July 1901 upon permanent additions to and improvements of the freehold estates of which the lunatic was seised in fee simple or as tenant in tail in possession amounted in the aggregate to the sum of 1244*l.* odd, all of which moneys had been paid out of the personal estate of the lunatic.

These moneys, it was alleged, had been so expended in addition to the ordinary repairs and maintenance of the lunatic's estates, and in respect of substantial and permanent additions and improvements thereto; and it was now contended by the next of kin of the lunatic that such moneys should be charged upon the estates which had been so improved in favour of the personal estate of the lunatic out of which the same were in the first instance paid and expended.

A summons was accordingly taken out by two of the next of kin of the lunatic on behalf of themselves and all other persons entitled in distribution to his personal estate asking for an order that the sum of 1244*l.* odd so expended by the committee upon permanent additions to and improvements of the freehold estates of which the lunatic was seised as tenant in tail in possession, together with the sum of 635*l.* odd, representing a moiety of the costs, charges, and expenses in the matter from the 20th March 1888 to date, might be a charge with interest upon those freehold estates, and that such charge should be made by way of mortgage for a term of years, without power of sale or foreclosure during the lifetime of the lunatic, to trustees for securing to the personal estate of the lunatic the said sums of 1244*l.* odd and 635*l.* odd respectively with interest for the same from the day of the death of the lunatic at the rate of 4 per cent. per annum.

The summons came on to be heard before Master Fischer, who made an order on the 8th Dec. 1903, under sect. 118 of the Lunacy Act 1890 (which order had not yet been drawn up and entered), whereby it was in substance ordered and declared that the freehold estates of which the lunatic was seised as tenant in tail in possession should stand charged with such sum as the master should certify (in default of agreement between the parties to the application on which the order was made) to have been expended by the committee of the lunatic in permanent improvements on the freehold estates, together with a moiety of the costs, charges, and expenses subsequent to the taxation directed by the order of

the 20th March 1888, and whereby consequential directions were given for the creation and execution of a mortgage upon the freehold estates to trustees for securing to the personal estate of the lunatic the amount of such charge.

From that decision the heir-at-law of the lunatic now appealed, asking that Master Fischer's order might be discharged and that no order should be made upon the summons except as to costs.

On the 12th Jan. 1904 the appeal was brought before Williams, L.J. sitting in Lunacy in chambers, but without discussion it was adjourned by his Lordship to the full court, and now came on to be heard.

Younger, K.C. (with him Wace), for the appellant, stated the facts of the case and the question raised. [He was stopped by the Court.]

Henry Terrell, K.C. and H. B. Howard for the respondents.—[WILLIAMS, L.J.—Do you say that sect. 118 of the Lunacy Act 1890 gives the court power to determine how these improvements shall be dealt with, even if without that section we have not the power?] Yes; we submit that that section applies here and gives the court the necessary power, and we ask the court to exercise that power. But we also say that the power has been effectively exercised by the previous orders, and that really the matter is *res judicata*. In any case, even if the court is not satisfied that sect. 118 is sufficient authority, we rely upon the inherent jurisdiction of the court to determine how these improvements shall be dealt with, and whether they shall be paid for out of the personal estate or out of the real estate of the lunatic. The real estate is large and the personal estate is small, and, if the personal estate is to be applied, it will be a great hardship upon the next of kin of the lunatic. The real estate is settled, but the lunatic is absolutely entitled to the personal estate. It is entirely for the benefit of the lunatic that the property to which he is absolutely entitled should be increased as much as possible; and the personal estate will be increased if the real estate bears the expenses of the improvements in question. Therefore we submit that Master Fischer's order of the 8th Dec. 1903 was right; and that the real estate ought to bear its proper burden. The question as to the circumstances under which the court may review its own orders was discussed in

Re Swire; Mellor v. Swire, 53 L. T. Rep. 205; 30 Ch. Div. 239, at p. 243.

See also

Annual Practice 1904, p. 357.

Master Fischer did in effect vary his own orders previously made. [WILLIAMS, L.J. referred to Order XXVIII., r. 11.] There was, we submit, an "accidental slip or omission" here within the meaning of that rule. [WILLIAMS, L.J.—I do not think that that means an "accidental slip or omission" on the part of the court, but on the part of its ministerial officer in drawing up the order.] We are not so much relying upon that rule as upon the inherent jurisdiction of the court to review its own orders. [STIRLING, L.J.—That rule confers upon the court a power which it did not previously possess. It provides that: "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court or a judge

on motion or summons without an appeal." [WILLIAMS, L.J.—The necessity for the rule arose out of the requirements of the Judicature Acts: (see *Re St. Nazaire Land Company*, 41 L. T. Rep. 110; 12 Ch. Div. 88). The rule was introduced to meet the difficulty to which the decision in that case gave rise. COZENS-HARDY, L.J.—It was introduced for the purpose of allowing a blunder of a ministerial officer of the court to be amended.] Is it not competent for the court to correct a mistake in its own order where such order does not carry out precisely what the court intended that it should carry out? See hereon the observations of Lord Watson in

Hatton v. Harris, 67 L. T. Rep. 722; (1892) A. C. 547.

[STIRLING, L.J. referred to the observations of Lord Selborne in *Attorney-General v. Marquis of Ailesbury* (58 L. T. Rep. 192; 12 App. Cas. 672) and WILLIAMS, L.J. to the observations of Lord Penzance in *Lawrie v. Lees* (46 L. T. Rep. 210; 7 App. Cas. 19, at pp. 34, 35). His Lordship added: In *Re Swire; Mellor v. Swire* (*ubi sup.*) the statement on p. 240 of 30 Ch. Div. shows that when the court speaks of the intention of the court it does not mean anything more than the intention appearing from the words that were actually delivered.] Then we say that, if the master had no jurisdiction to alter the previous orders, this is merely administration of the estate. The court can always adjust accounts as between the tenant for life and remaindermen and income and capital, and put right what was wrongly done before. In *Re Gist* (5 Ch. Div. 881) the intention was to make the real estate of the lunatic bear the expense of the improvements, and, in carrying out the administration of the lunatic's estate, the court has jurisdiction to adjust the error it made in the orders subsequent to that decision. [WILLIAMS, L.J.—Has the master in exercising the jurisdiction in Lunacy a right of rehearing, or have the Judicature Acts in taking away the right of rehearing destroyed that right as regards Lunacy jurisdiction?] That we cannot at present say. As to what improvements are authorised, see Wolstenholme's *Conveyancing and Settled Land Acts*, 8th edit., p. 352.

Younger, K.C. in reply.—With reference to the question last put, the Lunacy Rules, rr. 10 and 11, show what the jurisdiction of the master is under the circumstances referred to. It is said by the respondents that, even if Master Fischer had no jurisdiction to make the order of the 8th Dec. 1903, they pray in aid the power conferred by sect. 118 of the Lunacy Act 1890. That is a discretionary section, and it is not surprising that it is not relied upon very strongly. *Prima facie*, permanent improvements are to be charged upon the estate improved. The practice appears from the case of *Oxenden v. Lord Compton* (2 Ves. Jun. 69, at p. 72), where it was laid down by the Lord Chancellor (Lord Loughborough) that you cannot raise a question as to the property of a lunatic as between the heir-at-law and the next of kin. [WILLIAMS, L.J.—Is that not affected by sect. 118 of the Lunacy Act 1890?] I submit not, having regard to sect. 116, sub-sect. 4, which is the introductory section subject to which all the succeeding sections are to be read. [COZENS-HARDY, L.J.—There is nothing analogous to that in the Act of 1853.] No; it is an entirely new

section. Sect. 118 differs from sect. 123. The latter section leaves no discretion in anyone. The old Act of 1853 contained similar sections. [WILLIAMS, L.J. referred to *Re Badcock* (4 My. & C. 440).] The observations of Lord Macnaghten in *Attorney-General v. Marquis of Ailesbury* (at p. 688 of 12 App. Cas.) are to the same effect as in *Re Badcock* (*ubi sup.*) Sect. 118 and the jurisdiction thereunder, instead of being a matter of ordinary course, is a matter of special administration. It relates to something extraordinary, and that is not what happened in the present case. Then it is a circumstance not to be overlooked that in the case of the first two orders the fund out of which these repairs and improvements were to be effected was a fund created by the sale of timber. [STIRLING, L.J. referred to Shelford on Lunacy, citing the case of *Re Harris* (unreported).] Lord Eldon in *Ex parte Phillips* (19 Ves. 118) held that there was no equity for a charge in favour of the next of kin of a lunatic, the land tax on whose estate had been redeemed by order out of the produce of timber which had been felled. Unless, therefore, it is established that the improvements are of an extraordinary character and outside the ordinary administration of the lunatic's estate, *prima facie* they will not be a charge on the real estate, and will be dealt with out of the personal estate. The orders up to the present date were not *ultra vires*, but were made in the course of the regular administration of the lunatic's estate. Then it is suggested that the orders are in the nature of interim orders. As to that contention, the orders speak for themselves. They were made in the presence of the next of kin and of the heir-at-law, and were not intended to be temporary orders, but to determine as between those parties out of what parts of the lunatic's estate the expenditure was to be paid. What is now sought is this: Years after the expenditure has been incurred and many persons concerned are dead, the court is asked to exercise its discretion in regard to that expenditure. That was the difficulty which appeared to the court in the Irish case of

Lord Leitrim v. Enery, 6 Ir. Eq. Rep. 357, at p. 369.

It is only in exceptional circumstances that the court will review an order which has been made so long ago as these orders were made when the court is asked to exercise its jurisdiction under sect. 118 in the interests of the lunatic. But the lunatic is said to be *in articulo mortis*, and in any event he cannot live long. Under the Act it is the benefit of the lunatic alone that the court is to consider. That was so under the Act of 1853, and it is so under the Act of 1890. It cannot be said that it is in the interests of the lunatic here that the present application is made. It is made solely in the interests of the applicants—the next of kin. And whether there is or is not jurisdiction to rehear the orders at the instance and for the sole benefit of the next of kin, I submit that no case is made out under the circumstances for an alteration of the orders in their favour.

WILLIAMS, L.J.—This is an appeal against an order of Master Fischer, dated the 8th Dec. 1903, which raises rather a curious question. The lunatic, Samuel Gist, is tenant in tail of very considerable

freehold estates situated in the Midlands. He has been a lunatic for many years, and his property has been administered in Lunacy, and this is not the first occasion upon which questions arising in respect of this administration have been before the court. There was a question before the court as long ago as the year 1877, which is reported under the name of *Re Gist* (5 Ch. Div. 881), and I shall have to refer to that decision later on. But the question which is raised in the present case is this: There has been a series of orders made with regard to the raising and expenditure of money in respect of repairs of one character and another on these estates. It is suggested that some of these repairs which have been done have partaken of the nature of permanent improvements. Now, when these various orders were made they were such that the money was ordered to be raised out of the personal property of the lunatic; and it was out of the personal property that the expenses were accordingly paid. I may take as an example the order of the 14th March 1894. That order runs as follows: [His Lordship read it, and continued:] Well, the object of the present summons and of the order of the 8th Dec. 1903, with which we have now to deal, really was to charge this expenditure or part of this expenditure upon the real estate as having been expenditure upon permanent improvements which as between those entitled in the future to the real estate and those entitled in the future as next of kin to the personal estate ought, it is said, to be charged upon the real estate. We have gone to a certain extent into the authorities before the Lunacy Act 1853 and the present Act of 1890, with regard to the practice of those who had to administer the jurisdiction in Lunacy, and how far they would in the course of administration of the lunatic's estate have to go into the equities as between the next of kin and the heir-at-law of the real estate constituting the property of the lunatic. But I do not myself think that that practice is of very great importance now, because, whatever that practice was, it seems to me that it has been modified by the subsequent legislation. Generally, the Act of 1890, by sect. 118, reproduces the legislation under the Act of 1853. The section of that Act were the same number as the section of the Act of 1890. The material sections run in that Act from sects. 116 to 118. I shall assume for the purpose of my present judgment that, whatever may have been the practice in Lunacy or the jurisdiction in Lunacy previously to the passing of the legislation to which I have referred, yet after the passing of the Act of 1853 it was competent for those administering the jurisdiction in Lunacy to entertain this question as between the next of kin and the heir-at-law of a lunatic, and to dispose of the same. Indeed, in my view of the decision of Bagdollay, L.J. in *Re Gist* (*ubi sup.*), it is tolerably manifest that he intended so to do. It seems to me that having certain repairs and permanent improvements to provide for, and some of these repairs and permanent improvements being in respect of the estates of which the lunatic was owner in fee and some being in respect of estates of which he was tenant in tail in possession, the Lord Justice dealt with the costs of such repairs and permanent improvements differently in the case of those two estates. He makes an order

for a charge in respect of the repairs and permanent improvements of the settled estates upon those settled estates. But in respect of the repairs and permanent improvements done to the Alston estate of which the lunatic was owner in fee the Lord Justice made no such order. Under these circumstances the inference which I draw is that the Lord Justice really did, in arriving at that conclusion, consider not only the benefit of the lunatic, but also what was fair to the future owners of those two estates. Under those circumstances I assume, for the purposes of my judgment, that there is such a power under sect. 118 of the Act of 1890 and that when the order of the 14th March 1894 and the subsequent orders were made, it was within the power of the master or judge to have taken these matters into consideration, and to have determined this question having regard not only to the benefit of the lunatic, but also to what was fair and right as between the expectant owners of the real estate and the personal estate respectively. I propose to deal with this case upon that footing, and upon the admission of the appellant's counsel that, so far as they are concerned, they are not prepared in any way to suggest that, when these orders were made, the master in Lunacy did in fact take into consideration the question as between the personalty and the real estate independently of the immediate benefit of the lunatic. Now, if that is so, and if one looks at the orders and finds that the orders are consistent, so far as the words are concerned, with the master not having taken sect. 118 of the Act of 1890 into consideration, then I think that we ought to look at sect. 118 and see what can be properly done after the making of these orders in exercise of the jurisdiction in Lunacy. Notwithstanding the case of *Re Swire; Mellor v. Swire* (53 L. T. Rep. 205; 30 Ch. Div. 239), which was much urged upon us, in my judgment, if these orders had made it clear that this question was really dealt with by the master at the time of his making the orders respectively, we should in my opinion have, or the master in Lunacy would have had, no jurisdiction which we or he could properly exercise under sect. 118 of the Act of 1890. I think that when once the jurisdiction given by that section has been exercised by the master or the judge, and that the fact of its exercise has been made manifest before the orders, the jurisdiction cannot be exercised a second time. I do not think that there would be any power to make the order which the master has made in the present case if it were clear on the face of the former orders that that was the true state of the case. But for the present purpose I am assuming that there is nothing in those former orders which shows that the master did have this question before him. On that view, when one turns to the words of sect. 118, one finds that it empowers a judge to order that the "whole or any part of any moneys expended or to be expended under his order for the permanent improvement, security, or advantage of the property of the lunatic, or any part thereof, shall, with interest, be a charge upon the improved property or any other property of the lunatic, but so that no right of sale or foreclosure during the lifetime of the lunatic be conferred by the charge." Then the section goes on to provide that the income shall be kept down during the lunatic's lifetime, out of the income of the general

estate, as far as the same is sufficient to bear it; and that "the charge may be made either to some person advancing the money, or, if the money is paid out of the lunatic's general estate, to some person as a trustee for him, as part of his personal estate." It seems to me that the construction of this section is as was pointed out by Stirling, L.J. in the course of the argument. And I think that the master, in the absence of any order which had already exercised this jurisdiction, would have the power to exercise it subsequently—in other words, by making an order in respect of moneys already expended under a previous order. In the first place I agree with the observations of Lord St. Leonards in 1844 in the Irish case which has been cited of *Lord Leitrim v. Enery* (6 Ir. Eq. Rep. 357, at p. 369). I think that this jurisdiction is a jurisdiction which should not be exercised after a considerable lapse of time. It seems to me that it is a jurisdiction the exercise of which ought to be asked for promptly; and that in this case, the next of kin having chosen ever since the date of these orders to stand by and acquiesce therein, which *prima facie* threw the incidence of these expenses and costs upon the personal estate, ought not to be readily listened to coming here at this distance of time and asking us to alter the incidence of those expenses and costs. Speaking for myself, I think that if the lunatic had died—as it is said that he will very likely do shortly—before this order had been made it is very doubtful whether the jurisdiction would have continued in those who exercised it. Be that, however, as it may, in my judgment these persons have come forward too late to make this application. But I should be sorry to decide this appeal upon that ground alone. It is not, indeed, necessary in this case to rely upon that narrow ground. We have before us the affidavits and the orders, and we know what the nature of the repairs and permanent improvements was which were done under these various orders. And it is common ground that the great bulk of this work was work which was properly paid for out of the personal estate of the lunatic. But it is suggested that with regard to one or two of the items, which came to a very small proportion of the total sum expended, they were in the nature of permanent improvements which the real estate ought to bear. I take the strongest instance, which was the conversion of a malthouse into cottages. It is said that that is like the purchase of new estates, and like the instance which is mentioned by Lord Cottenham in *Re Badcock* (4 My. & C. 440), and that that is expenditure which ought to be charged upon the real estate. I cannot agree. As was said by the appellant's counsel—and as it seems to me—in dealing with these matters we must take into consideration the magnitude of the estate and nature of the estate. It may very well be the case that, in the ordinary course of things in the management of a large agricultural estate such as this, it became necessary in the ordinary course of management to expend money as each new tenant might require as a condition of taking the lease. We know from the affidavits that in fact this was the way in which this alteration from malthouse to cottages actually came about. It seems to me that such expenditure is expenditure which, in the ordinary course of the management of this estate, is essential to be paid for out

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of the rents and profits of the estate. It is not such an expenditure as one would be disposed in the exercise of this jurisdiction to order to be made a charge upon the realty. The very instance which I have just taken seems to me to go to show very strongly how unfortunate it would be to allow an order of that sort to be made after such a great time has elapsed from the original orders. We are not in a position now to ascertain all the facts about this expenditure and its nature. But among other things it is worthy to remark that the master had before him the fact that of the moneys to be provided for this expenditure a considerable part came from the cutting of timber on the entailed estates. The master may very well have thought that under those circumstances, in the absence of any objection, it was a reasonable order to make that this expenditure should be provided for in the way it was. Be that as it may, I do not think that, having regard to the small proportion that the expenditure which it is suggested should be thrown on the real estate bears to the total expenditure, we ought, after this long lapse of time since the orders were made, to authorise such an order as that of the 8th Dec. 1903 to stand. It seems to me, therefore, that this appeal ought to be allowed, and I put it on the two short grounds which I have mentioned—namely, first, because it is an order which ought not to have been made after this long lapse of time; and, secondly, because, even giving the go-by to the long lapse of time, I am of opinion that, looking to the nature of these repairs and improvements, the order of the master for the immediate payment of this expenditure and of these costs out of the lunatic's personal estate would be a perfectly reasonable and proper order, if this matter now came before us for the first time. With regard to the general costs incurred in the lunacy—one moiety of which the summons asked to be thrown on the real estate—it was hardly contended that in the circumstances of the case sect. 118 of the Lunacy Act 1890 had any application. And in my opinion it is impossible that the incidence of these costs should be dealt with or altered at all. I think that the master's order was clearly wrong on that point. It would be impossible to say, if the incidence of these repairs related partly to the real estate and partly to the personal estate, that therefore the right order would be to divide the costs between the real and personal estate. I do not think so. The appeal must be allowed and the order of the master discharged. The costs will be costs in the lunacy.

STIRLING, L.J.—I also think that the appeal ought to be allowed. The order which was made by the master gives the lunatic a charge upon certain settled estates, of which the lunatic is tenant in tail in possession, for sums which under four orders have been expended in permanent improvements of those estates. Now, the principles upon which the court acts with reference to such matters are very clearly stated by Lord Macnaghten in *Attorney-General v. Marquis of Ailesbury* (58 L. T. Rep. 192, at p. 195; 12 App. Cas. 672, at p. 688). He says: "The principles on which the court acts in dealing with the property of lunatics under its care are not open to question. The leading principle, the paramount consideration, is the interest

of the lunatic. Consistently with that principle it is settled that, in the ordinary course of managing a lunatic's estate, the court pays no regard to the interests or expectations of those who may come after; but it is equally well settled, that, in matters outside the ordinary course of management, it is the duty of the court, so far as may be possible, not to alter the character of the lunatic's property, or to interfere with any rights of succession." Then the learned judge quotes a passage from Lord Loughborough's judgment in *Oxenden v. Lord Compton* (2 Ves. 69), when he was commenting on Lord Bathurst's judgment in *Ex parte Grimstone* (4 Bro. C. C. 235n.; Amb. 706), as follows: "'If the Chancellor was continually looking to the right and left and weighing the probable interest of the representatives, the interest of the lunatic would be committed in favour of those who have no immediate interest, and whose contingent interests are left to the ordinary course of events. Therefore the Chancellor is to administer the estate *tanquam bonus pater familias*, making every advantage fairly to increase and improve it without engaging in risks and dangerous adventures, for those are not fit enterprises. But whatever leads towards ordinary improvement it is strictly the duty of the administrator to do, considering only the immediate interest of the proprietor of the estate. But when I am laying down this so generally I must be understood to do it with this guard, that great care must be taken that nothing extraordinary is to be attempted, as estates to be bought or interests to be disposed of. Alteration of property is, as far as possible, to be avoided consistently with the idea of preserving the interest of the proprietor.'" The rule there laid down is that it is the duty of the court, so far as possible, in matters outside the ordinary course of management not to interfere with or alter the devolution of a lunatic's property. And the illustrations given by Lord Loughborough are cases where property is to be bought or sold. The application of that rule, however, is not limited to cases of purchase and sale. It has long been settled, as appears from *Re Harris* (unreported), cited in *Shelford on Lunacy*, that, where it was absolutely necessary to expend money in rebuilding, the court would order that the sum expended should be taken as charged on the lunatic's real estate. And in *Re Badcock* (*ubi sup.*), to which my Lord has already referred, Lord Cottenham said that, "if the money were laid out in the purchase of land, or, what would amount to the same thing, in building a farmhouse, it would be right that the sum so laid out should retain its character of personalty." Now, it is sought on behalf of the next of kin of the lunatic to bring the present case within those decisions to which I have last referred, so that the court ought to say that there has been expenditure of an extraordinary kind made which would give them a right to say that there has been something in the nature of an alteration of the property, and that an order might be made under sect. 118 of the Lunacy Act 1890 giving the lunatic a charge upon the settled estates for the amount of the expenditure. Now, it is to be observed that all these orders were made in the presence of the heir-at-law and of the next of kin. They had therefore an opportunity of pointing out to the master at the time when the orders were made

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that the expenditure was of an extraordinary nature, and of calling upon him to exercise the jurisdiction which the court has of altering the devolution of the property, or of leaving the question open for future decision by inserting a few words in the orders to the effect that they were to be without prejudice as to how the expenditure was ultimately to be borne. Nothing of that kind, however, was inserted in the orders. They simply contain a direction to the committee to expend the money. That being so, it seems to me that the burden lies on the present applicants—the next of kin—to make out that extraordinary expenditure has taken place. Now, I confess that it seems to me that the evidence in support of that contention is of a very shadowy description. There are only a few items which bear the aspect of being at all extraordinary. The greater part of the expenditure sanctioned by these orders was simply for repairs of an ordinary character. In the first order, which is that of the 14th March 1894, the sum expended in alterations and repairs was 600*l.*, and of that the item which was pointed to was one, estimated at 150*l.*, for the conversion of a malthouse into cottages, one of the terms on which the tenant of the farm took the lease being that this should be done in order to increase the accommodation for labourers. That is stated in the affidavit of the committee filed in support of the order which was then made, and that is all that is said in the matter. And it is said very fairly that the master might have treated it as an ordinary case of management of the property, and one not calling for the exercise of any discretion on his part. The other instances are really weaker, and, upon the whole, I have come to the conclusion that the applicants have not made out that which it was necessary for them to make out, that there has been such expenditure as to bring the case within the rule which applies to what is outside the ordinary course of management. That being so, it seems to me that the application fails. I will only add that if it were proved that the court had not exercised a jurisdiction which is undoubtedly vested in it of altering the nature of the property so as to change its devolution, it would in my opinion be open to the court to make an order under sect. 118 of the Act of 1890. But if the jurisdiction is once exercised and the court has decided that the power vested in it to alter the nature of the property ought not to be exercised, then the court cannot go back upon its own order and make such an order as is asked for by the present summons.

COZENS-HARDY, L.J.—I am of the same opinion. The question before us is not one of amending the old orders. No such application as that ought to be listened to for a moment. The real question arises under sect. 118 of the Lunacy Act 1890. That section gives the court jurisdiction to make a charge upon the real estate of the lunatic for the moneys expended under its order for the permanent improvement of the property of the lunatic, unless in making that order the judge or master had that section before his mind and deliberately exercised the jurisdiction conferred by it. In the present case I am not satisfied that any one of the four orders in question is of such a nature as to prevent us from now exercising the jurisdiction under sect. 118. I do not hold the

narrow view of sect. 118 taken by counsel for the appellant, that the court cannot make a charge unless for the benefit of the lunatic. Any such contention seems to me to be negatived by Baggally, L.J. in the former case arising in this lunacy of *Re Gist* (5 Ch. Div. 881). Assuming, however, that we have jurisdiction, there are two grounds which are said to prevent our exercise of that jurisdiction. The first is delay. I do not attach much importance to that, as nothing has been done which would alter the position of the parties. But the other consideration, which really influences my mind, is that, in exercising the jurisdiction under sect. 118, regard must be had to the nature and extent of the lunatic's estate. It is an estate the rental of which was 5000*l.* a year, though it is now reduced to some 3500*l.* In approaching a question of this sort, regard should be had to this fact, that it is almost, if not quite, impossible to draw a clear line between what are repairs and what are permanent improvements. And we are asked to say that certain items on the border line must be regarded as improvements and cannot be considered as repairs. Now, there are three items only that need be referred to. The strongest in favour of the appellant was the conversion of the malthouse into cottages. The second was a new iron wheel in place of a wooden wheel; and the third was a new roof to an old barn. I am not clear that one single item is not of such a nature that the master could not have rightly said under sect. 118 that it was not the subject of a charge on the real estate. Speaking generally, it is a good rule that the masters in Lunacy in making an order for improvements should either take into consideration sect. 118 at the time and express that in the order drawn up, or, if that is not done, should add that the order is made without prejudice to any question as to how the expense should be ultimately borne. If neither the one nor the other course is adopted, and the court is afterwards asked to exercise its jurisdiction under sect. 118, I think that a very clear and strong case ought to be made out.

Appeal allowed.

Solicitors for the appellant, *Routh, Stacey, and Castle*, agents for *Stapleton and Son*, Stamford.

Solicitors for the respondents, *Bloxam, Ellison, and Co.*, agents for *Bryan and Helps*, Gloucester.

Friday, Jan. 22.

(Before Lord ALVERSTONE, C.J., COLLINS, M.R., and ROMER, L.J.)

HARROGATE CORPORATION v. DICKINSON. (a)
APPEAL FROM THE KING'S BENCH DIVISION.

Public health—Building by-laws—Deposit of plans—Change of by-laws after approval of plans—Row of houses—Part of work carried out—Right to complete according to approved plans—Harrogate Corporation Act 1893 (56 & 57 Vict. c. clix.), s. 27.

Sect. 27 of the Harrogate Corporation Act 1893 provided that the deposit with the corporation of any plan of any street or building should be null and void "if the execution of the work specified in such plan should not be commenced within three years from the date of such deposit."

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law

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In 1894 a builder deposited a plan showing thereon a number of houses which he proposed to erect, and which were in accordance with the building by-laws then in force in the borough. The plan was approved by the corporation.

Some of the houses were built and completed, and certificates were given on their completion by the corporation.

In Nov. 1901 the building by-laws in force in the borough were repealed "except as regards any work commenced before that date," and on the same day new by-laws came into force with which the plan that had been deposited by the builder in 1894 did not comply.

Held (affirming the decision of Wright, J. 88 L. T. Rep. 299), that the plan approved in 1894 was not merely the plan of one building, but was really a number of separate plans for the buildings shown thereon; that therefore the completion of some of the houses shown on the plan was not a commencement of the other buildings there shown, which were not in fact begun till after the new by-laws came into force, and the defendant was not entitled to go on with the work under the old by-laws.

APPEAL by the defendant from the judgment of Wright, J. upon a special case stated pursuant to Order XXXIV., r. 1.

The facts of the special case, which is set out in full in the report of the judgment of Wright, J. (88 L. T. Rep. 299), may be summarised as follows:—

The Harrogate Corporation Act 1893 (56 & 57 Vict. c. cccix) provides:

Sect. 27. The deposit with the corporation of any plan of any street or building shall be null and void if the execution of the work specified in such plan be not commenced within the following periods (that is to say): As to plans deposited after the passing of this Act, within three years from the date of such deposit; and as to plans deposited before the passing of this Act, within three years from the passing of this Act; and at the expiration of those respective periods fresh notice and deposits shall, unless the corporation otherwise determine, be requisite.

On the 1st Oct. 1894 the defendant deposited with the plaintiffs two plans showing thereon eleven dwelling-houses and two stables and coach-houses proposed to be erected by him on a plot of land in Walker-road and Bilton-drive.

On the 8th Oct. 1894 these plans were approved by the plaintiffs.

Five of the dwelling-houses and one of the stables and coach-houses shown on the plans were completed by the defendant, and by June 1899 the plaintiffs had given to the defendant certificates that the buildings were completed and fit for human habitation.

On the 7th Nov. 1901 new building by-laws of the plaintiffs came into effect, clause 117 of which provided:

From and after the date of the confirmation of these by-laws, all by-laws relating to new streets and buildings, previously in force in the district, shall be repealed except as regards any work commenced before the date of the confirmation of this by-law or any work not so commenced but of which plans shall either have been approved by the council before such date, or have been sent to the surveyor to the council one month at least before such date and shall not have been disapproved by the council.

With these new by-laws the plans that had been deposited by the defendant did not comply, and under them, if applicable, the defendant would have been unable to complete the buildings shown on such plans.

On the 3rd Jan. 1902 the defendant began the building of the other stable and coach house shown on the plans which he had deposited in Oct. 1894.

On the 18th Jan. 1902 the plaintiffs' building inspector, by letter, requested the defendant to discontinue the works on the ground that the plans deposited in Oct. 1894 were null and void, pointing out that it would be advisable for the defendant to submit new plans to the plaintiffs for their approval.

The defendant thereupon discontinued the works.

Upon the special case that was stated for the opinion of the court, Wright, J. held that the two plans deposited were really a number of plans, and those particular portions on which work was not commenced were not within the words in clause 117 of the new by-laws, "any work commenced before the date of the confirmation of this by-law."

The learned judge therefore gave judgment for the plaintiffs.

The defendant appealed.

Colefax for the defendant.—The question is whether the defendant is entitled to complete the houses according to the plans deposited and approved under the old by-laws, notwithstanding that the plans are not in accordance with the new by-laws. He is protected by the saving clause, No. 117, of the new by-laws. The plans which he deposited under sect. 27 of the Harrogate Corporation Act 1893 is a plan of one building. "A building" is an expression of wider meaning than "a house." This row of houses was in effect one building, and therefore the work of erecting the building had in fact been begun before the new by-laws came into force. The question here really turns on the meaning of sect. 27, and therefore the case of *White v. Corporation of Sunderland* (88 L. T. Rep. 592) does not really affect the present case. The question in that case was as to the construction of the saving proviso of the repealing clause of some new by-laws. The clause was: "From and after the date of the confirmation of these by-laws, the following by-laws and parts of by-laws relating to new streets and buildings shall be repealed, except as regards any work commenced before the date of the confirmation of this by-law." The fair construction of that was except as regards any work of a "new building," and no part, not even a foundation or a party wall, of the houses proposed to be erected had been begun.

Danckwerts, K.C. and *W. Mackenzie*, for the plaintiffs, were not called upon.

Lord ALVERSTONE, C.J.—We need not trouble you, Mr. Danckwerts. I have very great doubt whether this is not a question of fact. I certainly see no grounds on which we should reverse the findings of the learned judge on the question of fact if that were so, but inasmuch as we have more power in these cases than we have in cases which come to the Divisional Court—magistrates' cases—I should like just to say how it strikes me. It is perfectly true that Mr. Colefax may for

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some purposes call the plan one plan, and I can well imagine cases arising where there might be cases of estoppel, or cases of a right to go on, founded on what had been done with regard to buildings shown on a plan. But in each particular case you must look at the facts of it. In the case now before us the plan showed three houses in a side street and seven houses in a front street, and two coach-houses detached from one another, with fence walls between, behind Nos. 1, 2, and 3 in the side street. The defendant built Nos. 1, 2, and 3, and got them certified; he also built Nos. 4 and 5 and one of the coach-houses, and then, for the purposes of this case, did nothing more until after the by-laws had come into force. Under those circumstances Wright, J. has held, having regard to the words in the by-law of the 7th Nov. 1901, that the "plan deposited" under sect. 27 of the Harrogate Corporation Act 1893 was not a plan of one building which had been commenced, but was one plan of several buildings, and that therefore for the purposes of the by-law it was not protected, because sect. 27 of the Act of 1893 required that after three years there should be a fresh deposit. I think that it would be going too far to say that Wright, J. has come to a wrong conclusion; that for all time—which is the point which we have to consider in connection with the case of *White v. Sunderland Corporation* (*ubi sup.*)—a man has the right to go on, whatever might be the requirements of new by-laws, because he had begun to do part of the work or had built and completed some of the houses shown on the deposited plan. I think that all the grounds taken by Wright, J. are correct, and that the defendant was not entitled to go on under the old by-laws in consequence of what he had done in regard to the houses. I think that the appeal should be dismissed.

COLLINS, M.R.—I am of the same opinion.

ROMER, L.J.—I agree.

Appeal dismissed.

Solicitors for the plaintiffs, *Sharpe, Parker, Pritchards, Barham, and Lawford*, agents for *J. Turner Taylor*, Town Clerk, Harrogate.

Solicitors for the defendant, *Ullithorne, Currey, and Jennings*, agents for *Francis Barber*, Harrogate.

Friday, Jan. 22.

(Before Lord ALVERSTONE, C.J., COLLINS, M.R., and ROMER, L.J.)

Re ARBITRATION BETWEEN GOUGH AND ASPATRIA, SILLOTH, AND DISTRICT JOINT WATER BOARD. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Waterworks—Lands compulsorily taken for reservoir—Assessment of compensation—Natural and peculiar adaptability of land for building a reservoir—Right of arbitrator to take into consideration.

In assessing compensation for land compulsorily taken by a water company for the purpose of building a reservoir thereon, the natural and peculiar adaptability of the land for building a reservoir is a fit and proper matter for consideration as an element in the value thereof.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

although there may be no evidence of any possible purchasers for that purpose besides the water company.

Judgment of Wright, J. (88 L. T. Rep. 421; (1903) 1 K. B. 574) affirmed.

APPEAL by the Aspatria, Silloth, and District Joint Water Board from the judgment of Wright, J. upon an award stated by an umpire in the form of a special case for the opinion of the court.

The award is set out at length in the report of the judgment of Wright, J. in 88 L. T. Rep. 421. The case is also reported (1903) 1 K. B. 574.

The facts were shortly as follows:—

By the Aspatria, Silloth, and District Water Act 1901 (1 Edw. 7, c. lvii.), the Aspatria, Silloth, and District Joint Water Board was incorporated and constituted for the purposes of constructing the works and taking the waters authorised by the Act and supplying water within a certain district.

On the 14th Oct. 1901 the water board served a notice to treat upon the claimant as owner in fee simple of some lands proposed to be taken by the board.

The parties failed to agree as to the amount of the purchase money and compensation to be paid.

Arbitrators were appointed by the parties, and an umpire by the Board of Trade, and, as the arbitrators differed, the matter was referred to the umpire.

In the course of the arbitration the parties came to an agreement as to certain works which the board wished to carry out; and it was arranged that, instead of acquiring the fee simple of a certain piece of land on which was the Overwater Lake, the water board should acquire a perpetual easement for the construction and maintenance of a bank 440 yards in length and the right to cover the land with water or denude it of water, subject to certain conditions, so that the Overwater Lake should be comprised in what was called the Overwater Reservoir.

On another part of the land taken for the claimant a reservoir called the Chapel House Reservoir was to be constructed.

The umpire found that the lands over which such easement was to be acquired were, "owing to the natural configuration thereof, peculiarly adaptable in conjunction with Overwater Lake for the construction of a reservoir." He also found that, owing to the natural configuration of the lands which were the intended site of the Chapel House Reservoir, such lands were peculiarly adaptable for the construction of a reservoir.

The main question for the opinion of the court was whether, in estimating the value of the land and easements to be acquired by the water board for the Overwater and Chapel House Reservoirs respectively, the natural and peculiar adaptability for the construction of a reservoir of the lands in question is or is not a fit and proper matter for consideration as an element in the value thereof in the assessment of compensation.

If the court should be of opinion that in estimating the value of the land and easements to be acquired for the Overwater and Chapel House Reservoirs the natural and peculiar adaptability for the construction of a reservoir of the lands in question is not a fit and proper matter for con-

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sideration as an element in the value thereof in the assessment of compensation, then the sum awarded by the umpire was to be reduced by the sum of 1636l.

Wright, J. held that the natural value of the site for the purposes of water supply was a matter which ought to be taken into consideration in the assessment of compensation.

The water board appealed.

Balfour Browne, K.C. and Roskill, K.C. for the water board—The umpire has found nothing with regard to the value of the land except that, from the physical configuration of the land, it is peculiarly suitable for the building of a reservoir. That is not a ground on which compensation can be assessed. The value of the land to the water board is immaterial. There is no evidence that the suitability of the land for a reservoir increased its value as regards anyone besides the water board:

Re Ossalinsky and the Manchester Corporation, Browne and Allan's Law of Compensation, 2nd edit., p. 659;

Re Riddell and Newcastle and Gateshead Water Company, Browne and Allan's Law of Compensation, 2nd edit., p. 672. (a)

Sir Ralph Littler, K.C. and W. G. Clay, for the claimant, were not called upon.

(a) *Re RIDDELL AND NEWCASTLE AND GATESHEAD WATER COMPANY.*

June 13, 1879.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Waterworks—Land compulsorily taken for reservoir—Assessment of compensation—Special natural adaptability of land for building a reservoir.

APPEAL from the judgment of the Queen's Bench Division (Mellor and Manisty, JJ.) upon a case stated by an arbitrator for the opinion of the court.

J. G. Riddell was tenant for life of certain lands authorised to be taken by the Newcastle and Gateshead Water Company for the purpose of making three reservoirs and other works.

The Newcastle and Gateshead Waterworks Act 1877 (40 & 41 Vict. c. lxxxvii.) provided as follows:—“Sect. 9. For the further protection of the said J. G. Riddell, his heirs, assigns in estate, and assigns, all of whom are included under his name when used in this section, the following provisions shall have effect and be binding on the company. . . . (2) The company shall during every day of twenty-four hours in every year deliver into the said stream called Dryburn, below the ‘Little Swinburn Reservoir,’ a quantity of water being not less than 200,000 gallons. . . . (7) The said quantity of water shall, subject to the provisions of the agreement of 1876, and the agreement scheduled to and confirmed by this Act, be accepted and taken as full compensation for all water which the company can collect or divert and impound by the works authorised by the Act of 1876 as varied by this Act.”

The arbitrator, Mr. Clutton, in addition to a sum of 17,600l. which he determined as the amount of the purchase money, and compensation for damage, to be paid by the company to J. G. Riddell, awarded a further sum of 5000l. in respect of a claim by Mr. Riddell in regard to water which the company could divert and impound by means of their works, provided that the court should be of opinion that sect. 9, sub-sect. 7, of the Companies Act of 1877 was not a bar to that claim.

The Queen's Bench Division (Mellor and Manisty, JJ.) held that the award of the arbitrator was right, the

Lord ALVERSTONE, C.J.—The point argued here is one of very great importance, but, so far as this court is concerned, I think that the law is

proper compensation to be paid to the claimant being the sum of 17,600l. only.

Upon the claimant's appeal from this decision, the Court of Appeal delivered the following judgments:—

BRAMWELL, L.J.—Really, speaking sincerely, the only distrust I feel about this case is that I cannot get myself to entertain a doubt about it, but there are some points in it upon which I cannot say the award, to my mind, is perfectly clear and intelligible. The arbitrator says, “I award, settle, and determine that the amount of the purchase money and compensation to be paid by the said company for and in respect of the absolute purchase of the lands, tenements, right, easements, and premises so required to be purchased”; and one may observe that that certainly includes waters, because there is a reference to the 1st schedule in his award, and the 1st schedule says that the parcels are “all that piece of land,” and so forth, together with all waters, ways, paths, passages, &c.; and he says, “I award the purchase money for that.” Then he goes on, to my mind, most clearly, to say a claim has been made in respect of the damage that can be done to Mr. Riddell's estate and his successors by the powers of the company—that means as to his other lands, not to his lands to be taken and paid for, because it does not matter to him what damage is done to them—but for the damage in respect of the remaining lands by the powers of the company to divert and alter the natural course of the water. He says as to that: “It has been objected that it has been bargained away. If it has not, I give 5000l.; if it has, I do not give it.” That is the award, to my mind; and, as I understand, Mr. Webster says that if that is the award on the face of it, if that is what the award means, he cannot object. He says: “I contend that the meaning of the award is this: I give so much money for compensation, and I would give 5000l. more for compensation if I could, but the company says that Mr. Riddell's rights have been taken away, and the 5000l. more in respect of which I am asked to give compensation is this, that the land has a special value in respect of its fitness for a reservoir, and I would give 5000l. for that, if it were not that that is bargained away by the section.” Now, I am very clearly of opinion that, if he did act upon that notion, he acted upon an erroneous notion, because the land had a peculiar value on account of its fitness for a reservoir, or for building land, or for a skating rink, or for tea gardens, or what not. Those were all things the value of which must have been taken into consideration, and, when one knows that the arbitrator was Mr. Clutton, it is, to my mind, impossible to suppose that he would not have taken that into account. It certainly would be a most remarkable thing that he should have made a double mistake of not taking into account that which he ought to have taken into account and stated his award in such a way that the first mistake he made was concealed in the other. In my opinion the judgment of the court below was perfectly right, and I cannot think that any injustice has been done to Mr. Riddell in the matter. Of course, with respect to Mr. Webster's last application, if there was any obscurity on the face of the award we might send it back to have it cleared up; but, to my mind, there is absolutely none. I think before we send an award back we ought to have strong reasons given; and, if Mr. Clutton had come forward and made an affidavit that he had made the double mistake, there might be reason to entertain the application; but I am satisfied that the award was right (it is a question of what the arbitrator ought to say), and that the judgment of the court below must be affirmed.

BRETT, L.J.—It seems to me that the award is clear. In the first part of the award the arbitrator gives compensation in respect of the absolute purchase of the

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settled. If it is to be altered, it must be in the House of Lords. The umpire has found that the natural configuration of the land is peculiarly

lands and compensation for the damage that may be sustained by reason of the execution of the works. It seems to me clear that that would give the value of the land, taking into account its position and all its capabilities for any particular purpose. Then upon the face of the award it seems to me that somebody suggested that, besides that ordinary value—the land valued in the ordinary way with all its capabilities—Mr. Riddell was entitled to something more, not as adding value to the land, but that he was entitled to compensation for water as water which the company could collect or divert and impound, that means which the company could now collect or divert and impound, and which, if the company had not so done, he could have collected or diverted and impounded, and that he claims in addition to the land with all its capabilities. I think the answer of my brother Manisty is perfect, which is: "If you claim for water in that way, in addition to the value of the land, as water which the company could collect or divert and impound, you are claiming that for which by the Act of Parliament in terms you are already paid, for that says that the 200,000 gallons of water per day is to be compensation for all water which the company can collect or divert and impound"—the very thing which was claimed from the arbitrator in addition to the value of the land. I can see no answer to that judgment of my brother Manisty, and I think, therefore, that this appeal is wrong.

COTTON, L.J.—The question which we have to consider is whether the landowner is entitled to a sum of 5000*l.* in addition to the 17,600*l.* which has been given him by the award. Now, he was held by the court below not entitled to the 5000*l.*, and the arbitrator doubted about it in consequence of sect. 9, sub-sect 7, of the Act of 1877. As I understand that clause (I need not read it), it in no way deprives him of any right which he would have to enhance the purchase money to be given to him for land in consequence of any of the capabilities or circumstances which enhance the value of that land as land, but in my own opinion it did deprive him of any claim for compensation in consequence of damage alleged to be done by the execution of the works of the water company to the remainder of his estate by diverting or depriving him of water which otherwise the estate would have had the benefit of; and what we have to consider on the face of the award is whether or not the award shows that this 5000*l.* was a sum which would have been given by the arbitrator unless he had found himself bound to exclude, in estimating the value of the land, one of those circumstances which under ordinary circumstances but for the Act of Parliament he would have taken into consideration in estimating the value of the land so taken, or whether he has treated that 5000*l.* as a sum which was claimed in respect of damage to the estate in consequence of the execution of the works of the company and by the diversion of water from the estate. We must look only to the award and to the face of the award. We cannot regard anything which passed, even if there was anything which passed, before the arbitrator which might lead to a different conclusion from that which appears on the face of the award. Now, looking at the face of the award, I cannot possibly come to the conclusion that the arbitrator has not taken into consideration, in estimating the sum of 17,600*l.*, all the capabilities of the land, including any value arising from the fact of its being well-watered land or land available for the purpose of making a reservoir or anything else connected with traffic in water, and I also must come to the conclusion on the face of the award that the 5000*l.* was the sum which he rejected as being a sum paid for damage to the estate in consequence of the diversion of the water

adaptable for the construction of a reservoir, and has for that reason awarded £1636*l.* beyond what has been called the ordinary normal value of the

by the execution of the works of the company. Now, if you look at it, you will find a recital in the reference to him that he is to estimate what sum of money should be paid, not only for the absolute purchase of the lands and tenements, rights, easements, and premises so required to be purchased and taken, but also by way of compensation for any damage which might be sustained by reason of the execution of the works for which the said lands, rights, and premises were so required. Now, that of necessity must be damage to the remainder of the estate, because there could be no damage to the land taken by reason of the execution of the works; that would be the property of the company when the works were executed, and damage, therefore, necessarily must be the damage to the remainder of the estate and to the owners of the estate. Then we come to the award, and in the award the arbitrator gives the sum of 17,600*l.* in respect of the absolute purchase of the lands, tenements, rights, easements, and premises so required to be purchased and as compensation for the damage which may be sustained by reason of the execution of the works, subject to this, that, as part of the compensation for damage which the said John Giffard Riddell and his successors in estate would sustain by reason of the execution of the works for which the said lands, rights, and premises are required, he claims a large sum for water which the company could collect or divert and impound by the said works, and he doubts whether that is not concluded by the section of the Act of Parliament. By the very terms of his award he deals in one part of it with the value of the land, and as far as the award shows, and as we must conclude, has taken into consideration all the elements of value. He also deals with the claim made for damage in consequence of the execution of the works, all included in 17,600*l.*, with the exception of a certain particular claim made in respect of damage which would be sustained by the execution of the works. In my opinion, therefore, that award shows on the face of it that the claim in respect of the 5000*l.* which was not estimated by him was not a claim in respect of an element of value in the land, but a claim in respect of damage which it was said would be suffered by the estate in consequence of the execution of the works, and in consequence of the company diverting certain water. That claim was concluded, in my opinion, by the section of the Act of Parliament, although an element of value in the land not in any way to be taken into consideration by him. It was, however, said that he had excluded any water element value by the terms under which he mentioned what it was in respect of the purchase of which he gave the 17,600*l.* It was said that it was referred to him to estimate the value of the land, water, and premises, and various other things mentioned in the schedule, and that here he had omitted water; but in the award he is merely following the words of description which are to be found in the recital of the reference to him, because (and I have read it) it was referred to him to settle and determine what sum should be paid for the absolute purchase of lands, tenements, rights, easements, and premises, and these are the exact words which he uses in that part of the award which fixes the sum of 17,600*l.* as the compensation to be paid for those things. He does not give water in the awarding part any more than he gives it in the recital; but there being a long list of general words in the 1st schedule to the award which includes not only water, but hedges and fences and various other things in the award—both in the recital and in the awarding part—and there is a short description of the same in both cases, and the reference to him was clearly to ascertain the value of all that there was in the schedule. The description in the first place and in the latter must be taken to include water, and that is the only descrip-

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land. It is contended that he has acted wrongly; that he ought not to have given compensation based on the purpose to which the land is to be put by the water board, there being no evidence that any other purchaser would have paid that additional value. I think that the point is decided in *Re Riddell and Newcastle and Gateshead Water Company* (*ubi sup.*), and probably also in *Re Ossalinsky and Manchester Corporation* (*ubi sup.*). I should like to say exactly how the point arose in *Re Riddell and Newcastle and Gateshead Water Company*, in which I appeared as counsel. In the present case Wright, J. has held that the claimant could not sell the water, and therefore has no claim for compensation in that respect. That point was not argued in the Queen's Bench in *Re Riddell and Newcastle and Gateshead Water Company*, and therefore in getting to the Court of Appeal we were in a little difficulty. I thought at the time that there was ground for arguing that on the face of the award the arbitrator had included as an element of value the natural adaptability of the site, and I contended that that would not be taking the value of the land as it was in the hands of the vendor. But Bramwell, L.J. clearly thought that the adaptability of the site was an element which enhanced the value of the land in the hands of the vendor. He said that the arbitrator had awarded the 17,600*l.* as compensation in respect of the lands, tenements, rights, easements, and premises required to be purchased, and the sum of 5000*l.*, if he had power to give it, as compensation for damage done to the claimant's remaining land by the power of the company to alter the natural course of the water. And he then said that the land had a peculiar value on account of its fitness for a reservoir, or for building land, or for a skating rink, or for tea gardens, or what not, all things the value of which must be taken into consideration; and, knowing that Mr. Clutton was the arbitrator, it was impossible to suppose that he had not taken them into account. Brett and Cotton, L.J.J. gave judgment to exactly the same effect—viz., that it was a mistake to omit to consider any additional value to the land in consequence of the suitability of the site. It may be of interest to those who have followed this branch of the law that, in consequence of the decision of the Court of Appeal, I consulted Theisiger, L.J., who was a master of the law of compensation, and he told me that the judgment of the Court of Appeal had only followed the recognised practice of surveyors for many years. So deep was the impression made upon me by that case that I consulted other gentlemen of experience in this matter, who said that the rule laid down by the Court of Appeal was not a new one. For this reason I have always regretted that *Re Riddell and Newcastle and Gateshead Water Company* has not been reported, because I think that it really recognised that rule. *Re Ossalinsky and Manchester Corporation* is another example of the same rule. But, as I pointed out in the

tion there is to be found in the words of the schedule. In my opinion this claim on the award must be taken as a claim for damage—consequential damage—covered by the clause in the Act of Parliament as not being a sum in respect of an element of value which the arbitrator thought he was bound to exclude by that Act of Parliament.

Appeal dismissed.

course of the argument, no question of law is really involved. If no possible purchaser is to be found, that shows that the element of value is not worth very much. I think, therefore, that Wright, J. has not added to what was found by the umpire, but has decided in accordance with the principle laid down in the cases cited, when he said: "If there is a site which has peculiar natural advantages for the supply of water to a particular valley or a particular area, or to all valleys or areas within a certain distance, if those valleys are what might be called natural customers for water by reason of their populousness and of their situation—if the site has peculiar natural advantages for supplying in that sense—apart from any value created or enhanced by any Act of Parliament or scheme for appropriating the water to a particular local authority, then I think it ought to be taken that there is a natural value in the site for the purposes of water supply, and that it should be taken into consideration." For these reasons I think that the appeal must be dismissed.

COLLINS, M.R.—I am of the same opinion. The question is really one of fact. It is said on behalf of the appellants that it follows as a matter of law from the facts as found by the umpire that the element of value arising from the peculiar adaptability of the site for a reservoir ought not to be included. In holding that it ought to be included, the umpire has accepted a *prima facie* presumption that the element of value existed and should be paid for—a presumption based upon a long series of authorities, and one in accordance with good sense. Underlying all that is the presumption that there is a reasonable possibility of a market for the land. The whole question of value has relation to the existence of a possible market, and anyone who wishes to exclude an element of value which should *prima facie* be taken into account should show that there is no reasonable probability of the land coming into the market. I agree that the appeal fails.

ROMER, L.J.—I agree, and have nothing to add.

Appeal dismissed.

Solicitors for the claimant, *Metcalfe, Birkett, and Rowlatt*, for *Mounsey, Bowman, and Graham*, Carlisle.

Solicitors for the water board, *Hargreaves and Crowther*, for *Frank Richardson*, Aspatia.

Dec. 17 and 18, 1903.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.J.J.)

SHARMAN v. HOLLIDAY AND GREENWOOD LIMITED. (a)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—Weekly payment—Application to review—Change of circumstances—Res judicata—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), sched. 1, clause 12.

The employer of a workman receiving weekly payments under the Workmen's Compensation Act

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

1897 applied for a review of the weekly payment, under clause 12 of the 1st schedule to the Act, upon the ground that the workman was no longer incapacitated for work.

The County Court judge, acting upon the evidence of medical experts that the workman was not incapacitated for work, reduced the weekly payment to the nominal sum of 1d.

Subsequently the workman applied for a review of the weekly payment upon the ground that since the previous hearing he had repeatedly been refused, and had been unable to obtain, work owing to incapacity arising from his physical condition caused by the accident.

The County Court judge refused to entertain the application, upon the ground that the matter was *res judicata*, and that no change of circumstances since the previous hearing was alleged which would give him jurisdiction to review the weekly payment.

Held (allowing the appeal), that the matter was not *res judicata*, and that sufficient change of circumstances was alleged to give the judge jurisdiction to entertain the application.

Crossfield and Sons v. Tanian (82 L. T. Rep. 813; (1900) 2 Q. B. 629) distinguished.

APPEAL of the plaintiff from the award of the County Court judge at Lambeth upon an application to review the weekly payment under the Workmen's Compensation Act 1897.

The plaintiff was injured by accident arising out of and in the course of his employment by the defendants in an employment to which the Workmen's Compensation Act applied. His leg was broken, and he was for a time totally incapacitated for work.

A memorandum of agreement was filed in the County Court by which the defendants agreed to make a weekly payment to the plaintiff during incapacity for work.

On the 21st Jan. 1903 an application by the defendants to review the weekly payment, upon the ground that the plaintiff was no longer incapacitated for work, was heard by the County Court judge.

At the hearing of this application the evidence of expert medical witnesses on both sides was given upon the question whether the plaintiff was or was not in fact injured so as to be incapacitated for work.

The County Court judge found that the plaintiff was not incapacitated for work, and he reduced the amount of the award to the nominal sum of 1d. per week. He said: "This is a difficult case, but I think I am bound to come to the conclusion on the weight of the medical evidence that I will reduce the amount to the nominal sum of 1d. per week. Mr. Thompson [counsel for the plaintiff], the door is still open to you to come again. It is a very serious case indeed, and affects the whole foundation of the Workmen's Compensation Act, if it is a fraud. It is one thing or the other."

On the 23rd June 1903 the plaintiff applied for a review of the weekly payment. The County Court judge asked the counsel for the plaintiff what were the new facts arising out of the accident showing that the plaintiff's earning powers had been diminished since the hearing of the application to review on the 21st Jan. 1903.

Counsel for the plaintiff stated that the new facts upon which he relied, and which he was

prepared to prove, were as follows: (1) That the plaintiff had been refused employment repeatedly, even by his former master, on account of the condition of his foot. (2) That the County Court judge did not decide the application at the hearing on the 21st Jan. solely on the medical evidence, but partly on his personal observation of the plaintiff's movements, and that the highest expert evidence on new observations and tests of the condition of the plaintiff was tendered to show that the plaintiff was unfit to follow his usual employment. (3) That the County Court judge kept the arbitration alive by awarding 1d. weekly, in view of the possibility of a change in the circumstances, and that, the arbitration being so kept alive, it could not be *res judicata*. (4) The plaintiff did not seek for a fresh award, but for a review of the weekly payments.

The County Court judge gave his decision as follows: "As I decided on the 21st Jan. that the earning powers were not at that time diminished, and as the present application is again on the ground of total incapacity, I hold that the matter is *res judicata*, and also that there are no facts alleged showing any alteration in the circumstances of the case since the hearing on the 21st Jan."

The Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides:

First schedule. Clause 12. Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.

The plaintiff appealed.

R. M. Bray, K.C. and W. M. Thompson for the appellant.—The learned County Court judge was wrong in holding that the matter was *res judicata* and that there were no new facts alleged showing any change of circumstances since the former hearing. At the former hearing it is clear that the judge did not intend to treat his decision then as final and conclusive, but that it should be open for the workman to apply to him again if it should turn out that he was really incapacitated for work. The fact that it has been shown by subsequent experiment that the workman is unable to get employment because he is incapacitated for work is a sufficient change of circumstances to entitle him to apply for a review of the weekly payment, under clause 12 of the 1st schedule. Upon that ground this case is clearly distinguishable from *Crossfield and Sons v. Tanian* (82 L. T. Rep. 813; (1900) 2 Q. B. 629), in which the employers sought to show on a subsequent application that the average weekly earnings of the workman had been incorrectly stated at the first hearing when the weekly payment was awarded.

Shakspeare for the respondents.—The decision of the County Court judge was correct. An application for a review of the weekly payment cannot be made under clause 12 of the 1st schedule unless there has been a change in the circumstances of the case since the weekly payment was awarded:

Crossfield and Sons v. Tanian (sup.).

The change must be in the condition of the workman, affecting his capacity for work. In

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this case there is no suggestion of any evidence to show that there has been any change in the condition of the workman between the time when the award was made and the date of this application for review of the weekly payment. At the original hearing the question was whether the workman was totally incapacitated for work; the judge decided that he was not, and that question is *res judicata*. The plaintiff is really now seeking to show that he was then and is now totally incapacitated, and that the original decision was therefore wrong. The suggestion that subsequent experiment has shown that in fact the previous decision was wrong does not show that there was any change of circumstances to justify a review.

R. M. Bray, K.C., was not called upon to reply.

COLLINS, M.R.—This is an appeal from the decision of the County Court judge who gave his decision upon an application under clause 12 of the 1st schedule to the Workmen's Compensation Act 1897. Upon an application by the employers under clause 12, the County Court judge made an award for the payment of the nominal sum of 1d. a week, and thereby kept seisin of the matter. Upon a later occasion, on an application by the workman to review the amount of the weekly payment, the County Court judge held, upon the authority of *Crossfield and Sons v. Tanian* (82 L. T. Rep. 813; (1900) 2 Q. B. 629), that he could not entertain the application, because the matter was *res judicata*, and also because there were no fresh facts or circumstances in the case. The question now really is whether, in the circumstances of this case, the decision of the judge upon the first application is to govern the position of the parties for all time. In the first place, I very much doubt whether it can be said that there was any estoppel by the decision of the judge as to the capacity of the workman for work, which was merely a matter of opinion. That may often be a question which can only be really decided by experiment, and in that case the decision of the judge founded upon the evidence of experts may be quite displaced by subsequent experiment. The opinion of experts might be that a workman was capable of doing work, and yet the man might afterwards try to do that work and find that it was quite impossible. It is said that such a decision upon the evidence of experts is *res judicata* and must be an estoppel for all time. I cannot think that the doctrine of estoppel applies to such a case. It is said that the case of *Crossfield and Sons v. Tanian* (*ubi sup.*) is an authority to that effect, but I do not think that it is. What was decided in that case was not a matter of opinion or of expert evidence. In that case the award of the weekly payment was made upon the basis that the average weekly earnings of the workman before the accident were 30s. a week, as stated by him in his particulars, the employers not having taken the steps necessary to entitle them to dispute that statement, and being therefore precluded from proving that his average earnings were really much less. There was no appeal, but the employers subsequently applied for a review of the weekly payment, really upon the ground that the average weekly earnings were much less than had been stated at the first hearing. It was decided that the employers were estopped from denying that the average

weekly earnings were not as proved by the workman at the first hearing; and that, as there had been no change in the circumstances of the case since the weekly payment was awarded, the application could not be entertained. That was not the case of an application to review the weekly payment upon the ground that subsequent experience showed that a decision founded upon the evidence of experts was wrong. Here the application appears to be made upon the ground that evidence can now be given to show that it has been proved by the test of subsequent experiment that the workman is in fact incapacitated for work. I am not prepared to say that in this case there is not such a change of circumstances as to justify an application for a review of the weekly payment by the County Court judge. I do not think that the decision in *Crossfield and Sons v. Tanian* (*ubi sup.*) is any authority for saying that in a case like this, where the opinion of the County Court judge founded upon the evidence of experts is shown by subsequent experiment to be wrong, there cannot be an application to review the weekly payments because the workman's condition is really the same as it was at the time of the first hearing. If that were so, I think that great injustice might be done. There is nothing to be found in the Act to that effect. It seems to me that, within the principle of the decision in *Crossfield and Sons v. Tanian* (*ubi sup.*), when examined, there is such a change of circumstances alleged here as to justify an application for review, subsequent experiment having shown that in fact the previous opinion was wrong. When fairly considered, I think that the written notes of the grounds for review, put forward by the plaintiff's counsel, do suggest evidence of new facts and evidence of new circumstances which could be given, particularly the evidence that the plaintiff had been repeatedly refused work on account of his incapacity, which would justify a review of the weekly payment under clause 12 of the 1st schedule to the Act. I think, therefore, that this case must go back to the County Court judge to hear the application, and to hear the evidence on behalf of the workman. This appeal must therefore be allowed.

MATHEW, L.J.—I am of the same opinion. The doctrine of *res judicata* is reasonable when there has been a formal inquiry and an issue distinctly raised as to facts in an action or other legal proceeding. It would, however, I think be unreasonable to apply that rule to an inquiry of this kind as to a workman's state of health, which proceeded upon the evidence of experts when the actual facts could not be ascertained. It is not the same as the case in which a disputed fact has, upon conflicting evidence, been determined after a trial. The effect of the argument on behalf of the employers is that, although fresh symptoms may appear after the first hearing, the condition of the workman still remains the same as it was, and there can be no review. I am clearly of opinion that there is nothing in the Act of Parliament which precludes a further inquiry when, after the first hearing, fresh symptoms of incapacity for work have shown themselves. Expert witnesses may say that in their opinion, upon the symptoms then appearing, the workman is not in a condition which incapacitates him for work, and the County Court judge may so decide. That question may,

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however, be solved by subsequent experiment, and the workman may make the experiment by trying to get work and to work, with the result that he is shown to be in fact incapacitated for work. It would, in my opinion, be most unfair if, in a case of that kind, the doctrine of estoppel were applied to prevent a workman from applying for a review. I think that the plaintiff is entitled to have the inquiry for which he has applied to the County Court judge. Further, at the original hearing the County Court judge did not treat the matter in such a way as to show that he intended that the question should be *res judicata*. The County Court judge then said: "This is a difficult case, but I think that I am bound to come to the conclusion on the weight of the medical evidence that I will reduce the amount to the nominal sum of one penny per week. Mr. Thompson, the door is still open to you to come again." I think, therefore, that it is quite plain that this case must go back to the County Court judge to hear the application of the workman.

COZENS-HARDY, L.J.—I am of the same opinion, and have nothing to add.

Appeal allowed.

Solicitors for the appellant, Griffith and Gardiner.

Solicitors for the respondents, William Hurd and Son.

Jan. 12 and 13.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

NEAGLE v. NIXON'S NAVIGATION COMPANY.
EDWARDS v. GUEST, KEEN, AND NETTLEFOLDS;
HIATT v. SAME. (a)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—Workman in receipt of weekly payments—Medical examination of workman—Examination by employer's doctor—Refusal by workman of further examination by medical referee—Suspension of weekly payments—Right of workman to arbitration—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), sched. 1, clause 11.

A workman in receipt of weekly payments by way of compensation under the Workmen's Compensation Act 1897, who has at the request of the employer, under clause 11 of the 1st schedule to the Act, submitted to examination by the employer's doctor, cannot be required by the employer to submit to a further examination by a medical referee appointed under the Act, and he may, if the employer suspends the weekly payments, proceed to arbitration under the Act.

APPEALS of the plaintiff in the first case from the order of the County Court judge at Merthyr Tydfil, and of the defendants in the other two cases from orders of the County Court judge at Pontypool, in proceedings for compensation under the Workmen's Compensation Act 1897.

The plaintiff Neagle was injured by accident arising out of and in the course of his employment by the defendants.

Neagle duly gave notice of this injury to the defendants, and for some time they made weekly payments to him by way of compensation.

The defendants subsequently required him to submit himself for examination by a medical practitioner appointed by them, under clause 11 of the 1st schedule to the Workmen's Compensation Act 1897.

The Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides, by the 1st schedule:

(11) Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, or such other person; but, if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the second schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

Neagle did submit himself for examination by the medical practitioner provided by the defendants, who pronounced him to be recovered and fit for work, and made a certificate to that effect.

The defendants communicated to Neagle the effect of the certificate, and gave him notice that, if he was dissatisfied with the certificate, he might submit himself for examination by one of the medical practitioners appointed for the purposes of the Act, and that, if he did not do so, the weekly payments would be suspended.

Neagle did not submit himself for examination by such a medical referee, and the defendants discontinued the weekly payments.

Neagle then commenced proceedings to recover compensation under the Act by filing a request for arbitration.

The defendants then applied for a stay of proceedings in the arbitration until he had been examined by a medical referee, under rule 50 of the Workmen's Compensation Rules.

The Workmen's Compensation Rules provide:

Rule 50 (1). In any case in which an arbitration is pending, or an award has been made or a memorandum recorded or a certificate given, and the employer or any person by whom the employer is entitled to be indemnified alleges that the workman who claims or has been awarded compensation refuses to submit himself for examination in accordance with par. 3 or par. 11 of the first schedule to the Act, or obstructs such examination, such employer or other person may apply to the judge or arbitrator to stay proceedings in the arbitration, or to suspend the weekly payments awarded until such examination has taken place.

The County Court judge decided in favour of the defendants, and made an order staying the proceedings in the arbitration.

The plaintiff Neagle appealed.

In the other two cases, which were heard before a different County Court judge, the facts were similar to those in the first case, but the judge

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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decided in favour of the plaintiffs, and refused to stay the proceedings.

The defendants in these two cases appealed.

S. T. Evans, K.C., Rhys Williams, and J. Sankey for the plaintiff in the first case.—The decision of the County Court judge was wrong. The proper construction of clause 11 of the 1st schedule to the Act is that the workman must, at the request of the employer, submit to be examined by the employer's medical practitioner, with an option of being examined instead by a medical referee appointed under the Act if he objects to the employer's medical practitioner, and with the further option of appealing from the certificate of the employer's medical practitioner to a medical referee. The words at the end of clause 11, "if the workman refuses to submit himself to such examination," there clearly refer to a refusal to be examined either by the employer's doctor, or by a medical referee. The examination by a medical referee is purely optional on the part of the workman; the only examination to which the employer can require the workman to submit is an examination by the employer's doctor; and, therefore, that is the only examination to which the workman can "refuse" to submit. The certificate of the employer's doctor is not made conclusive in any way; it is not even made evidence. If the contention of the employers is correct, the result would be that, when the employer has required the workman to be examined by the employer's doctor, the workman will be deprived of his right to arbitration, because he must then be examined by a medical referee, whose certificate is conclusive. The suspension of the weekly payments is only to take effect if the workman refuses to submit to any examination at all. In this case the workman did submit to examination by the employer's doctor, and therefore rule 50 of the Workmen's Compensation Rules does not apply. This question has been decided in two recent cases in Scotland. In *Davidson v. Summerlee and Moss End Iron and Steel Company* (5 Fraser, 991) the point was decided in favour of the employer, one of the judges (Lord Young) dissenting; but in *Niddrie and Benhar Coal Company v. McKay* (40 Sc. L. Rep. 798) it was decided in favour of the workman. The reasoning of the dissenting judge in the former case, and of the judgments in the latter case, appears to be unanswerable and conclusive.

Asquith, K.C. and J. Sankey for the plaintiffs in the other cases, supported the above argument.

Haldane, K.C., Ruegg, K.C., and Anton Parsons for the defendants in all the cases.—The decision of the County Court judge in the first case was right. The question is simply one of construction of clause 11 in the 1st schedule. The Act provides, by clause 12 of the 1st schedule, that any weekly payment may, on review, be ended, diminished, or increased. The provisions of clause 11 are intended to enable the employer to obtain information for the purpose of having the weekly payments ended or diminished. If he requires the workman to be examined by his doctor and the workman refuses, the payments will be suspended; if the workman chooses to be examined by a medical referee his certificate is conclusive; equally if the workman refuses to be bound by the certificate of the employer's doctor

the employer must have an option to require the workman to be examined by a medical referee. The meaning of the words at the end of clause 11, "if the workman refuses to submit himself to such examination," is that if the workman refuses any examination, or refuses on request of the employer to be examined by a medical referee, the weekly payments shall be suspended. If the workman chooses to take his case before a medical referee the certificate is conclusive on the employer. It would be strange if it were entirely at the option of the workman to get or not to get a certificate conclusive on the employer. The intention of the Act is that this question with regard to the condition of the workman from time to time might be settled speedily and cheaply by a medical referee instead of by arbitration proceedings.

Collins, M.R.—It seems to me that this point lies within a very short compass. The case arises thus: A workman was injured while in the employment of the defendants, and by agreement compensation was paid to him by the defendants for some time after the accident. Then the employers, thinking that the workman had recovered, required him to submit himself for examination by their medical practitioner. The workman did submit to such an examination, and was pronounced to be fit for work. The employers thereupon gave him notice that they would not pay compensation any longer. The workman then took these proceedings to recover compensation under the Act, and the employers applied to the judge, under rule 50 of the Workmen's Compensation Rules and clause 11 of the 1st schedule of the Act, to stay proceedings in the arbitration until the workman had been examined by a medical referee appointed under the Act. The question is whether, having regard to the terms of clause 11, it is a condition precedent to the right of the workman to have compensation assessed under the Act that he shall submit himself for examination by a medical referee appointed under the Act. That question turns upon the proper construction of clause 11. Perhaps it is desirable to refer first to the provisions of clause 3 of the 1st schedule, which provides that where a workman has given notice of an accident he shall, if so required by the employer, submit himself for examination by a medical man provided and paid by the employer, and that, if he refuses to submit to such examination, his right to compensation and any proceeding under this Act in relation to compensation shall be suspended until such examination takes place. Then we come to clause 11, the clause now in question, which provides that "Any workman receiving weekly payments under this Act shall, if so required by the employer . . . from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer." That clause presupposes that the workman is in receipt of a weekly payment either by agreement or under an award, and so far it imposes a compulsory obligation upon the workman, subject to certain consequences in case of refusal, to submit to examination by a medical man appointed by the employer. Then follow certain qualifications upon that compulsory obligation in these terms: "But if the workman objects to an examination by that medical practitioner, or is dissatisfied by

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the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act," whose certificate shall be conclusive evidence of the condition of the workman. Then the clause provides that "if the workman refuses to submit to such examination . . . his right to such weekly payment shall be suspended until such examination has taken place." It was contended on behalf of the employers that "such examination" means the examination by the medical referee appointed under the Act, and that, therefore, if the workman refuses to submit to that examination his right to receive compensation is suspended until that examination takes place. The County Court judge accepted that view of clause 11 and acted upon it. In my opinion, when the whole clause is read together, it appears clearly that that is not the right view. The sanction at the end of the clause is addressed to a person who has refused to do something which some other person has a right to require him to do. The only examination which the employer has a right to insist upon is an examination by a medical man provided and paid by him; that is the only compulsion imposed upon the workman, subject to this qualification, that the workman may substitute something else if he dislikes that medical practitioner or is dissatisfied with his decision, in which case he may submit to examination by a medical referee, and, if he does so, the certificate of the medical referee as to the workman's condition is binding upon both parties. If he chooses to do so, the workman takes that risk, but that is not compulsory upon him in any way. In this case the workman has submitted to the only thing to which he was bound to submit, and he has not taken the other choice. To hold that "such" examination means examination by a medical referee because the word "such" must refer to the last antecedent, would, it seems to me, be to substitute a highly technical interpretation of the clause for that which is its plain and obvious meaning. It is not necessary in all cases to take the last antecedent. In this clause, taking it as a whole, it is obvious that the examination to which the last part of the clause refers is that examination to which the workman is bound to submit. Many other clauses and rules have been referred to in argument, but I think that it is not necessary to go through them. This point has, in my opinion, been conclusively and satisfactorily dealt with by Lord Young, in *Davidson v. Summerlee and Moss End Iron and Steel Company* (5 Fraser, 991), and by all the judges in *Niddrie and Benhar Coal Company v. McKay* (40 Sc. L. Rep. 798), and I think that it is not necessary for me now to say more than that I entirely agree with those judgments. This appeal must, therefore, be allowed, and the appeals in the other two cases must be dismissed.

MATHEW, L.J.—I am of the same opinion. The case for the employers has been argued with great ingenuity in the face of the judgments in the Scotch cases which have been cited. It seems to me to be only necessary to read through clause 11 of the 1st schedule to see what it means. It is contended on behalf of the employers that it is a condition precedent to the right of the workman

to receive compensation that he shall submit himself for examination by "one of the medical practitioners appointed for the purposes of this Act," and that when he has done so the certificate of that medical practitioner is conclusive and the workman cannot go into court. Where is that to be found in the Act? Clause 11 of the 1st schedule provides, in the first part, that the workman shall, if so required, submit to examination by the medical practitioner provided by the employer, and then provides at the end that if he refuses to submit to such examination the weekly payments shall be suspended. It is contended for the employers that the second part of the clause is compulsory, but it seems to me to be clearly optional on the part of the workman to be examined by a medical referee. The words at the end of the clause are: "If the workman refuses to submit himself to such examination." It seems to me to be clear that that refers to the examination by the medical practitioner provided by the employer to which the clause requires the workman to submit. I agree with the reasons given by the Master of the Rolls, and that the appeal of the workman must be allowed.

COZENS-HARDY, L.J.—I entirely agree, and will add only a few words. A workman cannot be said to refuse to submit to an examination which is optional on his part. Upon the fair construction of clause 11 I think that the employer cannot require a workman, who has been examined by the employer's doctor, to submit to a further examination by the medical referee. The words "such examination" *prima facie* mean one examination only, and that is the examination by the employer's doctor to which the workman is required to submit.

Appeal of the plaintiff in the first case allowed; appeals of the defendants in the other cases dismissed.

Solicitors for the plaintiff Neagle, Riddell and Co., for Walter Morgan, Bruce, and Nicholas, Pontypridd.

Solicitors for the other plaintiffs, Metcalfe and Sharpe, for T. S. Edwards, Newport, Mon.

Solicitor for all the defendants, H. P. Becher, for Simons and Powell, Pontypridd.

Monday, Jan. 25.

(Before COLLINS, M.R. and ROMER, L.J.)

BEAUMONT v. KAYE AND ANOTHER. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Husband and wife—Tort of wife—Action against husband and wife—Defence—Different defences by husband and wife—Practice—Married Women's Property Act 1882 (45 & 46 Vict. c. 75), s. 1 (2)—Order XXII., r. 1.

In an action to recover damages from a husband and wife for a libel alleged to have been published by the wife, if the husband pleads a payment into court in satisfaction of the plaintiff's claim, the wife cannot plead a defence denying liability.

APPEAL of the defendants from an order of Bucknill, J. at chambers directing part of the defence to be struck out.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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The plaintiff brought this action to recover from the defendants, who were husband and wife, damages for a libel alleged to have been written and published by the wife.

The plaintiff by his statement of claim alleged that the male defendant was the husband of the female defendant; and that the female defendant had written and published a letter which was defamatory of the plaintiff; and he claimed damages from both defendants generally.

One defence was delivered by the defendants; the husband pleaded that, so far as he was liable as the husband of the other defendant, he paid the sum of 5*l.* into court as sufficient to satisfy the plaintiff's claim; and the wife denied that she had published the alleged defamatory letter.

The Married Women's Property Act 1882 (45 & 46 Vict. c. 75) provides:

Sect. 1 (2). A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or other proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise.

The Rules of the Supreme Court, Order XXII., provide:

Rule 1. Where any action is brought to recover a debt or damages, or in an Admiralty action, any defendant may, before or at the time of delivering his defence, or at any later time by leave of the court or a judge, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability (except in actions or counter-claims for libel or slander), pay money into court which shall be subject to the provisions of rule 6.

The plaintiff applied for an order striking out all the paragraphs of the defence except that in which the husband pleaded the payment into court.

The district registrar refused to make an order, but, on appeal, an order was made by Bucknill, J. at chambers striking out all the defence except the plea of payment into court.

The defendants appealed.

T. P. Perks for the appellants.—The learned judge was wrong in ordering to be struck out that part of the defence which was set up by the wife. There are two separate and distinct defendants to this action, and each of them is entitled to set up such a defence as seems right to each. The husband is liable for the tort of the wife, and the wife is also personally liable for her own tort. The Married Women's Property Act 1882, by sect. 1 (2), has not in any way altered the personal liability of the wife for her own tort; it has only made the wife liable to be sued without her husband being joined, and has made her liable to satisfy the damages out of her separate estate:

Earle v. Kingscote, 83 L. T. Rep. 377; (1900) 2 Ch. 585.

The liability of the wife always was a personal

liability at common law, which survived after the death of her husband; and an action against husband and wife did not abate upon the death of the husband:

Capel v. Powell, 17 C. B. N. S. 743.

The disability of the wife by reason of which she could not be sued without her husband being joined was only a matter of procedure, and, being personally liable, she could formerly have been taken under a writ of *ca. sa.* upon a judgment against her husband and herself:

Weldon v. Winslow, 51 L. T. Rep. 643; 13 Q. B. Div. 784;

Scott v. Morley, 57 L. T. Rep. 919; 20 Q. B. Div. 120.

The wife is now liable to satisfy the damages out of her separate estate, and therefore she is entitled to defend separately in respect of her separate estate. There will be two judgments, one against the husband personally, and the other against the wife in respect of her separate estate. They must both be served with the writ (Order IX., r. 3); and each of them must enter an appearance. Order XXII., r. 1, provides that "any defendant" may pay money into court in satisfaction of the plaintiff's claim. That plainly means that any one of several persons who are sued jointly may pay money into court; and therefore one of these two defendants is entitled to take that course, and the other may set up any other defence denying liability.

J. A. Compston, for the respondent, was not called upon to argue.

COLLINS, M.R.—I see no ground for interfering with the order of the learned judge in this case. I think that the case is quite plain when once we arrive at the conclusion that this is the old common-law action of tort in which the husband is joined as a defendant, and that the old rules as to joining the husband in an action for a tort committed by the wife are still subsisting. It was at one time suggested in a well-known text-book that the effect of the Married Women's Property Act 1882 was to do away with the husband's liability for the torts of his wife, and to make the action one against the wife alone in respect of her separate property. That question was raised in the case of *Seroka v. Kattenburg* (54 L. T. Rep. 649; 17 Q. B. Div. 177), where Mathew and Smith, J.J., in a Divisional Court, held that the Act did not do away with the liability of a husband for his wife's wrongful acts, and that the husband and wife might still be sued jointly for those acts. The point was later brought before the Court of Appeal in *Earle v. Kingscote* (83 L. T. Rep. 377; (1900) 2 Ch. 585), and it was there held that the earlier case of *Seroka v. Kattenburg* (*ubi sup.*) had been rightly decided. Therefore the old common-law action against the husband and wife jointly in respect of a tort of the wife still subsists. The present action is carefully so framed. It is an action for damages for a tort of the wife, and the husband is simply joined as a defendant. There is no claim made under the Married Women's Property Act 1882 against the wife in respect of her separate estate. The action is simply in respect of the joint liability of the husband and wife. There is one tort only. The defence pleads a payment into court by the husband. That is, in this case, an admission of liability on behalf of both hus-

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band and wife, and it is incompatible with the other defence set up by the wife that there was no publication of the alleged libel. The learned judge, therefore, was quite right in ordering to be struck out that part of the defence which was incompatible with the payment into court. This appeal, therefore, fails, and must be dismissed.

ROMER, L.J.—I agree. This being an action in the old common-law form against husband and wife jointly for the tort of the wife, there cannot be separate judgments against the husband and against the wife. The husband is liable and is sued only because he is the husband of the other defendant. There can be but one judgment against the two. The husband is entitled to say that there shall not be any judgment against him and his wife except upon the defence which he chooses to put in. If the contention of the appellants were right, this curious result might follow, that a defence might be put in by the husband and judgment go against both husband and wife upon that defence, and another judgment be given upon the separate defence set up by the wife. This is the ordinary common-law action, which must proceed in the ordinary way, and therefore there can be only one defence and one judgment. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Chester, Broome, and Griffiths*, for Craven and Clegg, Leeds.

Solicitors for the respondent, *Hamlin, Grammer, and Hamlin*, for H. R. Cousins, Leeds.

Monday, Jan. 25.

(Before COLLINS, M.R. and ROMER, L.J.)

SNEADE v. WOTHERTON BARYTES AND LEAD MINING COMPANY LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Remitting action to County Court—Claim on writ exceeding 100l.—Amendment of writ—Claim reduced to sum not exceeding 100l.—Jurisdiction to remit—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 65.

Where in an action of contract brought in the High Court the claim indorsed on the writ in the first instance exceeds 100l., but the writ is subsequently amended and the claim reduced to a sum not exceeding 100l., there is jurisdiction to order the action to be tried in a County Court under sect. 65 of the County Courts Act 1888.

APPEAL of the defendants from an order of Bucknill, J. at chambers ordering the action to be tried in a County Court.

The plaintiff, by the claim originally indorsed upon the writ, claimed the sum of 139l. from the defendants for goods sold and delivered.

The defendants set up the defence that the claim was barred by the Statute of Limitations.

The plaintiff then applied at chambers for an order giving him leave to amend the writ by striking out all the items of his claim except one item amounting to 24l., and also for an order that the action should be tried in the County Court, under sect. 65 of the County Courts Act 1888.

The master made an order giving leave to

amend the writ, but refused to order the action to be tried in the County Court.

The County Courts Act 1888 (51 & 52 Vict. c. 43) provides :

Sect. 65. Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds, or where such claim, though it originally exceeded one hundred pounds, is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding one hundred pounds, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of the court mentioned in the order, who shall appoint a day for the trial of the action, notice whereof shall be sent by post or otherwise by the registrar to both parties or their solicitors, and the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein; and the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the County Courts, and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court.

The plaintiff appealed, and Bucknill J. at chambers made an order that the action should be tried in the County Court.

The defendants appealed.

Disturnal and S. R. C. Bosanquet for the appellants.—The learned judge had no jurisdiction to make an order that this action should be tried in the County Court. The words of sect. 65 of the County Courts Act 1888 are: "Where such claim, though it originally exceeded 100l., is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding 100l." It was decided in the Court of Appeal in *Hodgson v. Bell* (62 L. T. Rep. 481; 24 Q. B. Div. 302) that "payment" there meant payment before action; and the ground of that decision was that the action must originally have been brought to recover a sum not exceeding 100l., and that therefore nothing which happened after the action was commenced to reduce the amount of the claim could give jurisdiction to remit the action. In the later case of *Dierken v. Philpot* (85 L. T. Rep. 246; (1901) 2 K. B. 380), in the Divisional Court, it was held that the principle of the former decision applied to the case where the plaintiff, who by his writ claimed more than 100l., afterwards abandoned the excess over 100l. when he applied for an order under sect. 65. The words "or otherwise," in sect. 65, must be construed as referring to something which has happened before action:

Foster v. Usherwood, 37 L. T. Rep. 339; 3 Ex. Div. 1.

In this case the amount originally claimed in the action exceeded 100l. The amendment of the writ, by which the amount of the claim was reduced, cannot make any difference, for it was something done after the action was commenced, and could not alter the fact that the amount for which the writ was originally indorsed exceeded

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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Re SPARK'S TRUSTS; MASSEY v. SPARK.

[CHAN. DIV.]

100*l.* This was in substance and reality an abandonment of part of the claim after the action was commenced, and is governed by the decision in *Dierken v. Philpot* (*ubi sup.*).

J. R. Randolph for the respondent.—The order of the learned judge was rightly made. The only question is whether there was jurisdiction to make the order under sect. 65 after leave had been given to amend the writ. The writ when it has been amended becomes the writ in the action, and is just as much the foundation of the action as if it had been in the first instance indorsed with a claim for the smaller sum. The reduced claim appears upon the writ itself, and this case therefore comes within the principle of the decision in *Percival v. Pedley* (18 Q. B. Div. 635), where it was held that the equivalent section of 30 & 31 Vict. c. 142 applied where the writ showed a set-off admitted by the plaintiff, though it was not admitted by the defendant. In *Dierken v. Philpot* (*ubi sup.*) it was held that there was no jurisdiction under sect. 65, because it appeared on the face of the writ that the claim exceeded 100*l.*, there being nothing on the writ to show that the claim had been reduced. The only writ in this action is the amended writ, and the claim which appears upon that writ is for 24*l.* only. An amendment relates back, and is substituted for the former claim just as if it had been made in the first instance :

Nottage v. Jackson, 49 L. T. Rep. 339; 11 Q. B. Div. 627.

Bosanquet replied.

COLLINS, M.R.—This is an appeal by the defendants from an order of Bucknill, J. made at chambers. The circumstances of this case are somewhat peculiar, and, in my judgment, are not covered by any of the authorities which have been cited. The action was commenced in the High Court by a writ upon which a claim was indorsed for 139*l.* After the action had proceeded for some time the plaintiff applied for leave to amend the writ by abandoning the whole of his claim except a sum of 24*l.*, and then applied that the action should be remitted to the County Court. The master gave leave to amend the writ as asked, but refused to remit the action to the County Court. The plaintiff then appealed to the judge from the refusal of the master to remit the action to the County Court. Upon that appeal Bucknill, J. made an order that the action should be tried in the County Court. The defendants have appealed, and the point is taken that there was no jurisdiction under sect. 65 of the County Courts Act 1888 to order the action to be tried in the County Court. The provisions of sect. 65 are that : "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding 100*l.*," on the application of either party a judge may order the action to be tried in a County Court. Now, it has been held in a series of decisions that where the claim in an action as indorsed on the writ originally exceeded 100*l.*, the judge did not obtain jurisdiction to remit the action to the County Court by reason of any reduction subsequent to the issue of the writ, upon the ground that "payment" clearly pointed to something happening before action; and that where

the reduction in the amount claimed arose from a payment made after action there was no jurisdiction to remit the action to a County Court. It has been contended that those decisions apply to the present case. But in this case the application to remit was not made upon the ground of any reduction in the amount claimed, but upon the ground of the substitution of a claim for 24*l.* for the amount originally claimed by reason of the writ having been amended. The writ, though amended, still remains the writ in the action, and is still the commencement of the action. When an amendment of this kind is asked for, proper terms ought to be imposed, because the substituted claim becomes the original claim in the action. In the present case the amendment was allowed upon certain terms, and the amended writ became the initial stage in the action; the amended claim was substituted for the previous claim. Therefore this amended writ initiated this action; and the claim indorsed thereon was for 24*l.* only. If at first the writ had been indorsed with a claim for 24*l.* only, it would clearly have been proper to remit this action to a County Court. The fact that the writ has been amended so as to claim only the smaller sum does not impose any condition making it necessary for the plaintiff to try the action in the High Court. It is possible, with leave, to substitute a reduced claim for a larger claim originally indorsed upon the writ, and, when that is done, the plaintiff is in the same position as if he had only made the smaller claim in the first instance. A reduction of the claim by amendment is not the same as if a claim is made in the action and then there is a reduction by payment or set-off. This case is entirely outside the principle governing the cases which have been cited. The order of the learned judge was therefore right, and this appeal fails and must be dismissed.

ROMER, L.J.—I am of the same opinion for the same reasons, and I have nothing to add.

Appeal dismissed.

Solicitors for the appellants, *Woosnam and Smith*, for *G. H. Morgan*, Shrewsbury.

Solicitors for the respondent, *Pritchard, Englefield, and Co.*, for *J. P. Court*, Liverpool.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, Feb. 3.

(Before *KEKEWICH, J.*)

Re SPARK'S TRUSTS; MASSEY v. SPARK. (a)

Separation deed—Construction—Voluntary settlement or deed of separation—Reconciliation—Trust for children.

Where articles of agreement under seal are entered into between husband, wife, and a trustee, reciting that the husband, who was entitled to a share of residuum under a will, as a condition of a mutual separation which had been agreed on, had agreed to assign his interest under the will to the trustee upon trust to pay the interest thereof to the wife and then as to the principal for the three children of the marriage, and the

(a) Reported by *W. P. PAIN, Esq., Barrister-at-Law.*

wife covenants not to molest the husband, and are followed by a separation and nine months afterwards by reconciliation and return to cohabitation :

Held, that, upon the true construction of the articles, the trusts thereby declared in favour of the wife and children were subsisting notwithstanding the reconciliation, and that there was no resulting trust for the settlor, the husband, of the property comprised therein.

Ruffles v. Alston (32 L. T. Rep. 236; L. Rep. 19 Eq. 539) followed.

Bindley v. Mulloney (20 L. T. Rep. 263; L. Rep. 7 Eq. 343) distinguished.

ADJOURNED SUMMONS raising the question whether the articles of agreement following, in the circumstances hereunder set out, constituted a revocable deed of separation or a voluntary settlement the trusts of which were still subsisting.

Articles of agreement made this twenty-fifth day of February 1893 between John Ernest Hunt Spark, of Brixton-road, tobacconist, of the "one" part, and Mary Edith his wife of the second part, and Henry Richard Suffield Massey of the third part. Whereas the said J. E. H. Spark has been guilty of adultery and other misconduct towards his wife, and, in order to prevent proceedings being taken against him by her and as a condition of a mutual separation which has been agreed upon between them and also in consideration of the said wife taking the care and custody of the three children of the marriage, the husband has consented to enter into the following agreement and the said wife the following covenant—namely, the said J. E. H. Spark doth hereby as beneficial owner assign to the said R. H. Suffield Massey all his share and interest under the will of his late grandmother, H. S. Bewsher (save the sum of 200*l.* and a sum sufficient to pay the costs of and incidental to this assignment), upon trust to pay the annual interest and proceeds thereof to the said M. E. Spark his wife for her life and from and after her decease to divide the same equally between such of the said children as shall attain the age of twenty-one years or being daughters marry under that age, and in consideration of such assignment the said M. E. Spark hereby covenants not to molest the said J. E. H. Spark or to compel him to pay directly or indirectly for the maintenance of herself or the said children. And all the said parties hereby mutually agree to execute any further deed that may be necessary to carry out the assignments and covenants herein contained. As witness the hands and seals of the parties hereto the twenty-fifth day of February 1893.

The above articles were duly signed, sealed, and delivered by the three parties thereto.

Mr. and Mrs. Spark were married on the 31st March 1889, and on the 25th Feb. 1893 there was issue of the marriage the three infant defendants.

Shortly before the 25th Feb. 1893 unhappy differences arose between the defendants Mr. and Mrs. Spark, and they consequently decided to separate and live apart from one another.

The defendant J. E. H. Spark had then recently become entitled under the will of his grandmother, H. S. Bewsher, to an undivided moiety of her residuary estate, and he received from the trustees of her will (of whom the plaintiff H. R. S. Massey was one) payments on account thereof, but the greater part of his share remained invested.

Pending the separation between Mr. and Mrs. Spark, it was arranged that he should make

some provision for her and the infant defendants, and the agreement above set out was executed.

Mr. and Mrs. Spark thereupon separated and lived apart from one another, the wife taking the custody of the infant defendants.

Mr. and Mrs. Spark, however, became reconciled and resumed cohabitation before the end of 1893. Since that time they have continuously lived together, three other children being born in the years 1896, 1899, and 1901.

Mr. and Mrs. Spark, wishing to make provision for their children, in Nov. 1903 applied to the plaintiff to treat the agreement of the 25th Feb. 1893 as at an end, inasmuch as they had become reconciled and were then cohabiting together and the separation therein contemplated had come to an end, and requested the plaintiff to transfer and assure the funds and property representing the share subject to the agreement to the defendant J. E. H. Spark, discharged from its operation.

The trustee had paid the interest to the wife under the agreement.

H. Greenwood, for the plaintiff trustee, stated the facts. The question is whether the document is a separation deed or a voluntary settlement. There are two lines of reported cases, in one of them, where the document has been held to be a separation deed, it is entirely put an end to by reconciliation; but the trusts of a voluntary settlement are unaffected by resumption of cohabitation by the husband and wife parties to it:

H. v. W., 3 K. & J. 382;

Nicol v. Nicol, 54 L. T. Rep. 470; 31 Ch. Div. 524;

Westmeath v. Salisbury, 5 Bli. (N. S.) 339;

Bindley v. Mulloney, 20 L. T. Rep. 263; L. Rep. 7 Eq. 343.

Ward Coldridge, for the defendant J. E. H. Spark, submitted that this was a separation deed. With the single exception of *Ruffles v. Alston* (32 L. T. Rep. 236; L. Rep. 19 Eq. 539), there is no case which suggests that such a deed as this is not a separation deed. There the property was the wife's. It was not a case of the husband providing for the wife. The question whether there had been a reconciliation in *Westmeath v. Salisbury* (*ubi sup.*) was tried in Ireland in the absence of the daughter, who was a beneficiary under the deed, consequently the House of Lords would not bind her by the evidence called to prove cohabitation. If the deed was a voluntary settlement, the question of cohabitation is immaterial: (per Lord Eldon at pp. 376, 377, and 402). *Bindley v. Mulloney* (*ubi sup.*) shows that consideration is necessary to support the provision for children. Here the whole provision for the three children was based on separation, and nothing has been shown to take this case out of the ordinary doctrine as to separation deeds.

Leonard Mossop for the wife and children.—*Westmeath v. Salisbury* (*ubi sup.*) was an instance of a separation deed containing trusts for a child of the marriage. But in that case the House of Lords declined to declare the deed void as against the child: (per Lord Eldon, at p. 417). For the children, I say that this deed goes beyond a separation deed. Directly you have an ultimate trust in favour of children taking effect after the death of the wife, the deed has gone beyond the scope of a separation deed. In *Hulme v. Chitty* (9 Beav. 437) the child born after reconciliation did not take under the deed. In *Bindley v. Mul-*

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loney (*ubi sup.*) the husband and wife never separated. The deed there was conditional on separation taking place: (*vide Jessel, K.C.'s argument*). That case is no authority that the gift to the child is necessarily part of the deed *quoad* separation deed. *Ruffles v. Alston* (*ubi sup.*) shows that a deed containing provisions for children is not void on reconciliation between their parents. The precedents only contain provision for the maintenance and education during the life of the wife:

5 Davidson's Precedents, 3rd edit., p. 688.

6 Byth. & Jarm. Conv., pp. 96, 98, 4th edit., by Robbins.

Here the trustee continued to pay the dividends of the life interest to the wife, and the presumption which might have arisen in the case of an ordinary separation deed, that it is intended to come to an end with reconciliation is rebutted:

Webster v. Webster, 21 L. T. Rep. O. S. 192; 4 De G. M. & G. 437.

KEKEWICH, J.—This is a point of some interest to persons who have to advise husband and wife as to arrangements to be made on a separation, and the point to be decided depends really upon the proper effect to be given to, and the proper construction of, an agreement of the 25th Feb. 1893. It is desirable to look at it for a moment apart from the motive which led to its execution—which was, no doubt, a separation. There was an assignment to the trustee by the husband of "all his share and interest under the will of his late grandmother, Hannah Sarah Bewsher, upon trust to pay the annual interest and proceeds thereof to Mary Edith Spark his wife for her life, and from and after her decease to divide the same equally between such of the said children as shall attain the age of twenty-one years or being daughters marry under that age." That is a perfectly good voluntary settlement within all the authorities to which reference is always made, such as *Kekewich v. Manning* (1 De G. M. & G. 176). A perfect trust is declared. There is a parting with his interest by the husband under his grandmother's will which gives the trustee the right to sue for the share and to hold it, when received, upon the trusts contained in the agreement. It is a perfectly voluntary settlement. If so, it can only be worked out after the performance of the trust—the ultimately handing over the property to those entitled to it. So that if it can be regarded from that point of view, there is no doubt that it is enforceable by the court. It is said that that is not the proper view to take of this deed, because it was made in view of a separation. It provides for the wife's maintaining herself and these children. Therefore if I can treat this simply as a provision for the wife during the separation, then, the parties having been reconciled, the consideration fails, and there is no reason why the settlement should not be declared void. There are two points of view from which the transaction can be regarded. On the one hand, separation is the paramount cause without which this agreement would never have existed; on the other, though brought into existence by that cause on the occasion of a separation between husband and wife, it does contain an assignment of the share of the husband under the will upon his wife and children in the way I have mentioned. Which ought

I to hold? Can I say that the trustee is safe in departing from the terms of the deed and giving up all this property? The decision in the House of Lords in *Westmeath v. Salisbury* (*ubi sup.*) does not decide this point. There the same question did not arise for decision, and the deed was held to be void on different grounds. The case of *Bindley v. Mulloney* before Lord Romilly, M.R. (*ubi sup.*) seems to me to be entirely different from this on account of the ground of the decision there. The deed was similar to this, and might have been held to be a separation deed. There is no doubt that that might have been held to constitute a settlement in the Court of Chancery. But what the Master of the Rolls held was that the consideration failed. He says: "Separation was the consideration upon which it was based." I do not mean to say that he did not say more than that. But that was the main point of his decision. I must, of course, assume that he was correct in coming to that conclusion. No separation had taken place, and the consideration failed. Here the consideration has not failed, and I am not asked to set aside this deed on that ground. He held that the consideration failed, and he did also hold that the deed was a separation deed. The precise point was before Malins, V.C. in *Ruffles v. Alston* (*ubi sup.*). There the deed took the form of a voluntary settlement, and, as such, was within the doctrine of *Kekewich v. Manning* (*ubi sup.*). Under these circumstances the Vice-Chancellor held it to be more than a separation deed. The case was argued on demurrer to the bill so as to set aside the settlement on the ground of reconciliation, and the demurrer was overruled on the ground that the child was entitled to maintain a bill for enforcing the settlement. The same principle applies to this deed here. The separation was the cause of it, and it resulted in the settlement of this share. That being so, I cannot see that the reconciliation affects the voluntary settlement thereby created, and I declare to that effect. All costs to come out of the fund, those of the plaintiff to be taxed as between solicitor and client.

Solicitors for the plaintiff, *Mossop and Rolfe*.
Solicitor for all other parties, *J. T. Campion*.

Tuesday, Jan. 19.

(Before EADY, J.)

Re EUPHRATES AND TIGRIS STEAM NAVIGATION COMPANY LIMITED. (a)

Company—Alteration of memorandum of association — Jurisdiction — Company incorporated under Joint Stock Companies Act 1856 (19 & 20 Vict. c. 47), but not registered under Companies Act 1862 (25 & 26 Vict. c. 8)—Companies (Memorandum of Association) Act 1890 (53 & 54 Vict. c. 62).

A company incorporated in 1861 under the Joint Stock Companies Act 1856 as a company limited by shares, but not registered under the Companies Act 1862, having increased its share capital and its business, passed a special resolution, in accordance with sect. 51 of the Companies Act 1862, for extending and defining its objects set out in its memorandum of association, and

(a) Reported by J. TRUSTEAM, Esq., Barrister-at-Law.

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petitioned the court under the Companies (Memorandum of Association) Act 1890 to confirm the special resolution.

Held, that, notwithstanding the fact that the company was not registered under the Companies Act 1862, the court had jurisdiction to confirm the special resolution.

Re Nitrophosphate and Odams Chemical Manure Company Limited (1893) W. N. 141; Re Hong Kong and China Gas Company Limited (106 L. T. 125; (1898) W. N. 158 (3); and Re Copiapo Mining Company (106 L. T. 411); (1899) W. N. 25) followed; and Re General Credit Company (1891) W. N. 153) dissented from.

PETITION by the company that the alteration of the company's objects proposed to be effected by the special resolution set forth in par. 4 of the petition might be confirmed by the court pursuant to the Companies (Memorandum of Association) Act 1890.

The company was incorporated in 1861 under the Joint Stock Companies Acts 1856 to 1890 as a company limited by shares with a capital of 15,000*l.* divided into 300 shares of 50*l.* each, which at the date of the petition had been increased to 100,000*l.* divided into 2000 shares of 50*l.* each, of which 1000 shares only have been issued and were fully paid up.

The objects for which the company was established were set forth in clause 3 of the memorandum of association as follows :

The objects for which the company is established are to convey passengers and merchandise on the rivers Euphrates and Tigris and their tributaries and on the Persian Gulf, and to and from Kurahee and any ports or places in the Persian Gulf or Indian Ocean, and to build or otherwise provide vessels, and to purchase or provide stores and all necessaries for such vessels, and to do all acts necessary for or incident to the attainment of such objects or any of them.

The petition further stated :

By special resolution of the company duly passed and confirmed in accordance with sect. 51 of the Companies Act 1862 at extraordinary general meetings of the company held respectively on the 24th June 1903 and the 9th July 1903 it was resolved as follows—that is to say : That the objects of the company set forth in clause 3 of its memorandum of association be altered by inserting immediately before the words and to do all acts necessary the following words : “ To establish, open, and regulate stores and markets and to purchase goods, products, cattle, live stock, hardware, provisions solid and liquid, and any other merchandise whatsoever for the purpose of freightage any vessels or medium of transport of the company, or for the supply of any such stores or markets, and to develop traffic on the rivers aforesaid and their tributaries and on the said gulf and ocean and elsewhere in the east, and, further, to do all or any of the things following—that is to say : (1) To construct, carry out, maintain, improve, manage, work, control, and superintend any roads, dams, ways, tramways, railways, branches or sidings, bridges, reservoirs, canals, docks, wharves, watercourses, hydraulic works, gasworks, electric works, factories, warehouses, and other works and conveniences in Mesopotamia, Persia, or elsewhere in Western Asia which may seem directly or indirectly conducive to any of the company's objects, and contribute to subsidise or otherwise assist or take part in such maintenance, management, working, control, and superintendence. (2) To purchase or otherwise acquire and undertake all or any part of the business, property, and liabilities of any person or company carrying on any business which this company is authorised to carry

on or possessed of property suitable for the purposes of the company. (3) To enter into any arrangement with any Government or authorities, supreme, municipal, local, or otherwise, and to obtain from any such Government or authority all rights, concessions, and privileges that may seem conducive to the company's objects or any of them. (4) To enter into any arrangement for sharing profits, union of interest, joint adventure, reciprocal concessions, or co-operation with any person, association, or company carrying on or engaged in or about to carry on or engage in any business or transaction which the company is authorised to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company, and to take or otherwise acquire and hold shares or stock in or securities of and to subsidise or otherwise assist any such association or company, and to sell, hold, or reissue with or without guarantee or otherwise deal with such shares, stock, or securities. (5) Generally to purchase, take on lease or in exchange, hire, or otherwise acquire any real or personal property, or any rights or privileges which the company may think necessary or convenient with reference to any of these objects or capable of being profitably dealt with in connection with any of the company's property or rights for the time being, and in particular any land, buildings, easements, licences, patents, machinery, ships, barges, rolling stock, plant, and stock-in-trade. (6) To sell any part of the undertaking, or property of the company for such consideration as the company may think fit, and in particular for shares or debentures, debenture stock, or other securities of any other company having objects altogether or in part similar to those of this company. (7) To promote any company or companies for the purpose of acquiring all or any of the property, rights, and liabilities of the company or for any other purpose which may seem directly or indirectly calculated to benefit this company. (8) To lend money to such persons and on such terms as may seem expedient, and in particular to customers of and persons having dealings with the company, and to give any guarantee or indemnity as may seem expedient. (9) To obtain any Act of Parliament for enabling the company to carry any of its objects into effect, or for effecting any modification of the company's constitution, or for any other purpose which may seem expedient, and to oppose any proceedings or applications which may seem calculated directly or indirectly to prejudice the company. (10) To raise or borrow or secure the payment of money in such manner and on such terms as may seem expedient, and in particular by the issue of debentures or debenture stock, whether perpetual or otherwise and charged or not charged upon the whole or any part of the property of the company, both present and future, including its uncalled capital, and to redeem, purchase, or pay off any such securities. (11) To draw, accept, indorse, discount, execute, and issue bills of exchange, promissory notes, debentures, bills of lading, warrants, and other negotiable or transferable instruments or securities. (12) To sell, improve, manage, develop, exchange, enfranchise, lease, mortgage, dispose of, turn to account, or otherwise deal with all or any part of the property or rights of the company.”

It is apprehended that on the true construction of the company's memorandum of association the existing objects of the company comprise some of the objects set forth in the said special resolution, but it was thought desirable, in accordance with modern practice, to express the objects of the company in greater detail, so as to avoid and preclude so far as may be all doubts as to the company's powers within the ordinary scope of its business. So far as the adoption of such objects involves an extension of the present objects, such extension is required to enable the company to carry on its business more economically and more efficiently than heretofore, and to attain its main purpose by new or improved means and

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also to enlarge the local area of its operations, and, further, to enable it to carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company. The company has extensive opportunities of doing business of the character authorised by the proposed extension of objects, and experience has shown that its objects as they stand are inconveniently restricted, and that its existing business is detrimentally affected by the absence of the powers which would be conferred by the objects set forth in the said resolution. The company has no debenture debt whatever, but is usually indebted to general creditors for wages and salaries and otherwise to the extent of about 700*l.*, though this indebtedness varies from day to day as the accounts come in and are paid off. The financial position of the company is good. It has accumulated a reserve fund which at the date of the last balance-sheet issued by the directors—that is to say, of the 31st December 1902—stood at 19,500*l.*, and at this same date had an insurance fund of 25,915*l.* 8*s.* 6*d.*, and at the date of the said last balance-sheet the position was as follows: Assets, 109,819*l.* 10*s.* 1*d.*; debts and liabilities (including reserve fund and insurance fund, but excluding liability in respect of share capital), 50,303*l.* 18*s.* 7*d.*; surplus, 59,515*l.* 11*s.* 6*d.* The company has, moreover, unissued 1000 shares of 50*l.* each, or 50,000*l.* of capital. The position of the company since the date of the said balance-sheet has not materially altered except that a further 5000*l.* has been carried to the reserve fund. The profits of the company for the year ending the 31st December 1902 were upwards of 9500*l.* The market value of the company's shares is 76*l.* per share, or thereabouts. No one will be prejudiced by the proposed extension of the company's objects, and it is just and equitable that the said special resolution for the proposed extension of such objects should be confirmed.

The company had not been registered under the Companies Act 1862.

Ere, K.C. M.P., and R. J. Parker for the petition.—The question is whether the company, which has not been registered under the Companies Act 1862, is entitled to present this petition without being registered under that Act, and the authorities are in its favour, as Kekewich, J. in *Re Nitrophosphate and Odams Chemical Manure Company Limited* (1893) W. N. 141 and in *Re Hong Kong and China Gas Company Limited* (106 L. T. 125; (1898) W. N. 158 (3) and Wright, J. in *Re Copiapo Mining Company* (116 L. T. 411; (1899) W. N. 25) held that such a company could present such a petition, while the only decision to the contrary is that by Romer, J. in *Re General Credit Company* (1891) W. N. 153). We submit that it is not necessary for the petitioning company to be registered under the Companies Act 1862.

EADY, J.—I think I may accede to your argument. Sect. 3, sub-sect. 2, of the Companies (Memorandum of Association) Act 1890 provides: "This Act and the Companies Acts 1862 to 1886 shall be construed as one Act." Then sect. 176 of the Companies Act 1862 provides: "Subject as hereinafter mentioned, this Act, with the exception of table A in the 1st schedule, shall apply to companies formed and registered under the said Joint Stock Companies Acts"—which expression is by the preceding section defined to include the Joint Stock Companies Act 1856, under the provisions of which the company is registered—"or any of them in the same manner in the case of a limited company as if such company had been formed and registered under

this Act as a company limited by shares." I think I am justified in following the decisions of Kekewich, J. in *Re Nitrophosphate and Odams Chemical Manure Company Limited* (*ubi sup.*) and *Re Hong Kong and China Gas Company Limited* (*ubi sup.*) and of Wright, J. in *Re Copiapo Mining Company* (*ubi sup.*), and holding that a company registered under the Joint Stock Companies Act 1856 may present a petition under the Companies (Memorandum of Association) Act 1890 for the alteration of its objects as set forth in its memorandum of association although it has not been also registered under the Companies Act 1862.

Solicitors: Hollams, Sons, Coward, and Hawksley.

KING'S BENCH DIVISION.

Tuesday, Dec. 8, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

CAREY (app.) v. MAYOR, ALDERMEN, and BURGESSES OF BEXHILL. (a)

Local government—Private street works—Apportionment of expenses on frontager—Notice of objection—Objection that street is not a street within meaning of Act—Evidence that street is repairable by inhabitants at large—Admissibility—Private Street Works Act 1892 (55 & 56 Vict. c. 57), ss. 5, 7, 8.

Sect. 7 of the Private Street Works Act 1892 enables the owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing private street works under the Act to serve a written notice on the urban authority, objecting to the proposals of the urban authority, on the grounds (amongst others): (a) That an alleged street is not a street within the meaning of the Act; and (b) that a street is a highway repairable by the inhabitants at large; and by sect. 5 a "street" means a street as defined by the Public Health Acts, "and not being a highway repairable by the inhabitants at large."

Held, that sub-sect. (a) includes and overlaps sub-sect. (b), and that under a notice of objection given under sub-sect. (a) "that the alleged part of a street does not form part of a street within the meaning of the Act," the objector is entitled to give evidence that the street in question is a highway repairable by the inhabitants at large, although that ground of objection is specifically dealt with in sub-sect. (b).

CASE stated by justices of the peace for the petty sessional division of Hastings, in the county of Sussex

Upon the application of the mayor, aldermen, and burgesses of the borough of Bexhill, acting by the council as the urban sanitary authority for the borough, the justices sitting as a court of summary jurisdiction at Bexhill heard and determined the matter of certain objections raised by Henry Carey (the appellant) to a certain provisional apportionment in respect of the expenses of executing certain proposed works in Springfield-road, Bexhill, under and by virtue of the Private Street Works Act 1892.

(a) Reported by W. W. Oms, Esq., Barrister-at-Law.

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The justices, after hearing the parties and the evidence adduced by them, disallowed the objections.

Upon the hearing of the objections, the following facts (amongst others) were admitted or proved:—

The Bexhill Urban District Council, having duly adopted the Private Street Works Act 1892, resolved to make up Springfield-road in a certain manner.

On the 20th Oct. 1902 the council passed a resolution that the plans, specifications, estimates, and provisional apportionments of proposed private street works of sewerage, levelling, paving, and making good the Springfield-road submitted to the district council by the surveyor be approved, and that the necessary steps be taken for the carrying out of such works in accordance with such specifications, and also in accordance with the Private Street Works Act 1892.

By a charter of incorporation the rights and powers of the Bexhill Urban District Council passed to the respondents on the 9th Nov. 1902.

The appellant was the owner of two freehold pieces of land having frontages of 82ft. and 95ft. respectively to a portion of the Springfield-road referred to in the resolution, and the total estimated apportionment charged to him was 134l. 9s. 10d. Within the time provided by the Act the appellant gave to the council the following notice, dated the 20th Dec. 1902:

I hereby give you notice that I the undersigned, being the owner of certain land numbered 7 and 8 on the plan and provisional apportionment relating to the portion of the said road referred to in the said resolution and therein shown as liable to be charged with part of the expenses of the above-mentioned works, object to your proposals in the matter on the following grounds or some or one of them: (1) That the alleged part of a street does not form a part of a street within the meaning of the Act. [There were other grounds of objection which are not now material]

At the hearing, the borough surveyor proved in his evidence in chief that Springfield-road was the only approach to another road called Beaconsfield-road; that there was a public footpath running along part of the site of the proposed road on the south-east side—that is to say, on the side next to the appellant's land—but he stated that this footpath was not repairable by the inhabitants at large and had never been repaired by the urban district council, and he added that, if it were, the corporation would have to repair all the footpaths in the district.

The appellant tendered evidence to show that it was a highway repairable by the inhabitants at large, but the justices refused to admit the evidence, on the ground that no notice of this objection had been given under sect. 7, sub-sect. (b), of the Private Street Works Act 1892.

It was contended on behalf of the appellant (*inter alia*) that he was entitled to call evidence of the existence of a highway repairable by the inhabitants at large, because, although he had not given notice of objection under sub-sect. (b) of sect. 7 of the Private Street Works Act 1892, he had given notice under sub-sect. (a). He relied upon the difference in the definition of the word "street" in sect. 5 of the Private Street Works Act 1892 and the definition in the Public Health Acts.

The appellant also relied on *Rishton v. Haslingden Corporation* (77 L. T. Rep. 620; (1898) 1 Q. B. 294). He further contended that, as the respondents were in no way taken by surprise, the justices should amend the notice of objection.

The justices decided that, in order to give them jurisdiction under this Act, the question of whether the street was in whole or in part a highway repairable by the inhabitants at large must be specifically raised upon a notice of objection given under sect. 7, sub-sect. (b), and that notice under sub-sect. (a) alone was not sufficient to enable the objector to raise the point. They also held that, in view of sect. 8, sub-sect. 2, of the same Act, they had no power to amend the notice of objection.

The questions for the opinion of the court were (amongst others not now material): (1) Whether the justices were right in excluding evidence of the existence of a footpath repairable by the inhabitants at large without notice of objection having been given under sub-sect. (b). If they were wrong, then the case was to be referred back to them to take evidence on the point. (2) Whether the justices had jurisdiction to amend the notice, and, if so, were bound to do so in favour of the appellant. If they were wrong as to that, the case was to be referred back to them to be reheard on an amended notice.

The Private Street Works Act 1892 (55 & 56 Vict. c. 57) provides:

Sect. 1. This Act . . . shall be construed as one with the Public Health Acts, and shall extend only to England; and this Act and the Public Health Acts may be cited together as the Public Health Acts.

Sect. 2. This Act shall extend and apply to any urban sanitary district in which it is respectively adopted under the provisions of this Act.

Sect. 5. In this Act, if not inconsistent with the context, the expression "street" means (unless the context otherwise requires) a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large.

Sect. 6 (1). Where any street or part of a street is not sewered, levelled, paved, . . . made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works); that is to say, to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting such street or part of a street; and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street.

Sect. 7. During the said month [that is, one month from the date of the first publication of the resolution of the urban authority approving the specifications, plans, estimates, and provisional apportionments] any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds; that is to say, (a) that an alleged street or part of a street is not or does not form part of a street within the meaning of this Act; (b) that a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large.

Sect. 8 (1). The urban authority at any time after the expiration of the said month may apply to a court of

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summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors; and at the time and place so appointed any such court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be, and with the same powers and subject to the same provisions with respect to stating a case, as if the urban authority were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable. The court may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority. The court may also, if it thinks fit, adjourn the hearing and direct any further notices to be given. (2) No objection which could be made under this Act shall be otherwise made or allowed in any court, proceeding, or manner whatsoever.

J. R. Macoun for the appellant.—The justices ought to have admitted the appellant's evidence tendered to show that this road was a highway repairable by the inhabitants at large. By sect. 5 a street means a street as defined by the Public Health Acts, "and not being a highway repairable by the inhabitants at large." The definition of "street" in the Public Health Acts is given in sect. 4 of the Public Health Act 1875; and, taking the definition in sect. 5 of the Act of 1892, it is clear that this evidence was admissible under the notice of objection given. If this footpath were a highway repairable by the inhabitants at large, then it would not come within the definition of "street" in sect. 5, and would therefore not be a street "within the meaning of the Act," so that, under the notice of objection that the street did not form part of a street within the meaning of the Act, it could be shown that the street was repairable by the inhabitants at large, as that would necessarily show that it was not a street within the meaning of the Act. Here the appellant gave his notice under sub-sect. (a) of sect. 7. If he had given his notice under sub-sect. (b), he clearly would have been entitled to give this evidence; but it is submitted that sub-sect. (a) includes and overlaps sub-sect. (b), and therefore an objection under sub-sect. (b) that the street is a highway repairable by the inhabitants at large necessarily can be brought under sub-sect. (a). The justices were therefore wrong in refusing to admit this evidence. Secondly, the justices had power to adjourn, and to order an amended notice to be given. That power is given in express terms in the concluding words of sect. 8, sub-sect. 1, where it is said: "The court may also, if it thinks fit, adjourn the hearing, and direct any further notices to be given." The justices were therefore wrong in not amending the notice.

Macmorran, K.C. (*C. A. M. Barlow* with him) for the respondents.—[*Lord ALVERSTONE, C.J.*—Why should not this notice be amended?] There was no power to amend the notice, as the jurisdiction of the justices to deal with the matter only arises on the notice of objection which the objector has given, nor is there any power given to the justices to adjourn the hearing in order that a fresh notice may be given where the time for giving the notice under sect. 7 has expired. If there is no notice given in a month, there is no jurisdiction in the justices to deal with a case of

this kind. The object of the Legislature in specifying the different grounds of objection in sect. 7 was to give the local authority an opportunity of knowing and being prepared to meet the particular ground of objection relied upon. The real question, however, in the case is whether under a notice of objection given under sub-sect. (a), the objection specified in sub-sect. (b) can be given in evidence. It is submitted that it cannot, and that the two sub-sections deal with totally different things. Sub-sect. (a) is intended to deal with a different point altogether from that which is intended to be dealt with in sub-sect. (b). Sub-sect. (a) is intended to deal with the case where the objection is that the alleged street is not a street at all:

Reg. v. Recorder of Sheffield, 50 L. T. Rep. 76; *Wake v. Mayor, &c., of Sheffield*, 12 Q. B. Div. 142.

But if the objection is that the street is not a highway repairable by the inhabitants at large, then the notice ought to be given under sub-sect. (b), and the point specifically raised under that sub-section. If it is not so raised under sub-sect. (b), the justices have no jurisdiction to entertain it; and, as it was not so raised in this case, the justices were right in excluding the evidence.

Lord ALVERSTONE, C.J.—I really cannot understand why this view of the matter was pressed against the admissibility of this evidence. With regard to the power to amend the notice of objection, I do not want to decide that there is no power to amend at all. If it becomes necessary to decide that question we may require further argument, but I must say that I do not at present wish it to be thought that magistrates who are hearing these objections cannot, in a proper case and subject to any questions they may raise as to costs, adjourn a case in order that a further notice may be given. I do not, however, wish to decide that question. In my opinion this evidence was clearly admissible, even upon the notice which was given. The section allows an objector to give a notice "that an alleged street or part of a street is not or does not form part of a street within the meaning of this Act"; or "that a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large." Now, the definition of "street" is given in sect. 5, and it says that it is a street as defined by the Public Health Acts and not being a highway repairable by the inhabitants at large. Under that definition, as my brother Kennedy has pointed out, the objector may give a notice of objection under sub-sect. (a) which will traverse all the allegations of fact which are necessary to prove that the alleged street is a street within the meaning of the Public Health Acts, and that it is not a highway repairable by the inhabitants at large. It may very likely be that the effect of that is to bring a good many more things into issue. Why it should be said, under that, that a person may not give evidence of that which would prevent the street from coming within the definition of street as defined by this Act, I cannot understand. I think it is quite possible, as has been pointed out, that if an objector wanted to raise that one strict point alone, he could raise it under sub-sect. (b). In my opinion the two sub-sections do overlap to this extent, that under this sub-sect. (a) it may be a ground for saying not

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only that a street is not a street within the meaning of this Act, but also that it does not fulfil the condition of not being a highway repairable by the inhabitants at large. Therefore, without deciding the question whether or not, in a case where the terms of the notice did not allow the person objecting to raise the question at all, the justices could have allowed him to amend his notice and adjourn the case, I think in this case they ought to have received the evidence. The case must therefore go back in order that they may receive the evidence, and if any point of law does arise they will be able to bring it before us. I ought to add that the ground upon which the magistrates decided that they could not allow amendment—namely, that in view of sect. 8, subsect. 2, of the Act they had no power to amend the notice of objection—was obviously not the right ground. In my opinion that provision that no objection which could be made under that Act should be otherwise made or allowed in any court, proceeding, or manner whatsoever, applies to proceedings in other courts and not to proceedings in that court.

LAWRENCE, J.—I agree.

KENNEDY, J.—I agree.

Appeal allowed. Case remitted to the justices with a direction to receive the evidence.

Solicitors for the appellant, *Lovell, Son, and Pitfield*, for *E. R. Willett*, Bexhill-on-Sea.

Solicitor for the respondents, *F. G. Langham*, Hastings.

KING'S BENCH DIVISION, IN BANKRUPTCY.

Dec. 7 and 12, 1903.

(Before WRIGHT and PHILLIMORE, JJ.)

Re JOHNSON; Ex parte MATTHEWS AND WILKINSON. (a)

Bankruptcy—Settlement—Settlor's own property—Trust to pay income to settlor determinable on bankruptcy—Discretionary power of trustees to apply income for benefit of settlor, or his children, or to accumulate—Second bankruptcy—Debtor unmarried—Right of trustee to income of settled funds.

In 1893 the debtor assigned property to trustees on trust to pay him the income until he was declared bankrupt. Thereafter his rights were to cease, and a discretionary power was given to his trustees to apply the income of any part thereof to the maintenance of the debtor, or for the benefit of his children, or to accumulate. In 1900 the settlor was adjudicated bankrupt, and under sect. 47 of the Bankruptcy Act 1883 an order was made setting aside the settlement so far as necessary to pay the provable debts. The trustees raised sufficient to pay in full the debts and costs, but the bankruptcy was not annulled. In 1902 the debtor was again adjudicated bankrupt. The trustee in this bankruptcy failed to obtain an order under sect. 47, the judge finding as a fact that at the time of making the settlement the debtor was able to pay all his debts without the property comprised in it. The trustee then applied for a declaration that the life estate of the bankrupt vested in him. The debtor was unmarried.

Held, that the debtor's life interest became forfeited on the first bankruptcy, when the income became vested under the control and discretion of the trustees, and it could only be divested by impeaching the settlement.

APPEAL from the decision of the County Court judge of Lancashire sitting at Manchester.

Leigh Clare for the appellants.

Carrington for the respondent.

Cur. adv. vult.

Dec. 12.—PHILLIMORE, J. read the following judgment of the court, which fully sets out the facts:—The bankrupt Johnson, being then and now an unmarried man, and having then only just come of age, made on the 1st Sept. 1903 a settlement of certain property, of which settlement the appellants are the present trustees. The property settled was a share of residue passing under the grandfather's will; and the grandfather, when bequeathing legacies to his sons for their lives, had made such legacies determinable on bankruptcy, or upon the assignment or charge of the annual income. For some reason, into which it is not important to inquire, the settlement made by the bankrupt Johnson, instead of expressing the trust and limitations explicitly, stated them by way of reference to the grandfather's will. There is, however, no dispute what these trusts and limitations are, though they have to be gathered from the two instruments. The settlor assigned property to the trustees on trust to pay him the annual income until he was declared bankrupt, or should assign or charge in any way the annual income. Thereafter his rights were to cease, and the trustees were to have power to apply or not, as they thought fit, the income or any part for his personal maintenance and support, and were to apply the residue, if any, for the benefit of his children, if there were any, or to accumulate it and add it to the corpus, which corpus was ultimately to go to certain relations. In 1900 there was a first adjudication in bankruptcy. The trustee in that bankruptcy moved, under sect. 47 of the Bankruptcy Act 1883, to set aside the settlement, and it was set aside so far as was necessary to pay the bankrupt's debts provable in that bankruptcy. Thereupon, under an order made by consent, the trustees of the settlement raised a sufficient sum to pay the bankrupt's debts in full and the costs. The bankruptcy, however, does not seem to have been formally annulled. In 1903 there was a second bankruptcy. The trustee in that bankruptcy again applied to set aside the settlement; but this time he failed, the County Court judge finding as a fact that at the time of making the settlement the bankrupt was able to pay all his debts without the aid of the property comprised in it. The trustee in bankruptcy then applied to have it adjudged and declared that the life estate of the bankrupt vested in him, the said trustee, and that he was entitled to the income thereof with the arrears. He obtained an order in these terms, and this is the order now under appeal. Now, an owner of property cannot by way of settlement or contract qualify his own interest in property by a condition determining or controlling it, in the event of his own bankruptcy, to the disappointment or delay of his creditors. This was decided in *Wilson v. Greenwood* (1 Swans. 471, 481; 18

(a) Reported by J. ARWYL THOROLD, Esq., Barrister-at-Law.

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R. R. 118), and that decision has been followed in a number of cases, many of which will be found enumerated in *Mackintosh v. Pogose* (72 L. T. Rep. 251; (1895) 1 Ch. 305). But this rule applies only to a limitation upon bankruptcy, and to cases where, but for this limitation, the property or income would have come to the assignee or trustee in bankruptcy, and then only so far as it would have thus come. Thus, in *Re Detmold; Detmold v. Detmold* (61 L. T. Rep. 21; 40 Ch. Div. 585), the husband settlor, with a similar clause, suffered an incumbrance of his income by the appointment of a receiver at the suit of a judgment creditor on the 19th July 1888. In or about September of the same year he was adjudicated a bankrupt upon an act of bankruptcy committed on the 29th July. It was held that before the act of bankruptcy there had been a forfeiture by the husband owing to the appointment of a receiver; that the limitation over to the wife upon such forfeiture was good, inasmuch as it defeated a particular alienee, and was not a fraud on the bankruptcy laws; that, therefore, the gift over had taken effect before bankruptcy, the income had become vested in the wife, and there was nothing for the trustee in bankruptcy to take. Following this authority, the judge in *Re Brewer's Settlement; Morton v. Blackmore* (75 L. T. Rep. 177; (1896) 2 Ch. 503) stated as follows the point which he had to determine: "The question is whether the life interest had determined previously to the bankruptcy." In that case it was held that what had been done previously to the bankruptcy did not amount to forfeiture or determination of the life interest, and, therefore, the trustee in bankruptcy took the life interest. In the case before us, the trustee in the first bankruptcy, if he had failed in setting aside the settlement, would have succeeded in getting the bankrupt's life interest under it, because to allow the limitation over to take effect would have been, in the language of the cases, a "fraud upon the bankruptcy laws" or a disposition of property forbidden by law. But although the alienation could not take effect so as to disappoint and delay the creditors in the first bankruptcy, it operated as against the settlor as a forfeiture. He lost all his rights to the residue left after paying those creditors. The income came under the control and discretion of the trustees. If the limitation over had been to a determined person (as to the wife in *Re Detmold, ubi sup.*), she would have claimed a vested interest, which could only have been divested by impeaching the settlement—an impeachment which in this case has failed. The case looks different because the trustees of the settlement have a discretionary power; but the law to be applied is the same.

Appeal allowed.

Solicitors: W. E. Dawson; W. B. Glasier.

Dec. 14, 1903, and Jan. 18, 1904.

(Before WRIGHT, J.)

Re REIS; Ex parte THE TRUSTEE. (a)

Bankruptcy — Marriage settlement — Husband's covenant to settle all after-acquired property except business assets—Act of bankruptcy—Subsequent transfer of property to the trustees of the settlement—Title of trustee in bankruptcy—Meaning of "becoming bankrupt"—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), ss. 43, 47 (2).

By his marriage settlement, executed in 1879, the debtor covenanted to settle all after-acquired property, both real and personal, except business assets. In 1891 he was very successful, and purchased a house and furniture for 17,000*l.*, in which he lived with his wife and family. Early in 1903 he was in financial difficulties, and on the 23rd May the trustees of the settlement served a written notice requiring him to transfer the house and furniture. On the 26th May the debtor committed an act of bankruptcy, and on the 10th June he conveyed the house and furniture to the trustees by two deeds. On the 15th July the receiving order was made on an act of bankruptcy committed after the 10th June, and on the 23rd July the debtor was adjudicated a bankrupt.

Held, that the words "becoming bankrupt" in sect. 47 (2) of the Bankruptcy Act 1883 must be construed by the light of sect. 43 of that Act, and mean the commission of an act of bankruptcy on which the receiving order is made, or, if more than one act of bankruptcy has been committed, the first act of bankruptcy proved to have been committed within three months next preceding the date of the presentation of the bankruptcy petition, and that, as the house and furniture had not been actually transferred to the trustees of the marriage settlement before the 26th May, the transfer on the 10th June was void against the trustees in bankruptcy.

MOTION by the trustee in bankruptcy to set aside a transfer of property by the debtor to the trustees of his marriage settlement.

The settlement was executed in 1879, and contained a covenant by the debtor to settle all after-acquired property, both real and personal, except business assets.

In 1901 the debtor, who had established himself in business as an "outside" stockbroker, was very successful, and his profits exceeded 50,000*l.* In that year he purchased a freehold house, in which he subsequently lived, the cost of the house and its furniture being 17,000*l.*

In the early part of 1903 he became involved in difficulties, his creditors being practically all stockbrokers.

On the 23rd May the trustees of his marriage settlement served on him a written notice requiring him to transfer his house, &c., to them.

On the 26th May he committed an act of bankruptcy by giving notice of an intention to suspend payment.

On the 10th June by two deeds he transferred the freehold house and furniture to the trustees of his marriage settlement.

On the 15th July a receiving order was made

(a) Reported by J. ARWYL THOROLD, Esq., Barrister-at-Law.

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on another act of bankruptcy committed on the 29th June.

On the 23rd July he was adjudicated a bankrupt.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52) enacts as follows:

Sect. 43. The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor.

Sect. 47 (2). Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy.

H. Reed, K.C., A. J. David, and Adler for the trustee in bankruptcy.—The debtor having committed an act of bankruptcy on the 26th May, and the receiving order having been made on the 15th July, the title of the trustee in bankruptcy relates back to the 26th May. The debtor became bankrupt, within the meaning of sect. 47 (2) of the Bankruptcy Act 1883, on the 26th May, before the property was "actually transferred" in pursuance of the contract contained in the marriage settlement.

Horridge, K.C. and Muir Mackenzie for the trustees of the marriage settlement.—The bankrupt did not "become bankrupt" before the 10th June. The words in sect. 47 are not "commencement of the bankruptcy" as they would have been if an act of bankruptcy had been intended. A man does not "become bankrupt" when he commits an act of bankruptcy; he does not become bankrupt until an order of adjudication is made. Even a receiving order may be rescinded, and a debtor, even after a receiving order has been made against him, may not become bankrupt within the meaning of this section. The furniture had been transferred before the 26th May. It was purchased by the debtor and brought by him into the house of his matrimonial domicile, and that constituted as effectual a transfer as was possible under the circumstances. The possession of chattels by a wife in her husband's house is as good as absolute possession anywhere else. When they ought to be in the wife's possession, the law will attribute the possession to her:

Re Satterthwaite, 2 Man. 52;

Ramsay v. Margrett, 70 L. T. Rep. 788; (1894) 2 Q. B. 18.

H. Reed, K.C. replied.

Hansell and Romer Macklin appeared for Mrs Reis, but took no part in the arguments.

WRIGHT, J.—On the 26th May there was an act of bankruptcy, and on the 10th June the debtor transferred to the trustees of his marriage settlement the after-acquired property which he had covenanted by his marriage settlement to transfer. There was another act of bankruptcy after the 10th June, on which a receiving order was made on the 15th July. The bankruptcy therefore relates back to the 26th May. Then sect. 47 (2) of the Bankruptcy Act 1883 enacts: [His Lordship read the sub-section.] On the construction of those words, the first question is, What is the meaning of "becoming bankrupt"? There is, apparently, no authority to guide me on that. Strong reasons have been urged for the view that "commencement of the bankruptcy" would have been used if that had been meant. On the other hand, it is said that "adjudicated bankrupt" would have been more natural than "becoming bankrupt" if that had been meant. It seems to me, however, that I ought to construe the words "becoming bankrupt" by the light of sect. 43. That section says, reading only the material words: "The bankruptcy of a debtor . . . shall be deemed . . . to commence at . . . the time of the first of the acts of bankruptcy proved to have been committed within three months next preceding the date of the presentation of the bankruptcy petition." If the bankruptcy is to be deemed to have commenced, then, as from the date it is deemed to have commenced, I should say the bankrupt must be deemed to be a bankrupt. I am quite alive to the possibility that the view I am taking is wrong, but I think I ought to take that view. Then there comes the second question, What is the proper meaning of the words "becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant"? It has been argued with great force that various kinds of constructive transfers are enough. It seems to me that the very object of the language used is to exclude all such arguments, and that it means what it says—viz., that the sub-section is to apply unless there has been an actual legal transfer pursuant to the contract or covenant. The cases of *Ramsay v. Margrett* and *Re Satterthwaite* (*ubi sup.*) appear to me to be quite different. In *Ramsay v. Margrett* there had been an actual verbal sale and payment of the consideration. In *Satterthwaite's* case the house, together with the furniture in it, had been actually assigned to trustees for the wife, and under those circumstances it was held that possession, which might on the face of it be ambiguous, must follow the title. Both those cases were decided on the Bills of Sale Acts. In this case there was no actual transfer till the 10th June. In my judgment sect. 47 of the Bankruptcy Act 1883 cannot be construed with reference to the Bills of Sale Act, and, the transfer having been subsequent to the 26th May, the transfer is not good within the sub-section. Then it remains only to ask whether sect. 47, if I have rightly held it applicable, is in any way subject to or modified by sect. 49. This point has not been really argued, and I do not think it could be properly argued. Sect. 49 appears on its face and by its terms only to apply when sect. 47 does not apply, and further, the enumeration of the cases to which sect. 49 is to be applicable does not include any description which is properly applicable to what

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took place when this property was transferred to the trustees. The transfer to the trustees was not a payment by the bankrupt to any of his creditors; it was not a payment or delivery to the bankrupt; it was not a conveyance or assignment by the bankrupt for valuable consideration; and it was not a contract or dealing by or with the bankrupt for valuable consideration. Therefore sect. 49 has no application.

Solicitors: *W. H. Martin and Co.*; *Nordon and De Frece*; *Spyer and Co.*

Monday, Jan. 25.

(Before WRIGHT and RIDLEY, JJ.)

Re A DEBTOR (No. 112 of 1903); *Ex parte* ROCK RED BRICK COMPANY. (a)

Bankruptcy—Final judgment in High Court—Judgment summons in County Court—Bankruptcy notice—Order on judgment summons to pay by instalments—No default—Petition—Debtors Act 1869 (32 & 33 Vict. c. 62), s. 5—County Court Rules 1889, Order XXV., rr. 17, 25, 26, 27—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 4 (1) (8).

A judgment summons was issued in the County Court on a final judgment in the High Court, and on the 17th Oct. 1903 a bankruptcy notice was served, which was not complied with.

On the 2nd Nov. an order to pay by instalments was made on the judgment summons.

On the 3rd Nov. a bankruptcy petition was presented by another creditor, founded on the non-compliance with the bankruptcy notice.

Held, that the petitioning creditor was entitled to a receiving order, the debtor having committed an act of bankruptcy before the making of the order on the judgment summons, which any creditor could take advantage of.

Montgomery v. De Bulmes (78 L. T. Rep. 671; (1898) 2 Q. B. 420) distinguished.

APPEAL by the petitioning creditors from the decision of the registrar of the County Court of Yorkshire, holden at Leeds, dismissing a petition.

On the 21st Sept. 1903 the Leeds Patent Brick Company obtained final judgment against the debtor in the King's Bench Division of the High Court of Justice for 43l. 10s. 3d.

On the 25th Sept. a judgment summons was issued in the Leeds County Court on the judgment of the 21st Sept., and on the 13th Oct. a bankruptcy notice was issued by the Leeds Patent Brick Company, which was served on the 17th Oct.

On the 2nd Nov. the judgment summons was heard at the Leeds County Court, and an order was made to pay the debt by monthly instalments of 1l.

On the 3rd Nov. a bankruptcy petition was presented by the Rock Red Brick Company, founded on a non-compliance with the bankruptcy notice served on the 17th Oct. This petition was heard on the 27th Nov., and was dismissed.

Ringwood in support of the appeal.—The decision of the registrar was based on *Jones v. Jenner* (25 L. J. 319, Ex.) and *Montgomery v. De Bulmes* (78 L. T. Rep. 671; (1898) 2 Q. B. 420), but neither of those cases apply to the facts here. The

procedure under the Debtors Act 1869 is merely punitive, and does not amount to an execution:

Stonor v. Fowls, 58 L. T. Rep. 1; 13 App. Cas. 20;
Re Watson; *Ex parte Johnstone*, 67 L. T. Rep. 519;
(1893) 1 Q. B. 21.

The proceedings on the judgment summons did not constitute a stay.

Hansell for the debtor.—The petition was rightly dismissed. The question for decision is whether after a judgment creditor has elected to take proceedings under the Debtors Act, and an order to pay by instalments has been made, on which there has been no default, the creditor can afterwards turn round and issue execution, or do what amounts to issuing execution, commence bankruptcy proceedings by the issue of a bankruptcy notice. The County Court Rules prevent a creditor who has taken proceedings by judgment summons from issuing execution. [He referred to Order XXV., rr. 17, 25, 26, and 27, of the County Court Rules of 1889.] The High Court is for the purpose of a judgment summons under the County Court Rules, and under those rules a judgment of the High Court when enforced by judgment summons is on the same footing as a judgment in one County Court enforced by judgment in another County Court. The case of *Montgomery v. De Bulmes* (*ubi sup.*) is a binding authority in my favour.

Ringwood, in reply, referred to

Church's Trustees v. Montague Hibbard and Co.,
87 L. T. Rep. 412; (1902) 2 Ch. 784.

The act of bankruptcy relied on by the petitioning creditors was the non-compliance with the bankruptcy notice served on the 17th Oct., and, as more than seven days had elapsed before the 2nd Nov., when the order was made on the judgment summons, there was an act of bankruptcy on which any creditor could found a petition.

WRIGHT, J.—I think this receiving order was wrongly refused by the registrar. The ground on which I base my decision is that before the making of the order to pay the judgment debt by instalments on the 2nd Nov. the debtor had committed a complete act of bankruptcy. That being so, any creditor was entitled to take advantage of that act of bankruptcy and to found a petition on it, even if the debtor had paid the whole of the debt. Apart from that fact, I think there is great force in the arguments of Mr. Hansell, and it seems to me that on the authority of *Montgomery v. De Bulmes* (*ubi sup.*) this petition might have been properly dismissed.

RIDLEY, J.—I agree. The decision in this case seems to me to follow from the words of sect. 4 (1) (8) of the Bankruptcy Act 1883, which provides that "a debtor commits an act of bankruptcy if a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him a bankruptcy notice . . . under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment . . . and he does not within seven days after service of the notice . . . comply with the requirements of the notice." Apart from the commission of an act of bankruptcy, I also think that there is great force in the contention that pro-

(a) Reported by J. ANWYL THEOBALD, Esq., Barrister-at-Law.

[IN BANK.]

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[IN BANK.]

ceedings under the Debtors Act disentitle the judgment creditor to levy execution.

Appeal allowed. Leave to appeal given.

Solicitors: *Scatcherd, Hopkins, and Middlebrooks, Leeds; Walter and E. H. Foster, Leeds.*

Monday, Jan. 25.

(Before WRIGHT and RIDLEY, JJ.)

Re JENKINS; Ex parte THE TRUSTEE. (a)

Bankruptcy—Execution—Payment to creditor—Withdrawal by sheriff—Bankruptcy of debtor—Completion of execution—Title of trustee—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 45—Bankruptcy Act 1890 (53 & 54 Vict. c. 71), s. 11.

On the 22nd July 1903 the sheriff levied on the goods of the debtor at the Alexandra and Adelphi Hotels. On the 27th July he withdrew, on the instructions of the judgment creditor, from the Alexandra Hotel on part payment.

On the 28th July the debtor sold to the execution creditor goods at the Alexandra Hotel which had been seized, and on the 29th July he also sold to the execution creditor goods at the same place which had not been seized. On the same day an arrangement was made by which the debtor received credit for the amount in the hands of the sheriff and for the goods sold, and he paid the balance direct to the execution creditor.

The sheriff withdrew, and on the 12th Aug. he paid over the amount in his hands to the execution creditor, having received no notice of a bankruptcy petition.

On the 20th Aug. a receiving order was made against the debtor on his own petition.

Held, that the trustee in bankruptcy had no title against the execution creditor to the money or the goods.

Re Pollock and Pendle (87 L. T. Rep. 238) distinguished.

Re Ford; Ex parte Official Receiver (81 L. T. Rep. 648; (1900) 1 Q. B. 264) applied.

APPEAL by the trustee in bankruptcy from a decision of the judge of the County Court of Glamorganshire holden at Swansea, dismissing his application for a declaration that certain cash and goods received by an execution creditor formed part of the bankrupt's estate, on the ground that the execution had not been completed before the date of the receiving order.

On the 22nd July 1903 an execution for 157l. 13s. 9d. was levied by the sheriff on the goods of the debtor situated at the Alexandra and Adelphi Hotels at Swansea.

On the 27th July the judgment creditor authorised the sheriff to withdraw from the Alexandra Hotel on payment of 20l., and he accordingly withdrew.

On the 28th July the sheriff was authorised to delay the sale of the goods seized at the Adelphi Hotel in view of the possibility of a settlement. On that day the debtor sold to the execution creditor a cash till for 25l. and some beer for 2l. 5s. These goods were at the Alexandra Hotel, and had been seized on the 22nd July under the execution.

On the 29th July the debtor sold to the execu-

tion creditor a cask of whisky for 21l. 0s. 6d. The cask of whisky was at the Alexandra Hotel, but it had not been seized under the execution.

In the afternoon of the same day a meeting of the debtor, the judgment creditor, and the sheriff took place when the execution was settled in the following manner: Credit was given by the execution creditor for the amount in the hands of the sheriff, and for the goods sold by the debtor, and the balance was paid in cash direct to the execution creditor. The sheriff withdrew by direction of the execution creditor.

The sheriff held the balance in his hands for fourteen days, and, not having received notice of any bankruptcy petition, on the 12th Aug. he paid it over to the execution creditor, less the costs of the levy.

On the 20th Aug. a receiving order was made against the debtor on his own petition, and he was adjudicated a bankrupt on the same day.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 45, enacts:

(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act an execution is completed by seizure and sale.

The Bankruptcy Act 1890 (53 & 54 Vict. c. 71) s. 11, enacts:

(1) Where any goods of a debtor are taken in execution and before sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or recovered in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge. (2) Where under an execution in respect of a judgment for a sum exceeding twenty pounds the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor and a receiving order is made against the debtor thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor.

Meager, for the trustee in bankruptcy, in support of the appeal.—This execution had not been completed before the date of the receiving order by seizure and sale or payment as required by sect. 45 of the Bankruptcy Act 1883 and sect. 11 of the Bankruptcy Act 1890. Here the sheriff only received part of the money paid under the execution; the rest was paid direct to the execution creditor, and the sheriff did not hold the full amount of the levy for fourteen days as required by the Bankruptcy Acts. The case of *Re Pollock and Pendle* (87 L. T. Rep. 238) is a conclusive authority in favour of my contention.

(a) Reported by J. ARWYL THOROLD, Esq., Barrister-at-Law, Vol. XC, 2314.

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Muir Mackenzie and S. G. Lushington for the execution creditor.—The execution had been completely got rid of more than fourteen days before the bankruptcy. They referred to

Re Ford; *Ex parte Official Receiver*, 81 L. T. Rep. 648; (1900) 1 Q. B. 264.

WRIGHT, J.—In my opinion there is no real question in this case. The case of *Re Pollock and Pendle* (*ubi sup.*) is clearly distinguishable, because there the receiving order was made within seven days of the payment of the money, and therefore there is nothing in that case which governs this. Here the sheriff retained the money for the fourteen days as prescribed by the statute, and, not having received notice of any petition against the bankrupt, paid it over to the execution creditor. As to the other items and the cash payment, they are covered by what the court said in *Re Ford* (*ubi sup.*). The whole transaction here was completed long before the date of the receiving order.

RIDLEY, J.—I agree.

Appeal dismissed with costs.

Solicitors: Smith, Rundell, and Dods, for Viner, Leeder, and Morris, Swansea; Helder Roberts and Co., for Davies and Harvey, Swansea.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 29, 30, Feb. 1 and 2.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re HANBURY; HANBURY v. FISHER. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Construction—Precatory trust—Gift absolute or on trust—Gift in default of disposition—Repugnancy.

A testator gave, devised, and bequeathed to his wife "the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be divided among the surviving said nieces."

The testator's wife and seven nieces survived him. Held (by Williams and Stirling, L.JJ., Cozens-Hardy, L.J. dissenting), that there was an absolute gift to the widow unaffected by any precatory trust in favour of the nieces, and the words "in default of any disposition," &c., imposed a condition which was repugnant to the previous absolute gift and could not be construed as creating an executory devise or gift over after the absolute gift, and must therefore be rejected.

Per Cozens-Hardy, L.J.: The widow took more than a life interest, and, should all the nieces predecease her, her absolute interest would remain; but the surviving nieces, if any, were

sufficiently indicated as the persons to take after her death; and this overriding intention could be given effect to without unduly straining the language of the will.

Decision of Kekewich, J. affirmed.

THE Right Hon. Robert William Hanbury, of Ilam Hall, Staffordshire, formerly President of the Board of Agriculture and M.P. for Preston, who died on the 28th April 1903, leaving a very large property, by his will, which was dated the 31st Oct. 1893 and was in the testator's own handwriting, after a bequest in favour of his sister, made the following bequest:

I give, bequeath, and devise to my very dear wife, Ellen Hanbury, the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces. I make this will in full confidence that my dear wife will show the affection of a daughter to my dear mother and stepfather.

And, after appointing his wife and Charles Fisher executrix and executor, the testator gave to the said Charles Fisher "such sum, not exceeding 150*l.*, as my dear wife may decide upon."

The testator never had any children.

A summons was taken out by the widow against the other executor and the testator's seven surviving nieces to have it determined whether the plaintiff took absolutely for her own use and benefit, or whether she took for life only, with remainder to such of the nieces as she should by will appoint, or, in default of appointment, to the surviving nieces in equal shares.

The summons was heard by Kekewich, J. on the 10th July 1903, when the following judgment was delivered:—

KEKEWICH, J.—The first question is undoubtedly one of construction. The contention of the nieces, to my mind, is perfectly unsound. Regarding the will for the purpose of construction, one must not bring in all one's knowledge and all the authorities about the use of the word "confidence" or "*cestuis que trust*," and so forth. In order to find out what the construction of the will is, one must in the first instance find what it means in ordinary language, and it seems to me that, construed in that way, there is, without the slightest doubt, an absolute gift to the wife. There is a gift to her of "the whole of my real and personal estate and property absolutely." Of course, if there were no more, no one could have any doubt about the meaning. But the testator goes on to say this: "In full confidence that she will make such use of it as I should have made myself." I repeat, one must dismiss from one's mind the technical meaning of "confidence" for the purpose of ascertaining in the first instance what the testator meant. I must not remember, or at any rate I must ignore, the fact that the word "confidence" may be used in a technical sense as meaning "use" or "trust." I must regard "confidence" as used or employed in the ordinary sense in which "confidence" is employed among Englishmen speaking their own language. I venture to say

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

that no one could put any meaning upon the word "confidence" standing alone, an English word used by Englishmen without technical knowledge, other than that which Mrs. Hanbury seeks to place on it here. When you confide in persons you trust them, not trust them in the technical sense of making them trustees, but leaving to them the power to do what you wish them to do and being sure that they will fulfil those wishes. The idea of trust is entirely out of the question. That seems to me clear on the use of the word "confidence" alone; but it is enhanced by the words which follow, that the confidence is "that she will make such use of it as I should have made myself." Now, I care not for this purpose whether "it" is, as it certainly is grammatically, the entire property, or whether "it" is only that of which a person in the ordinary case would make use—that is, the income. The confidence is that she will use it as she knows he would have used it, and that she should use it in the way in which he would have used it, leaving it to her in that confidence which exists between the two, and not as defining any particular trust. So far, to my mind, not only is the word "confidence" in favour of Mrs. Hanbury's contention, but the words following support that construction. Now, when you come further on, no doubt you come to difficulties, for the testator continues: "And that at her death she will devise it to such one or more of my nieces as she may think fit." He confides in her to do that. If the confidence means what I hold it to mean, that really means nothing more. But still there is, no doubt, an expression of his intention that she will dispose of it in that particular way among his nieces; and that is emphasised again by the gift in default of any disposition by her, which is: "I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces," showing that the nieces were in his thoughts; that the nieces were persons for whom he did not intend to provide, but for whom he wished the wife to provide. It all depends, therefore, whether these words are sufficient to cut down the gift which, according to my construction, is absolute in her favour in the first instance. I have no doubt that the rule which I ventured to lay down in *Re Hamilton* (72 L. T. Rep. 88; (1895) 1 Ch. 373) is perfectly sound, and I say so with more confidence because, although there are no words in the judgments of the Court of Appeal (72 L. T. Rep. 748; (1895) 2 Ch. 372) actually adopting the language in which I laid down the rule, still I do find expressions which show that the Court of Appeal did not differ from it. But I put aside that, and turn to what Lord St. Leonards said in his work, written in 1849, on the Law of Property, in the passage quoted by Lindley, L.J. in his judgment in *Re Williams* (76 L. T. Rep. 603; (1897) 2 Ch. 21). It is this (p. 375): "The law as to the operation of words of recommendation, confidence, request, or the like, attached to an absolute gift, has in late times varied from the earlier authorities. In nearly every recent case the gift has been held to be uncontrolled by the request or recommendation made or confidence expressed. This undoubtedly simplifies the law, and it is not an unwholesome rule that, if a testator really means his recommendation to be

imperative, he should express his intention in a mandatory form; but this conclusion was not arrived at without a considerable struggle." That rule seems to me to cover this case from the beginning to the end. You have the confidence; you have the absolute gift in the first instance not controlled by the confidence; you have the absence of the mandatory expression of intention which Lord St. Leonards says according to a not unwholesome rule ought to be found before you enforce the trust. It seems to me the cases cited and what I venture to say on the law generally cover the whole case, and that Mrs. Hanbury takes absolutely. It is said there is no case in which there was a gift over—that is to say, a gift in default of the exercise of the power purported to be conferred on the absolute donee—where the precatory trust is not mentioned. That may be so. I have not examined all the cases, but the answer to it, to my mind, is this: Here you have a gift over in these words, "In default of any disposition by her thereof by her will and testament, I hereby direct" that the property shall go among the surviving nieces. Is it right, on the proper construction of the will, to call that a gift over? To my mind it is not. There can be no gift over except in default of the exercise of a power of appointment, which power is valid and exercisable. Now, according to my construction of the will, there is no power of appointment; there is no power which is valid or exercisable. The power which he purports to give of devising it among the nieces at his decease is repugnant to the absolute gift and fails, and there is nothing, therefore, as regards which you can say strictly according to law it is in default of the exercise of the power. That argument, therefore, I think, fails as well as the others. The result is, I must find Mrs. Hanbury to be under this will the donee absolutely for her own benefit of all the testator's real and personal estate and property.

From this decision the nieces appealed.

Warmington, K.C., Vernon Smith, K.C., Christopher James, and M. Romer for the nieces. —Under this will the nieces are intended to have an interest in the property if they survive the wife, either under her will or under the testator's will. No difficulty arises as to what the nieces are to take, and there is a trust in their favour. In *Re Bagshaw's Trust* (36 L. T. Rep. 749) a gift to a wife absolute in form was held by the Court of Appeal on the whole will to be for life only. In considering whether a precatory trust is attached to any legacy, the court will be guided by the intention of the testator apparent on the will, and not by any particular words in which the wishes of the testator are expressed:

Re Hamilton; Trench v. Hamilton, 72 L. T. Rep. 748; (1895) 2 Ch. 370;

Re Williams; Williams v. Williams, 76 L. T. Rep. 600; (1897) 2 Ch. 12.

Here the will in fact contains, first, a gift to the wife; secondly, a gift to the nieces; and then it provides that if neither of the nieces survive the wife, then the whole property is to go to the wife. It is contrary to the testator's intention that if his nieces survive his wife they shall get nothing. This is, in fact, a gift to the wife subject to such interest as she may appoint to the nieces; and, failing any such appointment, there is a gift

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over to the testator's surviving nieces in equal shares. If the general intention of a testator can be collected upon the whole will, particular terms used which are inconsistent with that intention may be rejected as introduced by the testator's mistake or ignorance of the force of the words used; and where the latter part of a will is inconsistent with a prior part, the latter part will prevail:

Sherratt v. Bentley, 2 My. & K. 149.

[WILLIAMS, L.J. referred to Williams on Executors, 9th edit., vol. 2, p. 934.]

Haldane, K.C., Warrington, K.C., and Austen-Cartmell for Mrs. Hanbury.—Reading the whole of the will, it shows the intention of the testator was to put his wife in his place, and to give her an unfettered discretion as to what she would do with the property, but at the same time he expressed a wish that she would give some benefit to his nieces. It is an absolute devise and bequest to his wife, and the expressions of the testator's confidence are not intended to impose any trust on her. The final direction in default of any disposition by the will of his wife is repugnant to the previous absolute gift, and therefore must be rejected altogether:

Holmes v. Godson, 8 D. M. & G. 152, 159.

[WILLIAMS, L.J. referred to *Irvine v. Sullivan*, L. Rep. 8 Eq. 673.]

L. W. Byrne for the executors.

Vernon Smith in reply.

Cur. adv. vult.

Feb. 2.—WILLIAMS, L.J.—I will, for the purposes of my judgment, first assume that the words in this will following the words "in full confidence" do not, having regard to recent decisions, constitute a trust in favour of the nieces. Now, if that is so, the main question which we have to decide is whether the words "and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces" impose a condition which is repugnant to the previous absolute gift, or whether those words should be construed as creating an executory devise or gift over after an absolute gift. Now, in the first place, if you read the words from "I give and bequeath" down to the word "absolutely" and omit the words from "in full confidence" down to but exclusive of the words "and in default of any disposition by her thereof by her will and testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces," it seems to me impossible to construe those words as creating an executory devise or gift over, or otherwise than as repugnant to the absolute gift and devise to the wife. It was argued that if one takes into consideration the words "in full confidence that at her death she will devise it to such one or more of my nieces as she may think fit," this justifies us in reading the words "in default of any disposition by her thereof by her will and testament" as if the words were "in default of any such disposition," and it is said, if one does this, that the direction "in default of such disposition" really constituted a devise or gift over in favour of the

nieces who shall survive the widow. In the first place, the words are not "any such disposition," and in my opinion it cannot be said that there is anything in the will which renders it necessary to interpolate that word except the fact that the words of the will, read as they stand, contain a direction inconsistent with the law founded on principles of public policy, which says that, in the event of an owner in fee dying intestate, the estate shall go to his heir, and in the case of personal property to his next of kin; or, to put it shortly, contains a direction which defeats the course of devolution which the law provides as the incident of an absolute interest. My observation is, of course, quite apart from the question whether the words of this will, taken as a whole, create a trust binding on the conscience of the widow as owner in fee of the realty or absolute owner of the personalty. The case of *Holmes v. Godson* (*ubi sup.*), and in particular the judgment of Turner, L.J., seems to me, properly applied, to govern this case, and to justify thus far my conclusion. Now, is there a trust in favour of the nieces? The law appears to me now to be this, that a gift followed by such expressions as "in full confidence" will not by mere force of the words create a trust; you must take the will which you have to construe and see what it means—see, that is, what was the intention of the testator as expressed in his will—and answer the question *aye* or *no* according to the intention of the testator as expressed by his will. I will first deal with the considerations arising on the will which favour the trust, and then with the words which go to negative it. The words "in full confidence that she will make such use of it as I should have made myself" favour a trust because they suggest that the wife is not to dispose of the corpus, but to keep it till her death; but this is a very lame mode of expressing that which is really inconsistent with the ordinary use of the word "absolutely," which *prima facie* in a will means unfettered in respect of any condition or trust. Next we have the words "I hereby direct," which are certainly consistent with a trust, but, it may be observed, are inconsistent with the word "absolutely." Lastly, there is the bequest, "I give to Charles Fisher such sum, not exceeding 150*l.*, as my dear wife may decide upon." This can hardly be said to favour a trust otherwise than in the sense that it goes to negative the absolute property of the widow, but I cannot think there is really anything in this point, especially as the sentence, taken as a whole, is evidence of the wish of the testator that his wife's discretion should control everything. I think I ought to add in favour of the trust that there does not seem to me to be any uncertainty of fund or object. On the other hand, the word "absolutely" certainly goes to negative a trust imperative on the widow, and the words "in full confidence," in immediate collocation with the word "absolutely" go to emphasise that word almost as strongly as if the words had been "in full confidence nevertheless that my very dear wife will use the property as I should have done." I cannot easily bring myself to the conclusion that this form of words would be used by anyone who at the same time intended to impose any obligation on his wife. Again, the words "in default of any disposition by her thereof by her will or testament" seem to me unnatural if

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a trust was intended, although they are not so absolutely inconsistent with a trust as they would have been if the words had been "any disposition," omitting "by her will or testament." Then the testator directs that "all my estate and property acquired by her under this my will shall be divided," &c., which looks very like an attempt by the testator to control the disposition of property which he had intended she should absolutely acquire under his will. Again he uses in the clause relating to the personal relations of his widow with his mother the words "in full confidence" when he obviously could not have intended to create a trust. Then there is the general form of the will, which seems to me to exclude any intention by the testator to bind his wife by imperative obligations. In the case of the money which he bequeathed for the benefit of his sister, where he did intend an imperative obligation, he carefully excluded that money from the property to go to his wife absolutely. On the whole, I think there is no trust and no executory devise or gift over, but merely a forgetfulness by a testator, who intended to give an unfettered absolute property, of the rule of law which prevents him when he has made such a gift from controlling the subsequent devolution of the property thus acquired by his gift. I think I ought to add that I have considered that part of the argument in which it was contended that, according to the true construction of this will, the wife was to take a life estate with a special power of appointment by will, and I do not think that contention can be supported. The result is that the judgment of Kekewich, J. will be affirmed.

STIELING, L.J.—I have come to the same conclusion, and substantially for the same reasons; but, having regard to the difference of opinion which unfortunately exists in the court, I think it is right that I should state in my own way the reasoning which has brought me to take the view which I have just expressed. Now, we have here to deal with a will which is the workmanship, as I understand, of the testator himself, or, at all events, of someone who is not skilled in the law, and certainly it is expressed in such a way as to give occasion to great difficulty in ascertaining the real meaning of the testator. He begins with a disposition which is absolutely clear if it stood by itself: "I give, bequeath, and devise to my very dear wife, Ellen Hanbury, the whole of my real and personal estate and property absolutely," but later on there are strong words which appear to indicate an intention on the part of the testator that in certain events the property so given to the widow absolutely should go over in favour of his surviving nieces. He says in a certain event, which I shall speak of in a moment, "I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces"; and to my mind the real question which we have to deal with is, What is the event on which that gift over was to take place? Now, it was admitted by counsel for the appellants that if the will had run thus: "I give, bequeath, and devise to my very dear wife, Ellen Hanbury, the whole of my real and personal estate and property absolutely," and if that had been followed by these words, "and in default of any disposition by her thereof by her will or testament I hereby direct,"

and so forth, that the gift in default of any disposition by the wife of the property by her will or testament would be repugnant and void in law. I think that this admission was well founded, and is in accordance with the law laid down in *Holmes v. Godson* (*ubi sup.*). It was admitted, on the other hand, by counsel for the respondent that if the will had run thus: "I give, bequeath, and devise to my very dear wife, Ellen Hanbury, the whole of my real and personal estate and property absolutely, and, if any one or more of my nieces shall survive my said wife, then at her death to such one or more of them as she shall by will select, or in default of such selection to all my said surviving nieces in equal shares," the gift over in favour of the surviving nieces would have been perfectly good, and would have taken effect by way of executory devise and bequest in the event of any nieces surviving. An example of such a gift is to be found in *Crozier v. Crozier* (L. Rep. 15 Eq. 282). Now, the argument for the appellants consisted substantially in an endeavour to bring the case under the last category to which I have referred. They are, however, met with this great difficulty, that the event in which the testator has in terms said that the property acquired by his wife is to go over is not the event of any of the nieces surviving his widow, but that of his widow failing to make any testamentary disposition. To escape from this difficulty it was said that the will must be read as a whole, and that consideration must be given to the clause which up to this point I have not taken any notice of—namely, "in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit." Unquestionably the whole will must be read together, and that clause must be taken into consideration. It was then contended that, this being done, the will ought to be read as if the word "such" had been inserted before the word "disposition," so that the gift would take effect only in the event of the testator's widow failing to dispose of his property by will in favour of one or more of the surviving nieces. I confess that during the argument I was much impressed by this contention, and, if I thought that this really expressed the intention of the testator, I should have been very willing to give effect to it. But, after careful consideration, I cannot find enough in this will to enable me so to hold. The insertion of the word "such" appears to me to entirely alter the complexion of the will, and to afford an indication that the testator's intention was that the widow should not be at liberty to make a testamentary disposition of his property except in favour of one or more of the surviving nieces. Reading the will as it stands, and by the light of the views taken by the majority of the Court of Appeal in *Re Williams* (*ubi sup.*) as to the effect to be given to such expressions as "in full confidence," I am unable to find that the testator has given such an indication. It appears to me that all that the testator intended to do was to provide against the possible intestacy on the part of the widow, and that he has in this respect committed a mistake as to the law, which is not infrequently found in the testamentary disposition of persons who prepare their own wills. I think, therefore, that the appeal fails.

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Re GEIPEL'S PATENT.

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COZENS-HARDY, L.J. — This case affords a striking instance of the difficulty of construing a will drawn by a layman, although at the first glance the language used seems clear and free from ambiguity. The testator was a man of large property, real and personal. He left a widow, but he had no child. Among his nearest relations were his nieces. It is apparent that he was minded to benefit his wife, in whom he had "full confidence." It is equally apparent that he desired that such of his nieces as should survive his wife should, directly or indirectly, derive benefits under his will. Now, it is contended on the part of the widow that the gift to her is absolute and free from any trust, condition, or gift over, and that, in so far as the testator has expressed a "confidence" that she will devise her absolute property in a particular way, no binding effect can be attributed to it, and that the final direction in the event of her not making any disposition thereof by will is repugnant and void: (*Holmes v. Godson, ubi sup.*). On the part of the nieces it is contended that there is a clear gift on the widow's death in favour of the surviving nieces equally, subject to a power of appointment by will given to the widow enabling her to distribute the property between the nieces in different proportions. Upon the whole, I think the widow's contention cannot prevail. I do not doubt that she takes more than a life interest. Should all the nieces predecease her, her absolute interest will remain. But the surviving nieces, if any, are sufficiently indicated as the persons to take after her death. This overriding intention can be given effect to without unduly straining the language. There are several points which tend to support this view. In the first place, the testator seems to have contemplated that, although his widow would "use" the property, it would remain intact at her death. In saying this, I, of course, do not refer to things *quæ usu consumuntur*. Use and enjoyment, as distinct from disposition of the capital, is what the testator's words indicate. This alone would not suffice to cut down or destroy her *prima facie* title as absolute owner, but it cannot be wholly disregarded. In the second place, the words "that at her death she will devise it to such one or more of my nieces as she may think fit" do not necessarily import a disposition by her of her own property, but may well be read as an appointment by her of his property. No technical words are required for either the creation or the exercise of a power, if the intention is clear. In the third place, the words "in default of any disposition by her thereof by her will" seem from the context necessarily to require the insertion of the word "such" before "disposition." Indeed, this was not seriously disputed by counsel for the respondents. In the fourth place, there is the positive direction that, in the event of what I have called the special power of appointment not being exercised by the wife, all the property shall be equally divided among the nieces. You are not left, as frequently happens, to imply a gift; or to hold that the wife is bound to make an appointment. This express gift is the most distinguishing feature of the case. Lastly, I attach some slight importance to the final legacy to Charles Fisher of "such sum, not exceeding 150*l.*, as my dear wife may decide upon." If she was the sole and absolute owner of the

whole property, why this limit of 150*l.*? If the other view is adopted, there is an intelligible reason for the form of this bequest. Not more than 150*l.* is to be taken away from the capital to which the nieces may become entitled. The result is that, though not without considerable doubt, I do not find myself able to agree with the judgment of Kekewich, J., or with the judgments of Williams and Stirling, L.JJ.

Solicitors: Walker and Martineau; Patersons, Snow, Bloxam, and Kinder.

Jan. 21, 22, 23, 25, and Feb. 8.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re GEIPEL'S PATENT. (a)

APPEAL FROM THE CHANCERY DIVISION.

Patent action — Petition for revocation — Liberty to apply for leave to amend by disclaimer — Conditions as to infringement prior to order — Discretion of judge — Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), ss. 18, 19, 20.

Where a patent is ordered to be revoked unless within a certain time the patentee obtains leave to amend by disclaimer, the judge has a discretion as to the terms on which he will give the patentee the opportunity of obtaining the leave to amend, and such discretion will only be reviewed by the Court of Appeal in exceptional cases.

Decision of Buckley, J. on this point (89 L. T. Rep. 127) affirmed.

PETITION for revocation of a patent.

The patent was granted in 1893 for improvements in steam traps, which are devices for the removal from steam pipes or cylinders of water arising from the condensation of the steam.

Buckley, J. came to the conclusion that the provisional specification claimed as the essence of the invention the principle of differential expansion; but fig. 2 in the plan annexed to the complete specification had been proved to be unworkable and useless; and that fig. 6 was based on an entirely different principle, that of controlled expansion, and was therefore bad for disconformity. He accordingly held that figs. 2 and 6 must be disclaimed, but that, subject to such disclaimer, there was a good patent for an invention founded on the principle of differential expansion. He accordingly made an order for revocation unless the patentee should within a certain period obtain leave to amend the specification by disclaimer, but on the terms that, if the specification was amended, no injunction should be asked in any action brought for infringement of the patent in respect of any articles made prior to the date of the order, unless the patentee established "to the satisfaction of the court that his original claim was framed in good faith and with reasonable skill and knowledge," as provided in sect. 20 of the Patents, Designs, and Trade Marks Act 1883.

The patentee appealed from the decision so far as it referred to fig. 6, and there was a cross-appeal by the petitioner, who contended that the patentee ought to be absolutely restrained from

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

suing in respect of any article made prior to the order, as in *Deeley v. Perks* (75 L. T. Rep. 233; (1896) A. C. 496).

The cross-appeal only calls for a report.

T. Terrell, K.C., Astbury, K.C., and J. H. Gray for the petitioners.—The patentee, as a condition of being allowed to disclaim the bad parts of his patent, should be put on terms not to sue in respect of any articles whatever made prior to the order. The proviso in the words of sect. 20 of the Act of 1883 ought to be omitted. Under sect. 19 of the Patents, Designs, and Trade Marks Act 1883 the court has full power to impose any terms:

Deeley v. Perks, 75 L. T. Rep. 233; (1896) A. C. 496;

Re Pitt's Patent; Ludington Cigarette Machine Company v. Baron Cigarette Machine Company, 82 L. T. Rep. 173; (1900) 1 Ch. 508;

Re Allison's Patent, 17 Pat. Off. Rep. 513;

Woolfe v. Automatic Picture Gallery Limited, 87 L. T. Rep. 539; (1903) 1 Ch. 18.

It would not be fair or just that articles which were manufactured or sold in reliance on the invalidity of a patent which has now been declared to be bad and revocable should be exposed to attack, when as an indulgence the patentee has been allowed to amend his patent by disclaimer. The goods were rightly and legally manufactured. Sect. 20 restricts the recovery of damages where disclaimer is allowed to cases of use of the invention after the disclaimer "unless the patentee establishes to the satisfaction of the court that his original claim was framed in good faith and with reasonable skill and knowledge," and only applies to cases of amendment under sect. 18 on the application of the patentee. It does not refer to a case where the patent is revoked on a hostile petition. Here the claim was not framed with reasonable skill and knowledge, as fig. 2 could not work. Buckley, J. has based his judgment on wrong principles.

Bousfield, K.C. and A. J. Walter.—The petitioners obtain the fullest protection under the order of Buckley, J. They have all the rights given to them by sect. 20, and, in order to obtain any damages, the patentee will have to establish to the satisfaction of the court that his original claim was framed in good faith and with reasonable skill and knowledge. In the cases referred to there were exceptional circumstances, and in all of them the Court of Appeal or the House of Lords upheld the discretion of the judge. The judge who hears the case is best acquainted with the proper order to make. Where there are no special circumstances, no special order should be made, and the case should be dealt with under the provisions of sect. 20. It was intended by that section that a patentee should be able to obtain damages if he could show that his original claim was framed in good faith and with reasonable skill and knowledge.

Astbury, K.C. in reply.

WILLIAMS, L.J.—We all agree that the judge has a discretion in the matter, not merely a limited discretion as suggested. The judge knows much more about the case than we do, and he has exercised that discretion, and I do not think we ought to review it. Under those circumstances, I think perhaps the best way will be to abstain

from making any observation upon the arguments which were put forward at the Bar, whether I agree with them or whether I do not. I think this appeal ought to be dismissed.

STIRLING, L.J.—I agree.

COZENS-HARDY, L.J.—I agree. It is not for me to say whether I should have exercised the discretion in the same way as the learned judge, but, he having exercised it, I cannot say that he has gone so wrong that we ought to review it.

[The court reserved judgment on the other point, and on the 8th Feb. delivered judgment, holding that fig. 6 was based on the principle of differential expansion, and there was no conformity between the provisional and complete specification, and reversing the decision of Buckley, J. on this point.]

Solicitors: *Frank Evelyn Jones*, agent for *W. T. Hill*, Manchester; *Faithfull and Owen*.

Tuesday, Jan. 19.

(Before Lord ALVERSTONE, C.J., COLLINS, M.R., and ROMER, L.J.)

NORTHAMPTON CORPORATION v. ELLEN. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Water—Water supply by corporation—Water for domestic use—"Water rate"—Right of corporation to charge at different rates—"Rate"—Northampton Corporation Waterworks Act 1884 (47 & 48 Vict. c. cxxiii.), s. 36.

A municipal corporation acquired the undertaking of a waterworks company by a private Act, which authorised the corporation "to charge for the supply of water for domestic use to any dwelling-house a sum not exceeding 7½ per cent. per annum on the net rateable value of such dwelling-house as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable." The company had statutory power to supply any person with water for any purpose for such remuneration as might be agreed under a special agreement; and the corporation succeeded to that power.

The corporation charged for the supply of water for domestic use in one part of the borough 5 per cent., and in another part 7½ per cent., upon the net rateable value of dwelling-houses.

Held (reversing the judgment of Bigham, J.), that the corporation had power to charge at different rates, within the maximum, for the supply of water for domestic use to dwelling-houses.

A provisional order provided that the general district rates to be levied in a district thereby added to the borough should not in any year for ten years exceed such an amount in the pound as, when added to the poor rate and borough rate "and any other rate made by the corporation" in the same year, would make a total rate of 5s. 6d. in the pound.

Held (affirming the decision of Bigham, J.), that the water rate was not a "rate" within the meaning of the words "any other rate" in the provisional order.

APPEAL of the plaintiffs from the judgment of Bigham, J. upon a special case stated in the action by consent of the parties.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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The plaintiffs brought this action to recover from the defendant the sum of 1*l.* 4*s.* 9*d.*, the amount of a quarterly instalment of a water rate for water supplied for domestic use.

The plaintiffs provided the defendant with a supply of water for domestic use at his dwelling-house at Kingsthorpe.

Kingsthorpe was incorporated with the borough of Northampton by the Northampton (Extension) Order 1900. Before that date it had, since 1861, formed part of the area of water supply.

The sum of 1*l.* 4*s.* 9*d.* was made up of a sum of 1*l.* 0*s.* 3*d.*, a quarter's instalment of an annual rate of 7½ per cent. upon the rateable value of the defendant's house, and 4*s.* 6*d.* for extra charges for a bath and water-closets.

The defendant disputed only the sum of 1*l.* 0*s.* 3*d.*

In 1884 the plaintiffs, under the powers conferred on them by sect. 19 of the Northampton Waterworks Act 1882, purchased the undertaking of the Northampton Waterworks Company, which was incorporated by the Northampton Waterworks Act 1861.

The purchase was effected by the Northampton Corporation Waterworks Act 1884 (47 & 48 Vict. c. ccviii.), which provides:

Sect. 10. From and after the transfer of the company's undertaking to the corporation all the rights, powers, authorities, and obligations of the company shall be by virtue of this Act transferred to, vested in, and exercisable by and imposed upon the corporation, and the Act of 1861 and the Act of 1882 shall be read and have effect as if the corporation had been therein named instead of the company.

Sect. 25. If in any year the amount standing to the credit of the water account be insufficient for the payment of the charges thereon and the execution of this Act in relation to the water undertaking, the deficiency shall be made up out of the general district rate.

Sect. 36. Sect. 49 of the Act of 1861 [by which rates varying with different rateable values were authorised] is hereby repealed, and the corporation may charge for the supply of water for domestic use to any dwelling-house a sum not exceeding seven and a half per centum per annum on the net rateable value of such dwelling-house as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable, or if there be no such list then on the net rateable value of such dwelling-house as the same is assessed to the last poor rate.

The Northampton Waterworks Act 1861 (24 Vict. c. xlvii.) provides:

Sect. 59. The company may from time to time supply any person with water for any purpose for which such supply may be required, for such remuneration and upon such terms and conditions as shall be agreed upon between the company and the person desirous of having such supply of water, under a special agreement.

There was no provision in any of the Acts which gave any specific directions or powers as to either equality or differentiation of water rates.

The defendant had, until the 24th June 1901, always paid in respect of his house a water rate of 7½ per cent. on the net rateable value.

In the year 1900 that part of Kingsthorpe in which the defendant's house was situate was included within the boundaries of the borough of Northampton by the Northampton (Extension) Order 1900, which was confirmed by 63 & 64 Vict. c. clxxxiii.

By that Extension Order (art. 36) it was provided that the general district rates to be levied in Kingsthorpe should not in any one year for a period of ten years, together with the poor rate, the borough rate, and any other rate made by the corporation in the same year, exceed an amount which would make up a total rate of 5*s.* 6*d.* in the pound on the rateable value of any hereditament.

From the commencement of the order the rates (other than the water rates) in Kingsthorpe always amounted to 5*s.* 6*d.* in the pound.

From the commencement of the order until the 24th June 1901 the plaintiffs always demanded a water rate of 7½ per cent. per annum from the defendant and from all other consumers of water for domestic use both in the old borough and in the added districts.

On and after the 24th June 1901 the plaintiffs reduced the water rate from 7½ to 5 per cent. in the case of the domestic consumers within the old borough, but retained the rate of 7½ per cent. in Kingsthorpe and other added districts.

This difference in the water rates was made in pursuance of a resolution as follows:

To reduce the charge of 7½ per cent. upon the rateable value to 5 per cent., the deficiency to be met out of the district rate. As the district rate for this purpose will only be chargeable within the old borough, it is obvious that the reduction ought to apply only to the old borough until such time as the rates on the newly added portion cease to be differential. It is estimated that this reduction will leave a sum of about 3500*l.* to be contributed out of the district rate of the borough.

The plaintiffs stated that they deemed it equitable to effect the reduction because a large amount of property in the borough, which was rateable to the poor and district rates and which benefited by the presence of an adequate public water supply for fire extinguishing and sanitary purposes, did not pay anything towards the cost of the water undertaking, because the owners and occupiers of the property did not in respect of the same take the water supply of the plaintiffs.

As a means of enforcing contribution from such owners and occupiers the plaintiffs adopted the above reduction, so that the owners and occupiers within the old borough would by their contributions to the district rate fund have to make good any deficiency created by the reduction of the water rate.

The plaintiffs contended that they were entitled not to reduce the water rate in the parts newly added to the borough from the 7½ per cent. now levied, because, the ratepayers in those parts being privileged from an increase in the district rate for a period of ten years, those ratepayers would bear no part of the extra burden that might be thrown upon the district rate of the old borough by reason of any deficiency resulting from such reduction.

The defendant contended that the water rate was a "rate" within the meaning of art. 36 of the order, and that, as the other rates payable by him amounted to the maximum of 5*s.* 6*d.* in the pound, the plaintiffs could not recover any sum from him in respect of water rate; and that the plaintiffs were not, in any case, entitled to demand of him a higher rate than that demanded from domestic consumers in the old borough, but were bound to place all domestic consumers in the borough on an equality.

The questions for the opinion of the court were: (1) Whether the plaintiffs were entitled to differentiate the water rate; (2) whether the plaintiffs were entitled to demand a water rate of the defendant, within ten years of the commencement of the Extension Order, so long as the rates payable by the defendant, exclusive of water rate, amounted to 5s. 6d. in the pound; (3) whether the plaintiffs were entitled to reduce the water rate for the purpose of creating a deficiency on the before-mentioned grounds.

The special case was argued before Bigham, J., who held that the plaintiffs had no power to differentiate the water rate, but must charge the same rate over the whole borough, and that the water rate was not a "rate" within the meaning of art. 36, and accordingly gave judgment in favour of the defendant: (87 L. T. Rep. 335)

The plaintiffs appealed.

C. A. Russell, K.C. and W. Ryland Adkins for the appellants.—The learned judge was wrong in holding that the plaintiffs were bound to charge the same water rate to all consumers of water for domestic purposes throughout the borough. There is no duty imposed by any of the statutes to charge equal water rates to all domestic consumers; there are no equality clauses of any kind. In the absence of any express statutory provision to the contrary, an authority, having power to supply water and to make charges up to a certain maximum limit, may waive a part of that maximum charge in any case; it may in some cases make the maximum charge, and in other cases make a less charge. There must either be a power to charge a different rate in any case or no power at all to do so, and it would be going very far to hold that there is no power to charge a higher rate, within the maximum, in parts of the district in which for some reason or other it may be much more expensive to provide a water supply. This charge made for a supply of water is not a "rate" at all within the proper meaning of that term. It is in reality a charge authorised to be made, and made, by the undertakers for the supply of a commodity to consumers, and there is no good reason why different charges should not be made to different consumers within the authorised maximum. In sect. 3 of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17) it is provided that the "expression 'water rate' shall include any rent, reward, or payment to be made to the undertakers for a supply of water." That shows that a water rate is not really a "rate" in the ordinary sense, but is merely a payment for something supplied. By sect. 59 of the Northampton Waterworks Act 1861 the water company were authorised "to supply any person with water for any purpose for which such supply may be required for such remuneration and upon such terms as may be agreed upon"; and by sect. 10 of the Northampton Corporation Waterworks Act 1884 the corporation acquired all the powers and rights of the water company. If, then, the corporation may supply different persons at entirely different charges by agreement, there can be no reason why they should not charge different water rates. The principle of the decision in *Hungerford Market Company v. City Steamboat Company* (3 E. & E. 365) is applicable to this case. In that case it was held that a company empowered by statute to take

tolls in return for a public service is not bound, apart from express enactment, to charge the same tolls to all persons alike, but is at liberty to remit the tolls, or any part of them, to particular persons at its pleasure and discretion. By the private Act in that case the company was empowered to take such tolls, within the prescribed maximum, as should be fixed by the company; and the court held that there was no obligation to exact uniform tolls. The charge for water supplied is the same in principle as the toll charged for a public service, and there can be no greater obligation to make uniform charges in the one case than in the other. What is called a water rate is in no way like a poor rate or similar rates in respect of which all persons liable have to be charged at an equal rate; it is not a rateable division of a whole sum among different persons liable, but is simply a charge made to persons who take a supply of water. [ROMER, L.J. referred to sects. 47 and 80 of the Waterworks Clauses Act 1847.] The supply of water is a commercial undertaking, and there is, therefore, no reason why the undertakers should be bound to make equal charges to all consumers of water, and not be able to make different charges within the statutory maximum.

H. Ivory, K.C., Lampard, and B. Campion for the respondent.—The judgment of the learned judge upon the main question was correct. There may be very different considerations applicable in the case of a commercial company and in the case of a public authority which has power to charge any deficit arising on its undertaking to the public funds of the district. Treating, however, this public authority as being for this purpose in the same position as a water company, there is an implied enactment that the supply of water to consumers for domestic purposes is to be given and is to be charged for at an equal rate, not exceeding 7½ per cent., to all such consumers. In sect. 36 of the Act of 1884 the words "any dwelling-house" mean all dwelling-houses, and the intention of that section is that the same charge, not exceeding 7½ per cent., is to be made for all dwelling-houses. The contention of the corporation must go as far as saying that they have power to charge at different rates in respect of identically similar houses in the same street, which cannot have been the intention of these statutes. It has never yet been contended that a water authority has power to charge different rates in different areas except where by special provisions that power has been given. This is by statute declared to be a "rate," and a "rate" is something which must be imposed equally upon all persons liable to pay, as in the case of poor rates, district rates, and other similar rates. By sect. 56 of the Public Health Act 1875 (38 & 39 Vict. c. 55) it is provided that, where a local authority supply water to any premises, they may charge in respect of such supply "a water rate to be assessed on the net annual value of the premises." There a "water rate" must imply that the local authority cannot charge different rates for every house at their discretion. Assuming that for some good reason, such as the greater expense of providing a supply of water, a water authority may charge a higher rate in some districts than in others, yet it cannot be said that in this case there was any good reason at all. The corporation cannot have power to deliberately

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charge in the old part of the borough a rate below the maximum for the purpose of creating a deficiency in the water fund to be made up out of the general district fund. The imposition of a higher water rate in this district than in the old part of the borough is contrary to the intention of art. 36 of the Extension Order. It is a breach of the provision that the total rates in this district are not to exceed 5s. 6d. in the pound. By creating a deficiency in the water fund, which is to be a burden upon the district rate, the corporation deprive the ratepayers of this district of the chance of getting their district rate reduced.

Russell, K.C. in reply.—Sect. 36 of the Act of 1884 was enacted by reason of the then recent decision in *Dobbs v. Grand Junction Waterworks Company* (49 L. T. Rep. 541; 9 App. Cas. 49), and was not intended to impose any obligation upon the corporation to make equal charges in all parts of their district.

Lord ALVERSTONE, C.J.—There is no doubt about the very great importance of the point raised in this case. If the judgment of Bigham, J. is to stand upon the main point, I understand it to be a simple and clear judgment that, by virtue of the provisions of sect. 36 of the local Act of 1884 and any other statutory provisions applicable to this corporation, there is no power to differentiate between different persons who pay for a supply of water. That is a decision of very great importance. The point is one which from time to time to my knowledge has been suggested during the last twenty years, but, as far as I know, never has before received judicial sanction, at any rate in the way that Bigham, J. has decided. I was very anxious indeed to ascertain whether or not there were any other reasons given in that judgment founded upon any of the considerations that have been urged before us by Mr. Avory, because of course there is a great deal to be said *prima facie* for equality of charges in respect of the supply of such things as the public supply of water, in the same way as in the case of charges authorised in a number of provisions in Acts of Parliament relating to the supply of other sorts of commodities. But I have come to a very clear conclusion that that particular defence raised by this defendant is not open to him, and that, so far as the questions have been argued in order to show that there is an answer to this claim, unless the judgment of Bigham, J. can stand, that there should be equality in charge, the other defences ought not to be raised by the defendant. I think it will be convenient if I briefly state what I understand the point to be, and then refer shortly to the arguments which have been very clearly and ably urged before us. The action was brought to recover 11. 4s. 9d., of which 11. 0s. 3d. was made up by one quarter's instalment of an annual rate at 7½ per cent. upon the rateable value of 54l. Now, there is no question raised by the defendant that the sum claimed is not a proper calculation upon 54l. at 7½ per cent. and is within the maximum power which is given to the company by sect. 36. On the contrary, so far does the defendant press the point, that he says not only that he must pay at 7½ per cent., but that, everybody else must pay at 7½ per cent., and that, if the corporation do not charge everybody else at 7½ per cent., they cannot recover the 7½ per cent. against him.

I do not think he went so far as to say that they cannot recover anything against him, because this case, I presume, has been argued on the basis that he would be willing to pay the 5 per cent., but not the 7½ per cent. Under these circumstances, Mr. Avory says, first of all, that at any rate a corporation cannot, if they are simply relying upon their power to charge under such statutory powers as these, charge anything except an equal rate, or at an equal rate or percentage, all the persons who have not made an agreement with them; and, further, he raises this point, that, by virtue of the provisional order which added Kingsthorpe to Northampton, the total rates in Kingsthorpe were for a period of ten years not to exceed 5s. 6d. in the pound. Now, Mr. Avory has said that the effect of only charging 5 per cent. in the old borough of Northampton would be that there will be a larger charge come upon the general district rate of the borough of Northampton in respect of the water undertaking than there would have been if an equal rate of 7½ per cent. all round had been charged upon all the consumers in Northampton, and therefore, that being so, the effect will be that, there being a larger charge upon the general district rate, there is a greater probability of the 5s. 6d. being maintained, or at any rate that the inhabitants of Kingsthorpe do not get the opportunity, or prospect, or chance of the rates going below the 5s. 6d. For reasons which seem to me to be important, I propose to take that part of the case first, because it is not the most important point in the case, and it is not really the ground upon which Bigham, J. has proceeded. I am at present wholly unable to see how that question can possibly be raised in this action. I have already pointed out that the defendant does not deny that the charge made upon him is *prima facie* a lawful charge; but he says that the corporation have no right to reduce the rates upon the people who live in the old borough of Northampton, and he suggests that the reasons stated in the case as the justification given by the plaintiffs for the course of action they have adopted in reducing the water rate in the old borough of Northampton to 5 per cent. are not good grounds, and that they ought to have acted differently. All I can say is this, that it seems to me that, in such a proceeding as this, the defendant, unless he can make good the main proposition which Bigham, J. has decided in his favour, is not entitled, in answer to a claim for a specific sum of money otherwise lawful, to put himself in the position of a ratepayer who is alleging that the conduct of the corporation is *ultra vires* and not in accordance with the Act. I do not want to say more about this point except this, that I see a very great deal of difficulty in any single individual raising it. It may be that a ratepayer who is liable to the district rate may have the right to bring the corporation before some competent court, either with the assistance of the Attorney-General or in some other form of proceedings; it may be that there are proceedings contemplated by the Municipal Corporations Acts, which have sometimes been made available for the purpose of raising such a question as this, in which proceedings it may be that the right of the corporation to reduce the rates of the waterworks undertaking, in order that the consequences may follow which they seem to wish—that is, that

there may be a greater equalisation of the payment of the total burthen—may be questioned. I am, however, clearly of opinion that, apart from the ground upon which Bigham, J. proceeded, the question cannot be raised in this action in order to cut down the right of the corporation to make the charge in this case which they have now made. Now, that brings me back to what is the real and very important point in this case, whether the company and then the corporation could or could not differentiate between the charges for water, so that it may be contended that if, in the absence of agreement, they are suing a man for a water rate, the fact that they have in some circumstances charged less to other people makes the whole charge bad. The absence of any equality clause in the Waterworks Clauses Act 1847 has been the subject of comment on many occasions. I think that the case of *Hungerford Market Company v. City Steamboat Company* (3 E. & E. 365) is a very important authority for the view that it is necessary to find, either by Act of Parliament or at common law, some obligations upon the company to have uniform dealings with all the persons with whom they deal. It does not go further than that, because, as has been suggested more than once, one may find such an obligation implied in the way in which the statute had been framed, from the nature of the charge which is being imposed. With regard to the position of the former company, I do not wish to deal summarily with a point which is a very serious point. There are a number of sections in the Act of 1861 enabling the company to make contracts of all kinds with respect to all the purposes for which they supply water, and it is sufficient for my purpose to say that sect. 59 provides that "the company may from time to time supply any person with water for any purpose for which such supply may be required, for such remuneration and upon such terms and conditions as shall be agreed upon between the company and the person desirous of having such supply of water, under a special agreement." That gives absolute power to the company to make special bargains. It seems to me that, if a person is minded to make a bargain with the company, and a bargain is made, the result and effect of which may be that he pays less for his water, even for domestic purposes, than a person who does not choose to make a bargain, then, unless Mr. Avory is in a position to say that, because a bargain is made with a person by which he will get his water cheaper than another person, therefore the rate upon that other is bad, the fact that the company may make these agreements destroys to a large extent the foundation upon which Mr. Avory's argument rests. Then, in 1884, this waterworks undertaking was transferred to the Northampton Corporation. The transfer of waterworks undertakings to corporations is no new thing, nor is it any necessary part of the ordinary duties of a corporation. The corporation have had these waterworks transferred to them for a public benefit. In many cases, I will not say invariably, because I do not pretend to know, they are put under exactly the same obligations as this corporation were put. Under sects. 24 and 25 the corporation have still got to keep separate waterworks accounts. The waterworks undertaking is quite separate in their hands, subject to this, that

there is the security of the district and the borough rates behind for any deficiency which may arise in the course of carrying on the undertaking. I need not refer to the provisions as to working expenses, payment of rentcharges, payment of interest on mortgage debt, payment of interest on debentures, and providing a sinking fund. It becomes the corporation waterworks as distinguished from the company's waterworks. Now, has the power of making agreements been taken away from them? It seems to me that sect. 10 of the Act of 1884 shows that all the powers of the waterworks company are transferred; that the powers are to be such as if the corporation had been named in the general provisions which carry over to the corporation the powers and obligations of the water company, putting them in exactly the same position as the company was in, so far as their right of dealing with customers is concerned. Now, it has been said that sect. 36 of the Act of 1884 has repealed sect. 49 of the Act of 1861, and has imported an obligation to charge everybody alike, and that if they do not charge everybody alike a charge made is bad. I am unable to take that view. I think the only effect of sect. 36 was to alter the standards of payment established by sect. 49 of the older Act. It is quite possible, as Mr. Russell said, that one reason was to fix the rateable value as distinguished from the gross annual value, a question which gave rise to so much litigation in *Dobbs v. Grand Junction Waterworks Company* (49 L. T. Rep. 541; 9 App. Cas. 49); but, be that as it may, it is quite impossible, in my opinion, to say that by implication sect. 36 of the Act of 1884 overrides the powers which the corporation have, by virtue of being successors to the company, to make agreements with the various parties. That being so, what is the real position of this defendant? This defendant admits that he would owe 11. 0s. 3d. at the rate of 7½ per cent. under sect. 36, but says that, although that might be so, the defendants have, under some procedure which he attacks and which he objects to, made an arrangement, either public or private, with the ratepayers or water consumers of the borough that they shall only pay at the rate of 5 per cent. In my opinion that is no defence to the claim, and, unless it can be said that an unequal charge makes the charge within the maximum bad, there is no defence to this action. I will say a word or two upon another point. It is, in my opinion, not correct to speak of this corporation as rating for water. There are a great many cases under which corporations may rate for water. There are purposes for which they may include the cost of water, under certain circumstances, in the borough rates, and they are entitled to treat those charges as rates. But in this case the corporation are not rating for water in the ordinary sense or proper sense of the term; they are charging for water at a charge which is fixed by reference to the rateable value and by a percentage thereon, and in my opinion the suggestion that the power to make these charges according to the particular circumstances of the particular case is cut down by sect. 36 is without foundation. A number of other points were raised by Mr. Avory, as, for instance, the operation of sect. 80 of the Waterworks Clauses Act 1847, but I think a little consideration of that section shows that that

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applies to cases where the water company received money by rates or by charges. That section is a section which provided for a reduction or rebate all round under certain circumstances. I am therefore of opinion that the only ground upon which Bigham, J. decided against the corporation—namely, that there was no right to differentiate, or, in other words, that an equality clause must be held to be implied—was wrong, and the judgment must be reversed. I should like to add that I entirely agree with Bigham, J. in his finding that art. 36 of the Extension Order, of which the words are “other rates made by the corporation,” does not include water rates for the reasons which I have already indicated; and, on the face of that clause, it is quite clear that the rates there referred to are rates other than water rates. I do not think that the scheme could possibly be worked if it was supposed that a rate for the supply of water, which depends to a certain extent upon the individual, was included in such rates as are there referred to, which are clearly general rates levied quite independently of the supply of a commodity to a particular consumer. Therefore, notwithstanding the importance of this case and the respect I attach to the opinion of Bigham, J., I think that this appeal must be allowed, and that the plaintiffs are entitled to recover the amount they claim.

COLLINS, M.R.—I am of the same opinion, and, as we are differing from the learned judge below, I will give my reasons. The question is whether the corporation are entitled to differentiate their water rates—that is to say, whether they are entitled to charge persons in one district at one rate and persons in another district at another rate. The respondent in this case successfully resisted a claim for a rate against him at the rate of $7\frac{1}{2}$ per cent., and resisted it successfully on the ground that other persons in other parts of the borough were only charged at the rate of 5 per cent. Bigham, J. upheld that view. We have to see whether the statute (the amount is claimed under statutory authority) has or has not imposed any limitation upon the authority of the corporation in imposing this charge, any limitation other than that defining a maximum; in other words, is there any provision in the Act itself that the charge must be made to all persons equally? We have to begin the discussion by admitting that there is no such limitation clearly expressed on the face of the Act. If it is to be collected at all, it is to be collected from the words of sect. 36 of the Act of 1884, and those words, when one examines them, seem to me not to carry the defendant to the full length that it is necessary that he should show that they do carry him in order to succeed in this action. Sect. 36 repealed the section of the earlier Act which provided a number of different standards by which houses of different value should be assessed to this charge. Then it enacted: “The corporation may thenceforward charge for the supply of water for domestic use to any dwelling-house a sum not exceeding $7\frac{1}{2}$ per cent. per annum on the net rateable value of such dwelling-house as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable.” The Act uses the words “water rate” there, but does not, by any other expression, indicate any intention that the rate or the charge shall be equal upon every house in

proportion to its value in the borough. It does not say so. Mr. Avory contends that “any dwelling-house” must be read as though it were “all dwelling-houses.” That is a gloss which I do not think he can support. The section can be read perfectly easily without substituting “all” for “any”; but, even if we did substitute “all,” I do not think that we could get any further in the discussion, because all that is there imposed is a limit of $7\frac{1}{2}$ per cent. as the maximum sum that can be charged by the corporation. Why are we to impart into that that it is to be an equal sum levied upon every person? The only word in the section that gives countenance to that suggestion, or upon which the argument can be founded, is that that which is to be charged is called a “water rate”; but how do we get from that an implication that that must be an equal charge? It seems to me that, as to the basis upon which that conclusion was founded with regard to the poor rate, which is really the foundation of this contention, the basis is quite different in the case of the poor rate from that in the case of such a charge as the water rate. No doubt in the original enactment under which what is called the poor rate was established there is no express provision that there is to be absolute equality. The very nature of the charge itself, and the reasons why it was imposed, and the persons upon whom it was imposed, and the conditions attaching to it, all essentially involve equality, because it is an imposition upon citizens of a duty to the community in proportion to their means, and from that duty imposed necessarily arises the implication of equality—equality in bearing burthens in proportion to their means. What is the analogy between that and the duty of a person who buys a marketable commodity? The corporation here takes the right to sell, and the citizens take the right to buy, a marketable commodity, and there is no analogy between that position in taking from the corporation the water and that of a citizen who is bound according to his means to perform a public duty. One can well see the force of the obligation there of equality; but there is no such analogy in the case of a person merely having a demand in his household for a certain commodity which he has the right to go and demand from the persons who supply it. When we consider that this commodity is necessarily supplied at different costs to different persons in different places, there is no foundation for, and no presumption of, equality; on the contrary, in equity there would be a presumption of inequality, because persons who demand the water, and are given a right to demand it, are necessarily in places where it may be much more expensive in one instance to supply it than it may be in another. Therefore we do not start *prima facie* with any presumption that there ought to be equality of opportunity and equality of obligation. We clearly have to deal with this on first principles, because the sole foundation for the argument for the respondent is the implication to be drawn from the fact that the word “rate” is used in the section, and that there is a percentage upon value imposed. Now, it seems to me that that is where the case stands upon principle; but I think there is some authority upon the matter also. I think the case that was cited—*Hungerford Market Company v. City Steamboat Company* (*ubi sup.*), which was the case

of a toll—is an instance of the application of the true principles I have been attempting to set forth. There the thing to be done was the giving of permission to pass over certain property of the charging authority, and it was held there that there was no obligation of equality; or, in other words, that they were entitled to charge tolls at different rates to different persons for what was apparently and practically the same privilege or the same opportunity. Why did the court come to that conclusion? Because there were no words imposing the obligation of equality in the statute which entitled the charging authority to demand these tolls, there was no statutory provision, and there was no necessary implication of equality from the relations of the parties. It seems to me here that if we examine the words which impose, or give the right to impose, the charge, we find no higher implication from the word “rate” used here in the sense in which it is used, and in the connection in which it is used, than we can find from the word “toll” in the other case. Both words really might be interchanged so far as any implication of equality is to be derived from the use of either one or the other in the collocation in which it is used. It is simply a return made for some privilege used, or some article supplied. It is not in any sense based upon equality of duty or equality of obligation, which is really the basis upon which, in the case of poor rate, the inference of equality has been drawn. For these reasons, in addition to those given by the Lord Chief Justice, I am of opinion that we must differ from the decision of Bigham, J., and that this appeal must be allowed.

ROMER, L.J.—I have come to the same conclusion, and I need add but little after the judgments which have been already delivered. Certainly, my first impression when the case was opened was rather in favour of the view adopted by the learned judge in the court below; but, after the case has been fully argued and the various Acts bearing upon the question before us have been examined carefully, I have come to the conclusion that there is nothing in those Acts sufficiently strong to justify this court in holding that all dwelling-houses in Northampton borough must be charged with the same rate. In the first place, let me consider the Waterworks Clauses Act of 1847, which was incorporated with the special Act of 1861. Was there anything in that Act which would render it clear that, whenever dwelling-houses have to pay for their water what is called a “rate,” that rate must be the same percentage upon the value in respect of all those dwelling-houses? Well, I certainly cannot find anything in the Act of 1847 sufficient to lead to that conclusion, and, as has already been pointed out by my Lords, there is no principle here which would *prima facie* make it fair that all dwelling-houses should pay the same percentage upon their rateable value or upon their value. As has been pointed out, taking one simple illustration of two houses of the same value, to supply one with water might cost very much more than to supply the other; the two houses although of the same value might not for the purposes of the consumption of water be at all of the same character; and other illustrations might be supplied. Then, there being no principle as I have said, I cannot find any special provisions in the Act of 1847 which

would support the contention of the respondent in this case. I think, in the first place, that under the Act of 1847 the definition of water rate is significant, contained as it is in sect. 3 of the Act. I need not repeat the definition. Although, as to some of the sections in that Act, it is true that it is somewhat difficult to see the exact meaning or effect of certain provisions as to owners or occupiers of dwelling-houses who want water laid on to their premises paying or tendering a water rate in advance unless it means the maximum where no fixed rate is imposed by the special Act, yet, notwithstanding those difficulties, I think a meaning can be given to all those sections without allowing the argument of the respondent in this case; and certainly there is nothing in the difficulties created by those sections which would, I think, in themselves justify this court in upholding in this case the contention of the respondent. That being so, passing from the Act of 1847, the next Act about which I have to say a word or two is the Act of 1861. Now, it is clear that under that Act there is nothing, having regard to its wording, which would have prevented the company by agreement from charging any dwelling-house less than what it was charging other dwelling-house owners generally, according to what may be called a general rate or charge. Sect. 59 of the Act of 1861 is not immaterial in that context; it provides that “the company may from time to time supply any person with water for any purpose for which such supply may be required for such remuneration and upon such terms and conditions as shall be agreed upon between the company and the person desirous of having such supply of water under a special agreement.” The Act therefore contemplates that by agreement the company, if it chooses, may certainly charge certain dwelling-house owners less than they are charging others; and it is noticeable also that, even as between dwelling-houses strictly so called, under the Act of 1861 there was not a fixed rate, but that the maximum rate that might be charged depended upon the value of the houses. Also it is not to be forgotten that, in considering a question of equality as between persons who are taking water, dwelling-houses properly so called may not constitute even a majority of the hereditaments which require a constant water supply from the company. At any rate, under the Act of 1861, I think it is impossible to say that any specific provision or enactment can be pointed out as tending to support the view that under that Act the company could not as between different dwelling-houses charge a different rate. Then I come to the only other Act about which I need say a word, and that is the Act of 1884. It appears to me sufficient to say that, when you look at sects. 10 and 12 of that Act, it is clear to my mind that whatever powers the company had in this respect under that Act of 1861 the corporation has under the Act of 1884. It seems to me that the corporation have become the owners of the undertaking, and have the same rights with regard to that undertaking as the company had, subject only to those special matters which are mentioned in sect. 10 of the Act of 1884. Certainly I cannot find in that Act any provisions which would justify this court in saying that the main contention of the respondent in this case is correct, and ought to be upheld. With regard

to the rest of the case, I desire to add nothing to what has been already said by my Lords.

Appeal allowed.

Solicitors for the appellants, *Sharpe, Parker, and Co.*, for *Herbert Hankinson*, Northampton.

Solicitors for the respondent, *Warren, Murlon, and Miller*, for *Lamb and Skinner*, Kettering.

Oct. 29, 30, and Dec. 14, 1903.

(Before the LORD CHANCELLOR (Halsbury), Lord ALVERSTONE, C.J., and COZENS-HARDY, L.J.).

STUART AND OTHERS v. JOY AND NANTES. (a)

Landlord and tenant—Covenant by lessor running with the reversion—Assignment of reversion by lessor—Liability of lessor to lessee after assignment—Award under arbitration clause—Covenant in new lease to perform award—Action on award—Merger—32 Hen. 8, c. 34, s. 2.

At the expiration of a lease of an oil mill certain differences arose between the lessees and the lessors as to repairs and works to be done on the demised premises, and, these differences having, in pursuance of an arbitration clause in the lease, been referred to arbitration, the arbitrators awarded that certain millstones should be repaired by the lessors. Before the award was published the lessees took from the lessors a new lease which also contained a similar arbitration clause as to differences between the lessors and the lessees, and which, after reciting the reference to arbitration and that the award had not been published, contained a covenant that as soon as the award should be published the lessors should execute all the repairs therein stated to be within their province to repair. Subsequently both the lessees and the lessors assigned their interests in the premises, and, the lessors having refused to do the necessary repairs to the stones, the assignees of the lessees did the repairs, and brought an action on the award to recover the expenses from the lessors.

Held (affirming the judgment of Wright, J.), that the lessors' liability under the award to do the repairs was not merged or extinguished by the covenant in the new lease whereby the lessors covenanted to execute the repairs according to the award, and that an action on the award could be maintained by the lessees and their assignees for the expenses of the repairs which the lessors were bound to do, although there had been no reference to arbitration under the arbitration clause in the new lease.

Semble: A lessor who assigns his reversion remains liable to the lessee upon an express covenant to do repairs to the demised premises—a covenant running with the reversion—as sect. 2 of the statute 32 Hen. 8, c. 34, while giving to the lessee a right of action against the assignee of the lessor for breach of the covenant, does not release the lessor from his express covenant or from his liability thereunder.

Dictum of Lord Macnaghten in *Eccles v. Mills* (78 L. T. Rep., at p. 210; (1898) A. C., at p. 371) followed.

APPEAL by the defendants from a judgment of Wright, J. in an action tried by him without a jury.

(a) Reported by W. W. OAK, Esq., Barrister at-Law.

The action was brought by the plaintiffs Stuart and Gregson and the British Oil and Cake Mills Limited upon an award under the following circumstances:—

The plaintiffs Stuart and Gregson had been the lessees from the defendants, Joy and Nantes, of a certain oil mill in Kingston-upon-Hull.

The premises were demised by the defendants to the plaintiffs Stuart and Gregson in the year 1880, and subsequently in the years 1887 and 1890 respectively.

By these leases it was provided that any dispute or difference which might arise between the lessors and the lessees concerning their rights, duties, or liabilities thereunder should be referred to two arbitrators.

The lease of the 18th Dec. 1890 was for a term of seven years, and during the year 1897 disputes arose between the lessors and the lessees as to their respective rights, duties, or liabilities under the lease and the work to be done on the termination of the lease in performance of the repairing covenants therein.

Thereupon the lessors and lessees duly appointed their respective arbitrators, who on the 17th Feb. 1898 published their award, finding and directing by whom the various repairs and other work specified in the schedule to the award were to be performed.

With regard to a certain pair of millstones described in the schedule as No. 3 pair of stones, with respect to which the present action arose, the arbitrators awarded and found: "This No. 3 set may last for some little while longer until the stones require redressing, and then the whole matter must be taken in hand by the said Douglas Joy and Charles Nantes and made good by them"—that is, by the defendants.

At the expiration of the lease of the 18th Dec. 1890 the plaintiffs Stuart and Gregson continued in occupation of the premises, and on the 15th Feb. 1898—that is, two days before the publishing of the award—they took a new lease of the same.

This lease was granted by the defendants as lessors to the plaintiffs Stuart and Gregson as lessees. It contained the usual covenants and an arbitration clause as to disputes or differences arising between the lessors and the lessees. It recited that the premises had recently been occupied by the lessees under leases which had expired, the reference to arbitration, that the award had not been made, and it contained the following covenant as to the carrying out of the award by the lessors as to the repairs to be executed by them: "This indenture lastly witnesseth that the lessors do hereby jointly and severally covenant with the lessees and the lessees do hereby jointly and severally covenant with the lessors in manner following (that is to say), that when and as soon as the award of the said . . . in pursuance of the said reference shall be made in writing ready to be delivered to the lessors and the lessees, they, the lessors, will, on or before the 1st day of August 1898, and at a time or times convenient to the lessees, duly complete and execute all the repairs, matters, and things therein stated to be within the province of the lessors."

The award having been made on the 17th Feb. 1898, the plaintiffs Stuart and Gregson by an indenture dated the 30th Nov. 1899 assigned

their interest in the premises to the plaintiffs the British Oil and Cake Mills Limited, who thereafter were the defendants' tenants of the premises.

In 1901 the pair of millstones in question gave way and the stones required redressing, and it thereupon became—as the plaintiffs alleged—the defendants' duty to take in hand and make good the whole matter in performance of the award.

On the 27th July 1901 the plaintiffs by notice in writing required the defendants to perform the award and to put the stones in repair, and gave them notice that in default of their putting the stones in repair they (the plaintiffs) would themselves do the work and hold the defendants liable for the cost thereof and any damages sustained by them by reason of the defendants' failure to perform the award.

The defendants—who had in the meantime, namely, on the 23rd May 1901, assigned their interest to the North-Eastern Railway Company—declined to do the repairs.

The plaintiffs the British Oil and Cake Mills Limited then did the repairs to the stones, and in this action sued the defendants for the cost of so doing, claiming 250*l.* damages.

The defendants in their defence alleged (*inter alia*) that by an indenture dated the 23rd May 1901 the defendants conveyed to the North-Eastern Railway Company all their estate and interest in the premises, and none of the plaintiffs had since that date been tenants of the defendants.

They further alleged that by the lease of the 15th Feb. 1898 it was agreed and declared that if any dispute or difference should arise between the lessors and the lessees as therein set out no action should be brought in respect thereof unless and until such dispute should have been referred to arbitration as therein provided; that the matters in dispute in this action constituted a dispute within the meaning of that indenture, but had not been referred to arbitration as therein provided, and the defendants contended that the action was not maintainable. They also, without admitting liability, paid 150*l.* into court in satisfaction.

The plaintiffs replied that the matters in dispute in this action were not disputes which arose under the lease of the 15th Feb. 1898, at the date of which lease the arbitration respecting the matters in dispute was pending, and, further, that this lease contained an express covenant to perform and abide by the award, and that the plaintiffs would, if necessary, rely on that covenant as a further cause of action.

Wright, J. held that the action was an action on the award and was maintainable, and he gave judgment for the plaintiffs for 165*l.*

The defendants appealed.

Montague Lush, K.C. and Henn Collins for the defendants (the appellants).—The plaintiffs are not entitled to maintain the action. If the action is on the award, the plaintiffs the British Oil and Cake Mills Limited cannot sue on the award, as they can have no rights under it, they not being parties to it, and, even if they had rights under the award, those rights are gone as the award is gone. The award and the covenant in the lease of the 15th Feb. 1898 cannot co-exist together. The efficacy of both

cannot survive. The award does not survive, but the covenant clearly does survive. The covenant operates either as a merger of the award, or as an accord and satisfaction of it, so that if the plaintiffs Stuart and Gregson have any remedy at all, it is upon the covenant in the lease of Feb. 1898 and not upon the award. But before that covenant can be enforced, there must be a reference to arbitration in accordance with the terms of the same lease, by which all disputes under it were to be referred to arbitration. So that if the action be considered as an action on the award, the plaintiffs the British Oil and Cake Mills Limited cannot maintain the action as they were not parties to the award, and the plaintiffs Stuart and Gregson cannot maintain the action as the award is gone, the covenant in the lease being substituted for it. Then the next point is as to the effect of the statute 32 Hen. 8, c. 34, upon the assignment in May 1901 by the defendants to the North-Eastern Railway Company, assuming the action to be brought upon the covenant. By that assignment the liability of the lessors upon the covenant passed, under the statute 32 Hen. 8, c. 34, s. 2, to their assignees, and the lessors were thereby relieved from liability. At common law the covenants in the lease did not run with the reversion, but ran only with the land. Then came the statute 32 Hen. 8, c. 34, which in sect. 2 dealt with covenants running with the reversion. By reason of the statute the lessors do not remain liable after the assignment by them. Before the assignment there is privity of estate; after the assignment that privity is gone, and the only privity then would be privity of contract. The statute transfers the privity of contract from the lessor to the assignee of the reversion: (*Thuraby v. Plant*, 1 Wms. Saund. 237, at pp. 239-240; *Bickford v. Parson*, 11 L. T. Rep. O. S. 126; 5 C. B. 920, at pp. 930-932); and if the action can be maintained at all it can only be against the assignee of the reversion, in this case the North-Eastern Railway Company:

Conran v. Pedder, 2 Ir. C. L. R. 200.

Other instances in which the expression that "the privity of contract is transferred" by the statute of Henry VIII. occurs are *Midgley and Gilbert v. Lovelace* (Carthew, 289) and *Bacon's Abr. Tit. Covenant, E. 6*. If the privity of contract is transferred from the lessor to the assignee of the lessor, then the action cannot be maintained against the lessor. Therefore if the action be on the covenant, the defendants are discharged from the covenant by reason of the assignment; and if it be on the award, there was a dispute within the meaning of the covenant which ought to have been referred to arbitration before it gave a cause of action. [Lord ALVERSTONE, C.J. referred to *Beely v. Parry* (3 Lev. 154) and *Green v. James* (6 M. & W. 656).]

Scott Fox, K.C. and *A. J. Ashton* for the plaintiffs (the respondents).—The learned judge was right. This was really an action on the award and not on the covenant. The statement of claim refers to the award, but does not refer at all to the covenant. There was an obligation on the defendants to perform the award. In *Lievestey v. Gilmore* (15 L. T. Rep. 386; L. Rep. 1 C. P. 570) Byles, J. says: "In Williams' Saunders (vol. 2, p. 61*n*, note 2) it is laid down that every submission to arbitration implies an obligation to

perform the award of the arbitrator." The plaintiffs' claim is on the award, and they had a right to enforce the award quite independently of this lease. But then it is contended that the plaintiffs cannot enforce this award because of the lease of Feb. 1898 and of the covenant therein. That cannot be so, as the covenant does not affect the award or put an end to it. The covenant was not intended to be in substitution of the liability under the award; on the contrary, it clearly recognises the award and expressly provides that the lessors shall execute the repairs according to the award. Therefore it cannot be said that the covenant in the lease of Feb. 1898 is either a merger of the award or an accord and satisfaction of the liability under the award. As put by Maule, J. in *Price v. Moulton* (10 C. B. 561, at p. 573), it does no more than give the lessees an effectual remedy for the carrying out of the award. In the present case there was no right of action at the time—namely, the 15th Feb. 1898—when this covenant was entered into, and therefore there was no merger by the covenant of the obligation on the award, which was not then made. For the covenant to operate as a merger there must be an obligation which is less than a specialty obligation, and there must be identical debts and the same parties:

Filmer v. Burnby, 2 M. & G. 529;

Auriol v. Mills, 4 T. R. 94 (per Lord Kenyon, C.J., at pp. 98-99).

Then with regard to the question as to whether the lessors remain liable to the lessees notwithstanding an assignment of the reversion, it is clear that the lessors do still remain liable, although by 32 Hen. 8, c. 34, liability also passes to the assignees. The fact that under sect. 2 of that Act the lessees may have a right of action against the assignees of the reversion does not show that the lessors are released from their liability. The statute never intended to take away the liability of the lessor; it merely intended in case of an assignment by the lessor of his interest to give to the lessees a further right of action against the assignee of the lessor, but it did not release the lessor. It is exactly similar to the case of an assignment by the lessee; if the covenant was one which ran with the land, then if the lessee assigned, his assignee became liable under the covenant, but that did not release the lessee himself at common law; and the object of sect. 2 of 32 Hen. 8, c. 34, was to place the assignee of the reversion in precisely the same position as that in which the assignee of the lessee was at common law. That the lessor is not exempt from liability is perfectly clear from *Eccles v. Mills* (78 L. T. Rep. 206; (1898) A. C. 360), a case which is exactly in point here. It was not necessary for the court there to answer this point as they decided the case on another point, but, as it was dealt with in the court below, they thought it right to express an opinion upon it, and they did so. Lord Macnaghten, speaking of the statute of Henry VIII., there said: (78 L. T. Rep., at p. 210; (1898) A. C. at p. 371): "Whatever liability the statute threw on the specific devisees as assignees of the reversion, that they were bound to bear as between themselves and the lessee. But the testator's estate was also liable." It is submitted that the law is as there stated by Lord Macnaghten. When the expression is used in *Thursby v. Plant* (*ubi sup.*) that the privity of

contract is transferred by the statute, the word "transfer" does not mean "extinguish," and it cannot mean that the privity is destroyed or extinguished in the lessor:

Mills v. Auriol, 1 H. Bl., at p. 445.

There is no known principle of law which can get rid of the obligation of the covenant on the lessors in this case.

Henn Collins in reply.—The passage cited from the judgment of Lord Macnaghten in *Eccles v. Mills* (*ubi sup.*) is dictum only, and it was not necessary for the decision of the case. The defendants do not rely so much on the merger as on accord and satisfaction.

Cur. adv. vult.

Dec. 14.—Lord ALVERSTONE, C.J. read the following judgment:—This was an appeal from Wright, J., who decided in favour of the plaintiffs in an action brought by Messrs. Stuart and Gregson as lessees, and the British Oil and Cake Mills Limited as assignees, of a lease granted by the defendants Joy and Nantes. The action was founded upon an award whereby the arbitrators, acting under an arbitration clause in a lease or leases previously granted by the defendants Joy and Nantes to the plaintiffs Stuart and Gregson, had decided that the defendants should renew certain pairs of millstones. Prior to the 15th Feb. 1898 the plaintiffs Stuart and Gregson had occupied, under leases, an oil mill of which the defendants were the lessors. There had been several leasehold terms in succession, but in the year 1898 and prior to February the plaintiffs Stuart and Gregson and the defendants had referred the questions which had arisen at the expiration of the then existing term to arbitrators. The award was made on the 17th Feb. 1898. Before the award was made the parties negotiated for a new lease, which was granted on the 15th Feb. 1898 by the defendants as lessors to the plaintiffs Stuart and Gregson as lessees. The lease contained the usual covenants and an arbitration clause as to disputes or differences arising between the lessors and lessees. It then recited that the premises had recently been occupied by the lessees under expired leases, the reference to arbitration, that the award had not been made, and contained the following covenant: "Now, therefore, this indenture lastly witnesseth that the lessors do hereby jointly and severally covenant with the lessees and the lessees do hereby jointly and severally covenant with the lessors in manner following (that is to say), that when and so soon as the award of the said William Robert Harrison, Martin Samuelson, and Henry Sharp, in pursuance of the said reference, shall be made in writing ready to be delivered to the lessors and the lessees, they, the lessors, will, on or before the first day of August 1898, and at a time or times convenient to the lessees, duly complete and execute all the repairs, matters, and things therein stated to be within the province of the lessors." The award having been made, as I have already stated, the plaintiffs Stuart and Gregson in Nov. 1899 assigned their interest in the premises to the plaintiffs the British Oil and Cake Mills Limited, and in 1901, the stones referred to in the award having given way, the defendants were called upon to perform their duty as awarded. They declined to do so, where-

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upon the plaintiffs the British Oil and Cake Mills Limited put the stones in repair at an expense which was agreed between the parties as 165*l.*, for which sum judgment was given for the plaintiffs. Wright, J. decided in favour of the plaintiffs on the ground that the action was brought upon the award, and that the defendants, having failed to carry out the award, were liable to the plaintiffs for the amount expended. I am of opinion that the judgment is right, but if I were to state in my own way the reasons for my judgment I would say that both under the award and under the lease, whereby the defendants covenanted to perform the award, they, the defendants, were liable to carry out the award; that, not having done so, an action would lie by the plaintiffs Stuart and Gregson to enforce the performance of the award; and that the plaintiffs the British Oil and Cake Mills Limited, who are now beneficially entitled to the lease and have spent the amount which was necessary to carry out the award—the obligation to perform which was upon the defendants—are entitled to recover from the defendants either in their own name, or at any rate in an action to which both they and Messrs. Stuart and Gregson are parties, the amount so paid. In answer to this view a number of points were raised by Mr. Lush and Mr. Collins on behalf of the defendants, with which I will briefly deal. It was first said that the British Oil and Cake Mills Limited have no rights under the award, and, even if they had, these rights were gone because the covenant contained in the lease of the 15th Feb. 1898, to complete and execute the award, took the place of the liability upon the award, and the remedy by the plaintiffs Stuart and Gregson, if any, is upon the covenant. I am of opinion that this point is not sound. The covenant is not in substitution of the liability upon the award, but a recognition of its binding effect, and may well have been thought necessary in order to keep alive the rights of Stuart and Gregson notwithstanding that they had taken a new lease of the premises. But whether the remedy be upon the covenant, or upon the award, for the reasons which I have already stated, it makes no difference. It was then urged that before the covenant could be enforced there must be a reference to arbitration under the arbitration clause in the earlier part of the lease. An examination of the terms of the lease affords the answer to this argument. The lease contained mutual covenants to operate during the term, with the arbitration clause applicable to them. It then went on by express covenant to recognise and continue an obligation of the defendants to obey the award. To say that a second arbitration was necessary before effect could be given to that covenant, or the obligation thereby recognised, seems to me to be a plain contradiction of the express provisions of the deed. Lastly, it was urged that inasmuch as the covenant took the place of the award, and the reversion had been assigned by the defendants to the North-Eastern Railway Company, the defendants were discharged from the obligation imposed upon them by the covenant, and in consequence by the award. For the reasons I have already given this point does not become material, but I think it right to say that, so far as I personally am concerned, I am satisfied that any such view is

inconsistent with the judgment of the Privy Council in the case of *Eccles v. Mills* (*ubi sup.*). For the above reasons I am of opinion that the judgment for the plaintiffs should stand, and the appeal be dismissed with costs.

COZENS HARDY, L.J. read the following judgment:—I have had the opportunity of reading the judgment of the Lord Chief Justice, with which I entirely agree, and I do not wish to add anything except upon one point—viz., the liability of the defendants under the express covenant in the lease. It was strenuously argued, particularly by Mr. Henn Collins, that no liability can now be enforced against the lessors inasmuch as they have assigned the reversion, the effect of which was to shift the obligation from the lessors to the assignees. I assume, in favour of the appellants, that the covenant to execute repairs on the demised premises in obedience to the award to be made was a covenant running with the reversion to which the statute 32 Hen. 8, c. 34, applies. If so, sect. 2 gives the lessees a right of action against the assignees of the reversion for breach of the covenant. But it is difficult to see why that enactment should release the lessors from their express covenant. There is nothing in the language of the section to lead to this conclusion. It is true that in *Thursby v. Plant* (1 Wms. Saund. 237, at p. 240) it is said that the statute has transferred the privity of contract from the lessor to the assignee of the reversion, but that does not mean anything more than that the assignee of the reversion is made liable by the statute in the same manner as at common law the assignee of the lease was liable. In every case the express covenants entered into by the lessor with the lessee or by the lessee with the lessor remain unaffected. The consequence of holding that a landlord can escape from all liability upon his express covenants in the lease by assigning to a pauper would be alarming. In my opinion, the position of the lessor with respect to covenants running with the reversion is now precisely similar to the position of the lessee with respect to covenants running with the lease. In neither case is liability extinguished by assignment. No authority contrary to this view has been called to our attention, but the very point was raised before the Privy Council in *Eccles v. Mills* (*ubi sup.*). That case was ultimately decided on the ground that the covenant in question by the testator, who was the lessor, did not run with the reversion, but the arguments and the judgment dealt with the case also on the alternative view, which had been adopted in the court below, that the covenant did run with the reversion; and Lord Macnaghten (78 L. T. Rep., at p. 210; (1898) A. C., at p. 371) says: "Whatever liability the statute threw on the specific devisees as assignees of the reversion, that they were bound to bear as between themselves and the lessee. But the testator's estate was also liable." This dictum, though not necessary for the decision of the case, strongly supports the view which, apart from authority, I have expressed. For these reasons I think that the lessees and the assignees of the lease, as co-plaintiffs, can maintain the present action against the lessors for breach of the covenant to obey the award.

LORD ALVERSTONE, C.J.—I have to add that the Lord Chancellor concurs in both judgments

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that have been read, and does not desire to add anything.

Appeal dismissed.

Solicitors for the plaintiffs, *Collyer, Bristow, Hill, Curtis, and Dods*, for *W. J. Stuart*, Hull.

Solicitors for the defendants, *Chester, Broome, and Griffiths*, for *Holden, Sons, and Hodgson*, Hull.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, Jan. 14.

(Before KEKEWICH, J.)

Re DOWDING; GREGORY v. DOWDING. (a)

Marriage settlement—Covenant to settle wife's after-acquired property—Annuities—Construction of covenant.

By her marriage settlement, dated in 1886, a wife covenanted to settle all her after-acquired property, real and personal, whether in possession, reversion, or otherwise (with certain small exceptions), upon trust to be sold and converted and held by the trustees upon the trusts of the settlement. During the coverture the wife became entitled to certain annuities.

Held, that the annuities were not caught by the covenant.

White v. Biggs (22 Beav. 176n.) and *Townshend v. Harrowby* (4 Jur. N. S. 353) followed.

Scholfield v. Spooner (51 L. T. Rep. 138; 26 Ch. Div. 94) distinguished.

By a settlement dated the 5th May 1886, made upon the marriage of the Rev. J. W. Dowding with Margaret Carwithen, afterwards Dowding, the intended wife agreed that all real and personal property (if any) not therein before settled to which she at the time of the intended marriage or at any time during her intended coverture should be or become entitled, whether in possession, reversion, or otherwise, except jewels, trinkets, ornaments of the person, plate, linen, and china, furniture, prints, books, or other articles of like nature, and also except legacies or other property acquired at one and the same time not exceeding in amount or value the sum of 100l., should . . . be assured and transferred by the intended wife and all other necessary parties (if any) to the trustees of the settlement upon trust at such time and in such manner as they should think fit . . . to sell and convert into money such part of the said property as should not consist of money or of investments authorised by the settlement, and should stand possessed of the said investments and of the moneys to arise from such conversion as aforesaid upon the trusts and with the powers thereinbefore declared concerning the wife's trust funds, and so long as any such property remained unsettled upon trust to pay the income thereof to the persons for the time being entitled to receive the income of the wife's trust funds.

The trusts declared concerning the wife's trust funds were that the trustees should stand possessed of them upon trust to invest the same as and when received in certain specified securities and to pay the income thereof to the intended

husband for his life and after his death to the intended wife for her life, and after the death of the survivor of them upon trust, both as to capital and income, for the children of the intended marriage as therein set out.

The Rev. W. H. Carwithen, who died on the 11th April 1903, by his will, dated the 20th Aug. 1894, gave an annuity of 40l. to his daughter, the above-mentioned Margaret Dowding, for her life, and by a codicil to his will, dated the 4th Aug. 1896, gave her an additional annuity of 60l. for her life.

This was a summons taken out by the trustees of the marriage settlement asking whether Margaret Dowding, under agreement to settle after-acquired property, was bound to assign and transfer to them the two annuities, and, if so, whether they ought to be treated as capital or income.

H. T. Methold for the trustees.

T. T. Methold for the husband and wife.—These annuities are not caught by the covenant. They are legacies within the exception. Life interests are not bound by a covenant of this nature. They could only be bound if the trusts declared fitted them, and in this case the trust for conversion is inconsistent with the nature of an annuity and does not fit it:

St. Aubyn v. Humphreys, 22 Beav. 175;

White v. Briggs, 22 Beav. 176n (also 2 Ph. 583);

Townshend v. Harrowby, 4 Jur. N. S. 353;

Finlay v. Darling, 76 L. T. Rep. 461; (1897) 1 Ch. 719;

Re Crawshaw; *Walker v. Crawshaw*, 65 L. T. Rep. 72; (1891) 3 Ch. 176.

S. B. L. Druce for the children of the marriage.—The annuities are not legacies within the exception. They are caught by the covenant, which is in the widest terms and intended to include property of every description:

Scholfield v. Spooner, 51 L. T. Rep. 138; 26 Ch. Div. 94;

Re Bendy; *Wallis v. Bendy*, 71 L. T. Rep. 750; (1895) 1 Ch. 109;

Lewis v. Madocks, 8 Ves. 150; 17 Ves. 48.

KEKEWICH, J.—The question is whether two annuities given to a married lady are caught by a covenant to settle after-acquired property contained in a marriage settlement. It is a covenant though it is in the form of an agreement; it is executed by all the parties, and it is a covenant by all. The covenant is in the widest possible terms. I cannot conceive that anyone could put it in wider terms: "All real and personal property (if any) not hereinbefore settled to which the said Margaret Carwithen at the time of the said intended marriage or at any time during her intended coverture shall be or become entitled, whether in possession, reversion, or otherwise,"—there are certain exceptions which I must notice for two reasons: first, because it is said that one of these exceptions includes these annuities so that they are literally excepted from the operation of the covenant; secondly, because it is always necessary where there are exceptions to a general provision to see what is regarded as excepted in order that from that you may obtain light as to what is intended to be included—"except jewels, trinkets, ornaments of the person, plate, linen, and china, furniture, prints, books, or other articles of the like nature, and also except any legacies or

(a) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

other property acquired at one and the same time not exceeding in amount or value the sum of 100*l*." It is said that these annuities are legacies within that exception. For some purposes no doubt an annuity is a legacy, a legacy payable by instalments, and if that were the right view to take in this case the instalments are less than 100*l*., so that no part of them would be settled. But an annuity is not a legacy for all purposes, and in ordinary phraseology an annuity is distinct from a legacy. A legacy is a sum which the legatee is entitled to have paid down; an annuity is a sum which is to be secured by setting apart a portion of the personal estate and has to be paid in the shape of an annual payment, and in that sense it is not a legacy. In my opinion it would be entirely wrong to hold that these annuities were legacies within the exception. Then the question is whether these annuities are covered. They are within the words "all real and personal property to which the said Margaret Carwithen at any time during the said intended coverture shall be or become entitled." Of course, I am bound to construe those words according to the intention of the parties, and it may appear that an intention may be presumed or proved in some way or other that these annuities are not meant to be caught; but the words themselves are large enough. Nor is it said that annuities according to the ordinary practice for those who draw marriage settlements cannot be included in covenants to settle after-acquired property. On the contrary, I asked Mr. Methold, and he confirmed my own impression that the ordinary precedents for covenants to settle after-acquired property do include annuities and life interests; but when the draft is properly settled there is a direction that annuities and life interests shall be held for the benefit of the husband and wife as the case may be, and possibly, where they are for the benefit of the wife, shall be held for her separate use without power of anticipation. Therefore, apart from one authority which I will deal with presently—where the question was as to a life interest being included—there is no doubt that an annuity may be properly included. There is nothing foreign to the purpose of a covenant to settle after-acquired property in including an annuity. In one sense, therefore, the covenant fits the property, or the property fits the covenant. The difficulty arises from this, that the trust is for conversion, that that which is really the life interest of the wife is to be converted by the sale out and out of the annuity, or possibly by investing the annuity when it is received from time to time, and that is to be capitalised so that the wife or the husband who takes the first life interest would only receive the dividends. That is where the pinch occurs. You can make the covenant fit the annuity, and you can make the annuity fit the covenant, but they do not fit as they stand—that is to say, not according to the ordinary practice of mankind; and it goes against one's general knowledge of what is done on these occasions to say that that which is an annuity is to be capitalised and only to become a dividend-earning fund. These difficulties have occurred again and again, and several cases have been cited in which this question has been discussed. A great difficulty of this kind occurred in the case of *Lewis v. Madocks* (*ubi sup.*). I mention that

case because it has given rise to a certain amount of discussion from time to time. There the husband gave a bond with a condition to settle all the personal estate that he should at any time during the coverture be possessed of. The Lord Chancellor pointed out the great difficulty of executing the instrument, but thought that he was constrained by the general words of the bond, and declared that the personal estate of which the husband was possessed during the coverture was liable to the bond. This in so many words would appear to include every sovereign that came into his purse during the coverture, and it did occur to me, when the question came before me in *Re Bendy* (*ubi sup.*), that the Lord Chancellor meant that where you had a general covenant of that kind you must execute it, however absurd it might be and however great the practical difficulty might be in giving effect to it. But a similar case came before Romer, J.—*Finlay v. Darling* (*ubi sup.*)—and he differed, and, I have no doubt, differed soundly, from the view which I took of Lord Eldon's decision in *Lewis v. Madocks* (*ubi sup.*). After showing that that was a simple covenant by the husband to settle the whole of his personal estate, however acquired, he said this: "Lord Eldon pointed out in that case even that income which the husband received would not be bound by the covenant; but he did say that if that income became capital, then the capital that accrued to him would be bound. I do not know that that decision went so far as that, but certainly there is a statement of Lord Eldon to that effect. In the first place, I think that his observation must have been limited in its application to the case immediately before him, which, as I pointed out, concerned and dealt with a covenant of a substantially different kind from the covenant before me; and, secondly, I am not sure that Lord Eldon did not mean by the word 'capital' capital which was so held by the husband as to show that he intended it to become part of his personal estate which was bound by his covenant." I quote that as showing that there may be a way out of a covenant of that kind, and that Romer, J. thought that Lord Eldon meant to get out of it in that way, although his language was more general, and that he himself would have been able to do so. *Lewis v. Madocks* (*ubi sup.*) was referred to by Lord Romilly in his judgment in *St. Aubyn v. Humphreys* (*ubi sup.*), although apparently not cited in the argument. In *St. Aubyn v. Humphreys* (*ubi sup.*) there was a settlement by the husband of all his personal estate to which he was then or might thereafter become entitled in trust for himself for life with remainder absolutely to his wife. That, as regards the subject-matter of the settlement, was not unlike the bond in *Lewis v. Madocks* (*ubi sup.*). It was held not to comprise his interest in a fund bequeathed to him for life with remainder to his children. All that the Master of the Rolls says is: "Upon consideration of the case of *Lewis v. Madocks* (*ubi sup.*) and of *White v. Briggs* (*ubi sup.*), mentioned to me by Mr. Bagshawe, I am of opinion that I must hold"—and he held that the life interest was not caught by the settlement. The judgment of the Master of the Rolls, therefore, is of no value of itself. He looked at *Lewis v. Madocks* (*ubi sup.*) and read that with *White v. Briggs* (*ubi sup.*), and thought that he

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was bound by authority to hold as he did. I have not, therefore, the advantage of the independent judgment of the Master of the Rolls, but I have the advantage of the decision in *White v. Briggs* (*ubi sup.*), which is reported in a note to *St. Aubyn v. Humphreys* (*ubi sup.*). That, in my opinion, is a case of great importance. There there was a covenant by the husband to settle one moiety of the property he should acquire during the coverture upon the usual trusts. It was in quite general terms. It was held not to include his life interest in property bequeathed to him for the benefit of himself and his family. Some little account is given there of the nature of the bequest. There was a direction under a will to settle property on the husband and his family. That gave rise to a good deal of litigation, and ultimately Lord Cottenham determined that that direction meant that the husband took a life interest only (that is reported in 2 Ph. 583). Then the reporter tells us this, that he afterwards declared "that the interest which Charles Herbert White took under the will was not subject to the covenant contained in his marriage settlement." Therefore we have a distinct decision of Lord Cottenham, than whom there could not possibly be a higher authority, that a covenant to settle after-acquired property, framed in the most general terms, did not include a life interest given to the covenantor by will; and the Master of the Rolls followed that. I say nothing about the other case cited there—*Duncan v. Cannan* (No. 2) (21 Beav. 307)—because, in my opinion, that was a case of a different character. Then I am referred to a case before Kindersley, V.C.—*Townshend v. Harrowby* (*ubi sup.*). There the Vice-Chancellor had to deal with a covenant framed in the broadest possible terms to settle the wife's after-acquired property, and one of the questions was whether a life interest was covered by it. The Vice-Chancellor expressed a decided opinion upon it. He says: "It appears to me upon the whole scope of such a clause as this (assuming it in the strongest way against the lady), holding her to be covenantor, and holding her to be the person who is to do the act, that it is beyond the principle upon which the court has interpreted such clauses to hold that that applies to a mere life interest. It appears to me that if Lord Townshend had himself covenanted in the same terms as in this clause, the court would not hold that the covenant applied to a mere life interest—an interest limited to his life—so as to say that that life interest must be turned into corpus; that each annual or half-yearly payment on that life income was to be assigned over to the trustees to be capitalised, so that he, as tenant for life under the settlement, would only have the income arising from the investment of each successive sum as it accrued due from the property. I consider, therefore, that the life interest to the separate use of Lady Townshend is not affected by this covenant. If it had been an absolute interest to her use, I should consider it was affected; but, being a mere life interest, it does not signify whether it is to her separate use or not. It appears to me that it is not within the letter of the covenant." That is a distinct finding by a most experienced judge that a life interest is not within a covenant in general terms to settle after-acquired property. Unless there is some authority to the contrary overruling the decision of Kindersley, V.C. and dif-

fering from the decision of Lord Cottenham, I am bound to hold that a covenant of this kind does not cover a life interest. What is there to the contrary? I can see nothing in any one of the cases cited which touches those authorities. The case mainly relied on is *Scholfield v. Spooner* (*ubi sup.*); but before dealing with that case I ought perhaps to mention a case before North, J. which was cited to me—*Re Crawshaw* (*ubi sup.*). That does not really touch this case, because North, J. declined to try the question whether any life interest was affected by the covenant in that case, and he held that the particular life interest in that case was not affected because it was not assignable. *Scholfield v. Spooner* (*ubi sup.*) deserves more attention. On the covenant in that case there can be no question that the framer of the covenant contemplated including in it annuities and life interests, but by some curious omission there was no trust declared as to those annuities and life interests when assigned to the trustees, and it was argued in the Court of Appeal that, because there were no trusts declared, therefore the court could not hold the annuity therein question to be included in the covenant at all. To that there was a conclusive answer: "Upon the construction of the covenant, annuities are to be included in it, and, that being so, they must be brought within the settlement and held upon some trusts or other." If there are no trusts declared, then they are to be found by proper construction of the document. That is the substance of the decision. Of course, there is really no doubt that annuities may be properly included in covenants of this kind if there are apt words, and in *Scholfield v. Spooner* (*ubi sup.*) there were special words showing clearly that annuities were intended to be included in the covenant, and that distinguishes that case from this. *White v. Briggs* (*ubi sup.*) and *Townshend v. Harrowby* (*ubi sup.*) were not cited in *Scholfield v. Spooner* (*ubi sup.*), and it does not touch the question raised in this case, which is this: Whether where the covenant is framed in general terms and there is nothing in the settlement to bring in an annuity or life interest specifically, the inclusion of an annuity or life interest is consistent with the general intention of the parties in making the settlement. That question was not affected by *Scholfield v. Spooner* (*ubi sup.*). It seems to me that I am in the same position as Lord Romilly found himself in, except that I am more strongly bound. He was bound by *White v. Briggs* (*ubi sup.*). I am bound by *White v. Briggs* (*ubi sup.*) and *Townshend v. Harrowby* (*ubi sup.*). There is no case the other way, and I must hold that, strong and general as the words are, quite strong enough by themselves to include an annuity or a life interest, yet, having regard to the general intention of the parties, I must hold that these annuities are not covered by the covenant.

Solicitor: Nicholas Hanhart.

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CHRISTY v. TIPPER; Re YOUNG'S TRADE MARK.

[CHAN. DIV.]

Jan. 19, 20, 21, 22, and Feb. 1.

(Before JOYCE, J.)

CHRISTY v. TIPPER; Re YOUNG'S TRADE MARK. (a)

Trade mark—"Invented word"—"Absorbine"—Removal from register—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), s. 64, sub-s. 1—Patents, Designs, and Trade Marks Act 1888 (51 & 52 Vict. c. 59), s. 10, sub-s. 1.

Y., a manufacturing chemist, residing in America, obtained in Nov. 1901 the registration in the United Kingdom of the word "Absorbine" as a trade mark in respect of chemical substances used for agricultural, horticultural, veterinary, and sanitary purposes, and also in respect of chemical substances prepared for use in medicine and pharmacy. He used the word in connection with a liquid preparation designed to absorb and remove various growths and diseases in animals.

Messrs. T. were well-known manufacturers of an ointment intended for similar purposes, which they sold under the name of "Absorbent" till 1901, but about the time of Y.'s registration of "Absorbine" they, without any knowledge of that fact, changed the name of their ointment to "Absorbine," and sold it under that name.

Y. and his English agents, Messrs. C., brought an action against them to restrain them from infringing the registered trade mark "Absorbine," and from passing off any veterinary preparation as a preparation of the plaintiffs'.

Messrs. T. contended that "Absorbine" ought not to have been registered as a trade mark, and moved to expunge it from the register.

Held, that "Absorbine" was not an invented word, since the first two syllables formed an ordinary English word, and the last was a meaningless flourish or termination, and there was no invention in continuing the syllables; and that it must therefore be expunged from the register, and the action be dismissed.

TRIAL of action and motion for rectification of register.

Mr. Wilbur Fenelon Young, a manufacturing chemist carrying on business in Springfield, Massachusetts, United States of America, was the manufacturer of a medicinal preparation for veterinary purposes, and Messrs. Thomas Christy and Co., a firm of wholesale druggists in the city of London, were his sole agents in this country for the sale of it.

The preparation had been sold in America for some years under the name of "Absorbine," and there had also been sales of it under that name in this country.

On the 21st Nov. 1901 Mr. Young applied for and in due course obtained registration in the United Kingdom, as of that date, of the word "Absorbine" as his trade mark.

He was registered as proprietor of the trade mark "Absorbine," No. 242,163, in class 2, in respect of chemical substances used for agricultural, horticultural, veterinary, and sanitary purposes, and in class 3, No. 242,164, in respect of chemical substances prepared for use in medicine and pharmacy.

The following disclaimer appeared on the

register: "No claim is made to the exclusive use of the word 'absorb.'"

"Absorbine" had been described by Mr. Young, in an application for its registration in America, as an arbitrary or arbitrarily chosen word. Its user by him appeared to have been solely in connection with and as a designation of his preparation, which was a liquid one, professing to be prepared especially to absorb and remove "wind-puff, capped hock, thorough-pin, fatty tumours, enlarged glands, and all puffs and swellings." It was made up and sold in bottles contained in carton boxes.

Messrs. B. C. Tipper and Son, who had for many years past carried on in Birmingham a large and well-known business as manufacturers and vendors of various medical preparations for veterinary purposes, had, among other preparations, prepared and sold in pots a grease or ointment used as a remedy for bony and other enlargements on animals, and acting as an absorbent of excrescences.

Down to the year 1901 Messrs. Tipper and Son had sold this ointment under the name of "Absorbent"; but in the autumn of 1901 they determined to change words such as "Absorbent" to others of a more fanciful description, and accordingly they in Oct. 1901 reprinted their labels and catalogue and described the ointment as "Absorbine," under which name they had since sold it.

In doing this they had no knowledge of the sale by Messrs. Christy and Co. of Mr. Young's preparation as "Absorbine," nor of Mr. Young's intention to register "Absorbine" as his trade mark; and in Dec. 1902, on discovering the use by Messrs. Christy and Co. of the word "Absorbine," they wrote requesting them to desist from using it.

This Messrs. Christy and Co. refused to do, and they in their turn asserted their right to the word, and demanded that Messrs. Tipper and Son should abandon it.

Eventually, in March 1903, Messrs. Christy and Co. and Mr. Young commenced this action against Messrs. Tipper and Son, claiming an injunction restraining them, their servants and agents, from selling or offering or exposing or advertising for sale or procuring to be sold any veterinary preparation not of the plaintiff's manufacture under the name of "Absorbine" or under any other name which, by reason of colourable imitation thereof or otherwise, was calculated to represent or lead to the belief that such preparation was a preparation of the plaintiff's; from in any manner infringing the plaintiff's registered trade mark, No. 242,163; and from in any manner passing off or enabling or assisting others to pass off any such veterinary preparation as or for a preparation of the plaintiff's, together with damages or an account of profits and an order for delivery up or destruction of labels, &c., of the defendants offending against the injunctions.

The defendants contended that, apart from all other questions arising in the action, the registration of "Absorbine" as a trade mark was improper on the grounds that it was not an invented word or distinctive of the plaintiff's goods, but merely descriptive of the character or quality of the article, and had prior to registration been used by the defendants and other persons in connection with similar articles.

(a) Reported by H. W. LAW, Esq., Barrister-at-Law.

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They moved for the rectification of the Register of Trade Marks by the removal of the trade mark "Absorbine" in both classes.

The action and motion were tried together, and evidence was given of the use of the word "Absorbine" and words of similar meaning in connection with such preparations by the plaintiffs and defendants and other persons in this country and the United States, and of the nature of the respective preparations and the extent to which they had been advertised and sold.

Hughes, K.C. and *Sebastian* for the plaintiffs in the action, respondents to the motion.—A word is "invented" if it has not previously been in general use as an English word and is not a compound of existing words. See the judgments of the House of Lords in *Eastman Photographic Materials Company v. Comptroller-General of Patents, Designs, and Trade Marks* (79 L. T. Rep. 195; (1898) A. C. 571), which decided that an invented word may have reference to the character or quality of the goods. See also *J. C. and J. Field and Co. v. Wagel Syndicate* (82 L. T. Rep. 231; 17 Rep. Pat. Cas. 266), where "Savonol" was held to be an invented word. A word may be a good trade mark though it is not absolutely new, but has been used before:

Re Linotype Company's Trade Mark, 82 L. T. Rep. 794; (1900) 2 Ch. 238.

Nor can the defendants take advantage of user of "Absorbine" or similar words by third parties:

Paine and Co. v. Daniells and Sons' Breweries; Re Paine and Co.'s Trade Marks, 68 L. T. Rep. 801; (1893) 2 Ch. 567.

With regard to our claim in the action, the evidence shows that "Absorbine" would be taken by anyone to refer to our preparation, and we should be entitled to an injunction to restrain passing off even if our trade mark had been expunged from the register:

Birmingham Vinegar Brewery Company v. Powell, 76 L. T. Rep. 792; (1897) A. C. 710.

Younger, K.C. and *E. P. Hewitt* for the defendants in the action, applicants on the motion.—Before the decision in the "Solio" case, *Eastman Photographic Materials Company v. Comptroller-General* (*ubi sup.*), a word formed in the same way as "Absorbine" here—"Satinine"—had been held not to be an invented word in *Re Meyerstein's Trade Mark* (62 L. T. Rep. 526; 43 Ch. Div. 604); and we contend that there is nothing in the "Solio" decision which is at variance with this, nor with the similar decision that "Eboline" was not an invented word in *Re Sir Titus Salt, Bart., Sons, and Co.'s Application* (71 L. T. Rep. 386; (1894) 3 Ch. 166). These cases and *Re Farbenfabriken Application* (70 L. T. Rep. 186; (1894) 1 Ch. 645) were the leading authorities on the subject at the date of the decision in the "Solio" case, and in that case Lord Herschell (1898) A. C., at p. 580 expressly approved of the decision in *Re Farbenfabriken Application* (*ubi sup.*) with a qualification only as to foreign words. The "Solio" case (*ubi sup.*) merely decided that clauses (d) and (e) in sub-sect. 1 of sect. 10 of the Patents, &c., Act 1888 are independent of each other. It did not introduce any great change into the law, and the judgments of Lords Halsbury, Herschell, Macnaghten, and Shand are in our favour, and Buckley, J.'s words in *J. C. and*

J. Field and Co. v. Wagel Syndicate (17 Rep. Pat. Cas., at p. 271) show that he took this view of Lords Herschell and Macnaghten's judgments. An invented word cannot be made by taking an existing English word, at all events, and adding a meaningless syllable. The word must be new and freshly coined:

Re British Electrosons Company's Application, 13 Rep. Pat. Cas. 447;

Re Farbenfabriken Application (*ubi sup.*).

Even if the decision in *Re Linotype Company's Trade Mark* (*ubi sup.*) was correct, it was based on the fact that there had been no real publication of the word in this country. The word cannot be a trade mark if it has been used in a foreign country to describe the article, as "Absorbine" has been in the United States:

Re British Electrosons Company's Application (*ubi sup.*);

Davis v. Stribolt; Re Davis, Bergendahl, and Co's Trade Marks, 59 L. T. Rep. 854; 6 Rep. Pat. Cas. 207;

Re Densham's Trade Mark, 72 L. T. Rep. 148; and in the Ct. of App. *ib.* 614; (1895) 2 Ch. 176.

With regard to the claim in the action, it cannot be suggested that our sale of our preparation deceives anyone. The plaintiffs' preparation is a liniment and ours is an ointment, and, in the absence of evidence that the sale is calculated to deceive, the plaintiffs cannot succeed in an action against us for using their trade mark in connection with a totally different kind of goods:

Edwards v. Dennis; Re Edwards' Trade Mark, 54 L. T. Rep. 112; 30 Ch. Div. 454.

R. J. Parker for the Comptroller-General.

Hughes, K.C. in reply.—As to the previous user of the word in the United States, the plaintiff Young cannot be debarred from registering it as a trade mark by reason of the fact that he himself invented and used it. With regard to the suggestion that the goods of the plaintiffs and defendants are of different kinds, they are both veterinary preparations, merely made up in different forms. The decision in *Edwards v. Dennis* (*ubi sup.*) really turned, as is clear from the words of Fry, L.J. (30 Ch. Div., at p. 479), on the fact that the trade mark had been assigned, and the assignee claimed to use it for a wider class of goods than it had been used for by his assignor. Moreover, no one wanting wire, as in that case, would take iron sheets; but anyone wanting a veterinary remedy called "Absorbine," and not knowing its form, would take what was offered him. The use of the same word to describe two veterinary preparations must be calculated to deceive, and evidence is not necessary. He referred to

North Cheshire and Manchester Brewery Company v. Manchester Brewery Company, 79 L. T. Rep. 645; (1899) A. C. 83.

Cur. adv. vult.

Feb. 1.—JOYCE, J., after stating the facts respecting the registration of the trade mark "Absorbine" by Mr. Young and the nature of the preparations of the plaintiffs and defendants respectively, said that the defendants appeared to be perfectly honest and honourable tradesmen and to have changed the title of their ointment without any knowledge of what the plaintiffs were doing. His Lordship then said that in his

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opinion the only ground for the passing-off action was the use of the word "Absorbine," and that, if "Absorbine" were allowed to remain on the register, the action for passing off, as distinguished from infringement of trade mark, was unnecessary. He then continued: It is quite clear that the word "Absorbine" has obvious reference to the character or quality of the goods. It can only be registered, if at all, under sect. 64, sub-sect. (1) (d), of the Patents, Designs, and Trade Marks Act 1888 as being an "invented word." Whether it is or is not an "invented word" within the meaning of the statute is the single question that remains for me to decide. The first two syllables of the word now under consideration are beyond all question the common English word "absorb." I have not been told how the whole word was invented. In the application for its registration in America it was spoken of by the applicant as an arbitrary or arbitrarily chosen word. It may simply be a misspelling of the present participle of the verb "absorb," or represent that participle pronounced in a careless, slovenly fashion—I may almost say as frequently pronounced by ordinary people. If it be that, it is certainly incapable of registration in respect of such a veterinary medicament as that of the plaintiffs. Or it may be the common English verb "absorb" with a common termination added thereto. Such a termination is found in very many words designating chemical substances, as may be seen by reference to the index to any manual of chemistry—e.g., chlorine, glycerine, pepsine, saccharine. It is also frequently found as a mere termination in the names of medicinal and other preparations which are sometimes referred to as proprietary articles—e.g., maltine, phospherine, sulpholine, brilliantine, &c. When so used, I am not aware that the syllable "ine" has any meaning at all of itself; nor has it any here. It is little, if anything, more than a sort of flourish, rounding off the word or expression to which it is attached in order to make a euphonious name. In the "*Solio*" case (*Eastman Photographic Materials Company v. Comptroller-General*, 79 L. T. Rep. 195; (1898) A. C. 571) it was decided, contrary to what had previously been held, that a word might be a good invented word although it might have some reference to the character or quality of the goods, and that the word "*Solio*" was an invented word. But the present Lord Chancellor, in the course of his observations, said (1898) A. C., at p. 577: "My Lords, I desire to give my opinion with reference to the particular words, and not to go behind it. I can quite understand suggesting other words—compound words or foreign words—as to which it would be impossible to say that they were invented words, although perhaps never seen before, or that they did not indicate the character or quality of the goods, although as words of the English tongue they had never been seen before. Suppose a person were to attempt to register as a single English word 'Cheapand-good,' or, even without taking so gross an example, using a word so slightly differing from an ordinary and recognised word as to be neither an invented word nor, avoiding the prohibited choice of a word, indicating character or quality. The line must sometimes be difficult to draw; but to my mind the substance of the enactment is intelligible enough, and the comptroller has to make up his mind whether in substance there has been an

infringement of the rule. Of course, also, words which are merely misspelt, but which are nevertheless, in sound, ordinary English words, and the use of which may tend to deceive, ought not to be permitted." And Lord Herschell, a very high authority on the subject, said (at p. 581): "It may, no doubt, sometimes be difficult to determine whether a word is an invented word or not. I do not think the combination of two English words is an invented word, even although the combination may not have been in use before; nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed by the word in its ordinary form." And Lord Shand in the same case said (p. 584): "At the same time I agree with your Lordships, and particularly with what has been said by my noble and learned friend Lord Macnaghten, in thinking, especially after the decision to be given in this case, that the Comptroller-General will be fully warranted in taking care that there shall not be admitted, under the guise or cover of words called 'invented' by the applicant, words really in ordinary use, which might, in a disguised form, have reference to the character or quality of the goods. There must be invention, and not the appearance of invention only. It is not possible to define the extent of invention required; but the words, I think, should be clearly and substantially different from any word in ordinary and common use. The employment of a word in such use, with a diminutive or a short and meaningless syllable added to it, or a mere combination of two known words, would not be an invented word; and a word would not be 'invented' which, with some trifling addition or very trifling variation, still leaves the word one which is well known or in ordinary use, and which would be quite understood as intended to convey the meaning of such a word." I know of no authority which requires me to hold that a word such as "Absorbine" is an invented word. None of the syllables or parts of which the word is composed is invented, and I see no invention in the combining of them so as to form the whole. The case of *Re Linotype Company's Trade Mark* (82 L. T. Rep. 794; (1900) 2 Ch. 238) was materially different from the present case; and so, I think, was that of "*Savonol*" (*J. C. and J. Field and Co. v. Wagel Syndicate*, 82 L. T. Rep. 231; 17 Rep. Pat. Cas. 266). Under the circumstances I find myself compelled to hold that "Absorbine" is not an invented word; and consequently it must be expunged from the register of trade marks, and the action must be dismissed, with the usual consequences.

Solicitors: *L. G. Townroe; Belfrage and Co.*, agents for *T. W. Robinson*, Birmingham; Solicitor to the Board of Trade.

K.B. Div.] WALKER (app.) v. WALKER (resp.)—HAYCOCKS LIM. v. MULHOLLAND. [K.B. Div.]

KING'S BENCH DIVISION.

Wednesday, July 1, 1903.

(Before Lord ALVERSTONE, C.J., WILLS and CHANNELL, JJ.)

WALKER (app.) v. WALKER (resp.). (a)

*Licensing—Order taken by traveller—Appropriation—Sale off licensed premises—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 3.**An order for beer having been given to the traveller of a person licensed to retail beer at his premises by a customer at such customer's house, the traveller handed the order to the licensee at the licensed premises, who appropriated the beer by placing it in a box at those premises with a piece of paper on which was the customer's name. The beer was delivered and paid for at the customer's house.**Held, that this was not a sale off the licensed premises.*

CASE stated on an information preferred by the respondent against the appellant for unlawfully selling by retail certain bottles of beer and stout at a house where he was not then authorised by licence to sell the same.

The following facts were proved or admitted:—

The appellant was a grocer and held a retail off-licence for the sale of beer, wine, and spirits at his premises at Kingston-upon-Hull.

On the 17th Dec. 1902 the appellant's traveller went to Kirkella, a village some few miles distant from Kingston-upon-Hull, and called at the house of one Goulding, who gave him an order for six bottles of beer and six bottles of stout. The traveller made an entry of the order in his order-book, and upon his return in the evening to Kingston-upon-Hull handed his order-book to the appellant at the licensed premises.

On the 23rd Dec. the appellant wrote out from his order-book a delivery list of the goods which the traveller was to deliver the following day when, in the ordinary course, he would again visit Kirkella, and this list included the beer and stout ordered by Goulding.

By means of this list the various goods ordered by Goulding and others in the previous week were got ready by the appellant for each customer, and were loaded for delivery for such customers upon the appellant's trolley at the licensed premises on the 24th Dec.

The bottles for Goulding were selected by the appellant at the licensed premises, and were then placed in a wooden box, partitioned so as to hold twelve bottles and no more, and a piece of paper, with the name of Goulding on, was put into the box at the licensed premises, and the goods were then loaded for delivery. This box and its contents and the slip of paper were delivered at Goulding's house at Kirkella on the 24th Dec., and were paid for on delivery.

The appellant stated that if any of the bottles had been broken in transit and before delivery he should have borne the loss, as otherwise he would have lost a customer.

The respondent contended that the sale of the beer and stout took place at Goulding's house at Kirkella; that the property in the goods did not pass and there was no appropriation thereof until delivery; and that what was done on the licensed

premises of the appellant did not constitute in law an appropriation of the goods to Goulding.

The appellant cited the case of *Pletts v. Beattie* (74 L. T. Rep. 148; (1896) 1 Q. B. 519).

The justices were of opinion that there was no appropriation of the goods at the appellant's licensed premises, and that therefore the sale took place at Kirkella.

They therefore convicted the appellant.

Lush, K.C. and *Shortt* for the appellant.

Avory, K.C. and *Biron* for the respondent.

Lord ALVERSTONE, C.J.—Owing to the way in which the facts are stated, the case is not free from difficulty. The appellant was summoned for unlawfully selling beer by retail at a house where he was not then authorised by his licence to sell the same, and so the onus was on the prosecution to show a sale off the premises. The order was taken off the licensed premises, but was handed to the appellant at the licensed premises and accepted by him there. The goods were selected and placed aside at the licensed premises, and there was a subsequent delivery of the appropriated goods. I do not think the facts show a sale off the premises according to the authorities. They show a transaction where the contract was made on the licensed premises, though that might not be sufficient to pass the property in the goods, but, so far as the Licensing Act is concerned, I think the sale took place on the licensed premises.

WILLS and CHANNELL, JJ. concurred.

Appeal allowed.

Solicitors: *Rollit and Sons*, for *Rollit*, Hull; *Bockett, Stunt, and Nash*, for *J. B. Proctor*, Beverley.

Nov. 23 and Dec. 8, 1903.

(Before PHILLIMORE, J.)

HAYCOCKS LIMITED v. MULHOLLAND. (a)

Practice—Costs—Reference to master under Order XIV.—High Court scale—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 116.

Where an action is brought in the High Court and an application is made under Order XIV., and the action is referred to a master under rule 7 of that order, if the plaintiff recovers more than 20l., but less than 50l., he can only recover County Court costs of action, but, so far as the costs of the reference are concerned, the master is to be deemed an arbitrator, and he has the same discretion as to costs, including the power to certify for High Court costs of the reference, as an arbitrator has.

A master has no power to extend the twenty-one days allowed for obtaining judgment under Order XIV. with High Court costs, as by sect. 116 of the County Courts Act 1888 that power is only given to a judge of the High Court.

APPEAL in chambers from the order of a master.

The facts of the case sufficiently appear from the written judgment of the learned judge, which was read in court.

J. D. Crawford for the plaintiffs.

Nield for the defendant.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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[K.B. Div.]

WORDSLEY BREWERY COMPANY (apps.) v. HALFORD (resp.).

[K.B. Div.]

Dec. 8.—PHILLIMORE, J.—In this case the summons came before me in chambers, and was argued by counsel on the 28th Nov. last. I took time to consider what my order should be, and as the matter involves some questions of importance with regard to the procedure in small debt cases, I thought it well to have information from the masters of the King's Bench Division, and to give my judgment in court. The action is brought on a tradesman's bill for a small balance of account representing items of dispute between the tradesman and his employer in a bill of considerable amount. The sums taken out under Order XIV. was heard before a master on the 29th Oct. last. No order was drawn up upon this summons, but the master's note upon it is as follows: "Adjourned for trial before master." Thereafter the case was tried before the same master, witnesses were examined, and the master finally decided in favour of the plaintiffs for 23*l.* 15*s.*, which, if I recollect rightly, was either the whole or nearly the whole of the plaintiff's claim. The master proceeded to embody his judgment in the following terms: "It is ordered that the plaintiffs be at liberty to sign judgment for 23*l.* 15*s.* with 7*l.* costs of action, and also with costs of the reference to the master and his award, such costs to be taxed by the taxing master on the High Court scale, with the certificate that the action was a fit action to be brought in the High Court. This is the order under appeal; and the application to me is that I should vary it by directing that the plaintiffs should sign judgment with costs on the County Court scale. In the first place, it is, I think, inconvenient that no order of reference was drawn up. The reference to the master can only be made by consent of the parties (Order XIV., r. 7). In the case before me there was some uncertainty as to whether such consent was given. I think that consent was sufficiently expressed; but there ought to be no doubt in the matter. The master should explain to parties that he can only make such an order by consent, and this equally so whether it be in a town or a country case. Moreover, the word "adjournment" is not correct. There should be an order drawn up, and it should recite that it was made by consent. In the second place, I do not think the master has power to extend the twenty-one days allowed for obtaining judgment under Order XIV., with High Court costs. The statutory power under sect. 116 of the County Courts Act 1888 is given only to a judge: (see *Cox v. Hill*, 67 L. T. Rep. 26). I find the masters are entirely in accord as to this; and it is right to say that in this case the master has not purported to extend the time. This being so, and judgment not having been obtained within the twenty-one days, costs of the action, as distinct from the costs of the reference, must be on the County Court scale. Here the master has given a lump sum for those costs under Order LXV., r. 27, sub-r. 38, and the scale given under the practice rules for High Court costs under Order XIV., where the sum recovered is over 20*l.* and under 50*l.* I am far from saying that the master was wrong in giving a fixed sum. On the contrary, it seems to me the best thing to do, and it would be absurd to make out a hypothetical County Court bill of costs. But, as the scale is to be County Court and not High Court, I think (as the master points out) special regard should be paid to Order LXV., r. 12, and it seems to me

that the fixed sum should be less than the High Court fixed sum. I have no reason to suppose that the master was professing to arrive at probable County Court costs; and though I was told that the difference would not be great, it was admitted that the County Court costs would be rather less. I propose in this case to save the expense of a further inquiry, and reduce this 7*l.* to 5*l.* 10*s.* The particular figure is not to be a precedent, and I should hope that the masters may arrive at some fixed sum for future occasions. Then as to the costs of the reference. Treating this, as I must, as a reference by consent, I think the case is governed by the decision of the Court of Appeal in *Street v. Street* (82 L. T. Rep. 648; (1900) 2 Q. B. 57). The master is to be deemed an arbitrator, and he has the same discretion as to costs, including the power to certify for High Court costs as an arbitrator has. The judgment, therefore, in this respect must stand. I have made a slight variation in favour of the defendant, the appellant, and I think, as I have pointed out, that he may have been somewhat prejudiced by the informal mode in which the matter was submitted to the master. In the main, however, the plaintiffs, the respondents, hold what they have got. There should be no costs of the appeal.

Order accordingly.

Solicitors: J. J. Edwards and Co.; J. Moverley Sharp.

Wednesday, Dec. 9, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

WORDSLEY BREWERY COMPANY (apps.) v. HALFORD (resp.). (a)

Landlord and tenant—Tenancy—Grant of lease during tenancy—Notice to quit by original landlord—Validity.

A landlord who, during the currency of a yearly tenancy, grants a lease of the premises to a third person, cannot, during the term granted by such lease, give the yearly tenant notice to quit.

CASE stated on an information by the appellants to recover possession of certain premises, known as New Inns, Alveley, in the occupation of the respondent.

The owner of the New Inns, Alveley, was a Mrs. Ann Whiting, and the respondent had been a yearly tenant under her of the premises at the yearly rent of 15*l.* payable half yearly, the tenancy being a Lady Day take.

During the continuance of this tenancy, by an indenture dated the 4th March 1902 Mrs. Ann Whiting granted to the appellants a lease of the New Inns for the term of fourteen years, commencing on the 25th March 1902, at the yearly rent of 20*l.*, payable half yearly.

At the time the lease was executed, and at the request of the appellants a notice in writing addressed to the respondent was signed by Thomas Whiting, as agent on behalf of his wife Ann Whiting, to quit and deliver up possession of the New Inns on the 25th March 1903, the date of such notice being at the time left blank.

The notice was without any alteration or addi-

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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tion, except the date, served on the respondent on the 4th Sept. 1902, and was dated on that day.

In July 1902 the appellants made application to the respondent to pay to them a quarter's rent up to the 24th June 1902 (reckoned from the previous 25th March), but the respondent declined to do so, alleging that no rent was then due.

The respondent, on the application of the appellants, did, in Oct. 1902, pay them the half year's rent up to the previous 29th Sept.

The respondent also, in April 1903, paid to the appellants a half year's rent up to the 25th March.

Objection was taken on behalf of the respondent that the notice to quit was void and of no effect, and it was contended on the part of the respondent that as such notice was not served prior to the commencement of the lease, it should have been given by or on behalf of the appellants who were the persons entitled to immediate reversion in the premises.

It was contended on the part of the appellants that, although Mrs Ann Whiting had granted them a lease of the New Inns, it did not affect the yearly tenancy in the premises of the respondent, and that until the respondent attorned tenant to them they could not give him notice to quit, distrain for rent, or act as his landlords, and that therefore the proper person to give the notice to quit was Mrs. Ann Whiting, and by the subsequent payment of rent by the respondent to the appellants, he became their tenant, and they were entitled to adopt the notice which was running.

The justices being of opinion that Mrs. Ann Whiting having granted a lease of the premises to the appellants, could not give a valid notice to quit, dismissed the application.

Manby for the appellants.

Fisher Williams for the respondent.

LORD ALVERSTONE, C.J.—I do not think that we can say that the decision of the justices was wrong. The present respondent was a tenant from year to year of Mrs. Whiting, and during such tenancy she granted a lease for fourteen years to the appellants. The husband as agent for Mrs. Whiting at the time the lease was executed signed a notice to quit addressed to the respondent, but that was not dated and served until September. If by any rule of law the lessor of the appellants is entitled to be treated as the landlord of the respondent, then that notice to quit would be good. It seems to me that the real question is whether or not under these circumstances the assignee of the reversion is bound to give the notice to quit, or whether such assignee can avail himself of the notice given on behalf of his lessor. I think in this court the law is in favour of the contention adopted in the court below. I think that the case of *Doe v. Brown* (2 El. & Bl. 331) is binding upon us. That case says that where a party entitled to a remainder in tail expectant upon the determination of a life estate grants a term of years to commence immediately, the grantee without entry takes an immediate vested estate carved out of the remainder, the statute 4 Anne, c. 16, s. 9, making the conveyance as effectual as if attornment had been made by the tenant of the particular estate. The grant of the lease, therefore, passes the reversion, and not merely the attornment. Lord Campbell, C.J. in his judgment,

says: "The effect of this doctrine with regard to leases carved out of the reversion or remainder is very distinctly stated in *Bac. Abr. Tit. Leases* (N) (vol. 4, p. 846, 7th edit.). If the grantees of such leases could not obtain an attornment, they might at their election treat the grant as an *interesse termini*; but where they obtained the attornment the grant operated as a conveyance of so much of the reversion. The statute of 4 Anne, c. 16, s. 9, now makes all grants of manors or rents, or of the reversion or remainder of any messuages, effectual to all intents and purposes without any attornment of the tenants of the manors or of the lands out of which the rents shall be issuing, or of the particular tenants upon whose estates any such reversions or remainders shall and may be expectant or depending as if their attornment had been had and made." Parke, B. in *Harmer v. Bean* (3 C. & K. 307) said: "It appears that all the rent was paid up to Michaelmas 1851, and the plaintiff is entitled to receive for all rents due after that till Midsummer 1852; for we find that in Aug. 1852 the plaintiff granted a lease under seal of this property to Mr. Ford for twenty-one years, and in consequence of this being done the reversion was transferred to Mr. Ford, and the plaintiff cannot recover for any of this rent due afterwards." It is said that some authorities are inconsistent with that view, and to some extent they may be, but, even if that is so, we have to choose between them all. We must hold that the reversion passed, and the appeal must be dismissed.

LAWRANCE and KENNEDY, JJ. agreed.

Judgment accordingly.

Solicitors: Church, Rendell, and Co., for C. Herbert Collis, Stourbridge; Botterell and Roche.

Nov. 16 and Dec. 21, 1903.

(Before Lord ALVERSTONE, C.J., KENNEDY and DARLING, JJ.)

JENKINS (app.) v. GROCOTT (resp.). (a)

Registration of voters—Declaration by lodger claimant—Evidence—Personal attendance of claimant—Rateable value of house—Character of street—Parliamentary Voters Registration Act 1843 (6 & 7 Vict. c. 18)—Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26).

A revising barrister by personal inspection satisfied himself that certain houses were very poor and small, and that it was very doubtful whether any lodgings in those houses were worth 10l. a year unfurnished.

J. duly sent in his claim as a lodger with his declaration attached. It was proved that the rateable value of the house, which was stated to be in as poor a street as any the revising barrister had inspected, was only 14l. per annum, which was 6s. less than J. claimed to pay as lodger. The revising barrister adjourned the hearing of the objection to J.'s claim, and sent him the following notice: ". . . your claim to vote as a lodger has been objected to . . . your claim will or may be disallowed unless you produce or cause to be produced to me . . ."

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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your rent-book or other sufficient evidence that your said lodgings are of the clear yearly value of 10*l.* if let unfurnished." J. did not attend or make any communication, and his claim was disallowed.

Held, that, as the revising barrister did not make the allowance of the claim dependent upon J.'s personal attendance, the court could not interfere, as there was evidence to support his decision.

A revising barrister cannot make the personal attendance of a claimant a condition of the allowance of his vote.

The right of a revising barrister to disallow a claim, when a claimant has by his declaration given prima facie evidence of his qualification, is not confined to the case of such prima facie proof of the ground of objection as is described in sect. 28 (10) of the Parliamentary and Municipal Registration Act 1878, but he may act on other evidence.

REGISTRATION APPEAL.

The report of the revising barrister for the borough of Hackney to the court was as follows:

1. The claim of William Jenkins, of 8, Ada-street, Hackney, to vote as an old lodger was duly objected to, on the ground that his lodgings were not of the clear yearly value of 10*l.* or upwards, if let unfurnished. I disallowed the said claim, because the claimant failed to satisfy me that his said lodgings were of such yearly value. I was therefore asked to state a case by way of appeal on the ground that I had no power to disallow the said claim, but I declined to do so.

2. The claim of the said William Jenkins stands by itself, and is not, as suggested in the affidavit dated the 15th Oct. 1903 of Mr. Southerton, a test case, and, if I was wrong in disallowing the said claim, no other claim will be affected.

3. I do not propose to notice in detail the statements contained in the affidavit of the said Mr. Southerton and of the said William Jenkins, but I am unable to accept as accurate the statement contained in par. 2 of the affidavit of the former. I therefore think it right to state as briefly as possible the course I adopted, and my reason for it.

4. Towards the end of the revision of the lists for South Hackney in the year 1902, the town clerk (who performs the duties of the overseers for the purpose of registration) drew my attention to the excessive expense that, as he alleged, was being cast upon the rates owing to the party agents combining to place upon the register all lodger claimants, whether they possessed the necessary qualification in point of value or not. He alleged that I was admitting the claims of thousands of persons who had no qualification. As a matter of fact, no objections on the ground of want of value were made by either agent.

5. On my inquiring into the matter, it was admitted by the party agents that an agreement existed between them to refrain from objecting on the ground of want of value, and to place all lodger claimants on the register, whether they possessed the necessary qualification in value or not.

6. I publicly expressed my disapproval of this practice, and stated that, if reappointed for the present year, I should insist on proof of value. Thereupon the Liberal agent—the deponent Mr. Southerton—stated that, if I did so, I should disfranchise thousands of voters. I regarded this statement as an admission that the town clerk's allegations are substantially correct.

7. I was appointed revising barrister for the current year in the month of July last. Shortly afterwards I directed the town clerk to note in my lists against the name of every lodger claimant the rateable value of the house in which he occupied lodgings, and to supply the

same information to the party agents. This was accordingly done.

8. On or about the 6th Aug. 1903 I received from the town clerk a letter asking me to fix some limit of rateable value below which I would refuse to allow a lodger claim. I declined to lay down any hard-and-fast rule based on rateable value, but wrote the letter a copy of which is contained in the exhibit to the affidavit of the said Mr. Southerton. I subsequently satisfied myself, on referring to the authorities, that I was not at liberty to treat rateable value as conclusive in any case.

9. On the 10th Sept. 1903 I opened the registration court for the borough of Hackney. The lists for South Hackney were not reached until the 15th Sept.

10. On or about the 14th Sept. I made a personal inspection of the larger part of the south division, accompanied by the borough registration officer, who had known the constituency for twenty years and had until lately been the Liberal agent for it. The result of my inspection was that I was satisfied that the character of the constituency was very poor and the houses very small, many streets consisting entirely of houses that were little better than hovels, and that consequently the question whether or not any particular lodgings were worth 10*l.* a year unfurnished was extremely doubtful.

11. On beginning to revise the lists for South Hackney on the 15th Sept., I found that the number of new lodger claims was 1014 less than last year, owing mainly to the Conservative agent having fallen in with the views I then expressed. He had also objected to several hundreds of the Liberal claims on the ground of want of value. No objections on this ground were made by the Liberal agent.

12. On the same day the claim of William Jenkins was one of the first three objected to. The Conservative agent stated that there was insufficient value. I had not personally visited Ada-street, and therefore asked the registration officer to state what the character of that street was. He said, "It is as poor a street as any you have seen, sir."

13. It was proved to my satisfaction that the rateable value of the whole house in which William Jenkins occupied lodgings is 14*l.* per annum, or 6*s.* less than the rent which in his claim he stated he paid. I then followed my usual practice in the case of disputed lodger claims, which is as follows:

14. I treat the declaration annexed to the claim (but not the claim itself) as *prima facie* evidence, and, unless there is evidence in support of the objection, I allow the claim. If, however, the objector is able to raise a reasonable doubt, I hold that the *prima facie* evidence in favour of the qualification is displaced, and that the claimant must attend and prove his claim. I have the less difficulty in treating the *prima facie* evidence as rebutted in South Hackney than elsewhere, because it is apparent on the face of the claims, and was expressly admitted by both political agents during this revision, that, in the case of old and new lodgers alike, the agents fill in all particulars, including the amount of rent, in the form of claim and declaration before it is sent to the claimant for signature. The result is that the evidence afforded by the declaration is, in my opinion, highly unsatisfactory in the majority of cases.

15. The Liberal agent, though he had made no objections on the ground of value as already stated, called my attention to certain new lodger claims put forward by the Conservative agent, which he alleged to be bad for want of value, basing his contention on the rateable value of the respective houses.

16. I ordered all the objections on the ground of value and all the claims so questioned by Mr. Southerton to stand over till the evening sitting of my court on the 18th Sept. The first part of the schedule hereto contains a statement respecting lodger claimants during the present year in South Hackney, considered in relation to the rateable value of the houses in which they respectively live. Such statement was prepared

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for my information by the town clerk, and was had in evidence before me.

17. On the said 15th Sept., being of opinion that there were grave doubts as to value in the case of all the claims and objections referred to in pars. 15 and 16 of this report, I gave to each claimant a notice in writing, a copy of which forms the exhibit "W. J. 3" to the affidavit of the said William Jenkins. I stated in court that if such claimants respectively satisfied me that they paid rent amounting to 10l. per annum, or that their lodgings were of the necessary value, I should allow their claims, but not otherwise.

18. At the evening sitting held on the 18th Sept. some sixty claimants attended, and by production of their rent-books or other sufficient evidence satisfied me that they actually paid the rent stated in their claims, or, at any rate, rent amounting to 10l. per annum or upwards. A few other claimants who were unable to attend wrote letters to the same effect, which I accepted as evidence. I allowed the claims of all the above. William Jenkins and some hundreds of other claimants neither attended nor wrote, nor was any explanation of their absence given. I disallowed their claims on the ground that they had respectively failed to satisfy me that they had occupied lodgings of the necessary value.

19. The deponent Mr. Southerton thereupon requested me to state a case by way of appeal in the case of William Jenkins alone, and handed me a written notice of appeal which is contained in the second part of the schedule hereto.

20. Having regard to the provisions of sects. 42 and 65 of the Parliamentary Registration Act 1843, and to the remarks of the Court of Appeal in Ireland in a recent case (*Hambridge v. Campbell*, Lawson, 1893, p. 348), I thought I ought not to state a case.

21. Moreover, I was of opinion that by stating a case I should be throwing doubt upon the existence of the power of the revising barrister to require the personal attendance of the claimant in a case where the *prima facie* evidence of the claimant is displaced, and where there is, in addition, reason to suspect, as I suspected, the prevalence of a wholesale manufacture of unequalled votes. The overseers do not exercise the same supervision in the case of lodger claimants as they exercise in the case of other claimants, and, indeed, have been advised by counsel that they have no power to incur any expenses in investigating lodger claims. Practically the only check upon such a manufacture as I have indicated is the power already referred to of the revising barrister, and I was unwilling to disparage it. I therefore declined to state a case unless directed to do so by this honourable court.

22. I may add that on the evidence now before this court I should have had no hesitation in allowing the claim of the said William Jenkins. It is to be observed, however, that no explanation is given why such evidence was not brought before me.

SCHEDULE.

PART I.

Number of houses in which there is one lodger for each rateable value.

Rateable value £14 and under	317
Rateable value £15	83
Rateable value £16 to £19	554
Rateable value £20	421

Houses.	Lodgers.	Rateable value.
53 in which there are	2	£9-£20
35	2	£21-£25
29	2	£26-£30
1	3	£12
1	3	£13
1	3	£20
3	3	£23

PART II.

Addendum to Report.

14A. In case the court should see fit to review my practice, as stated in par. 14 of the foregoing report, I desire to amplify the said paragraph. The question is generally raised by the objector tendering hearsay evidence in support of his objection. For example, the objector says: "The claimant does not occupy solely, but jointly with his brother. I have seen his brother, who says so"; or, again, "He does not pay 4s. a week, but only 3s. His landlord told me so." In all such cases I hold that the recent case of *Dalglish v. Dodds* (1894, 22 R. 198) precludes me from disallowing the claim on hearsay evidence, but I think I am justified in saying that the claimant must attend and prove his claim. I therefore adjourned the matter to the evening sitting, giving the claimant notice as in the case under appeal, or summoning him to attend pursuant to sect. 36 of the Registration Act 1878, in most cases issuing a notice rather than a summons as being less oppressive. Sect. 23, sub-sects. 10 and 11, of the same Act seems to render the giving of the notice unnecessary, but I consider it fairer to give it.

By the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 23:

(10) If the objector so appears, the revising barrister shall require him, unless he is an overseer, to prove that he gave the notice or notices of objection required by law to be given by him and to give *prima facie* proof of the ground of objection, and for that purpose may himself examine and allow the objector to examine the overseers or any other person on oath touching the alleged grounds of objection, and, unless such proof is given to his satisfaction, shall, subject as herein and otherwise by law provided, retain the name of the person objected to. An objection made under this Act by overseers shall be deemed to cast upon the person objected to the burden of proving his right to be on the list. The *prima facie* proof shall be deemed to be given by the objector if it is shown to the satisfaction of the revising barrister, by evidence, repute, or otherwise, that there is reasonable ground for believing that the objection is well founded, and that by reason of the person objected to not being present for examination, or for some other reason, the objector is prevented from discovering or proving the truth respecting the entry objected to.

(11) If such proof is given by the objector as herein prescribed, or if the objection is by overseers, then unless the person objected to appears by himself, or by some person on his behalf, and proves that he was entitled on the last day of July then next preceding to have his name inserted in the list in respect of the qualification described in such list, the revising barrister shall expunge the name of the person objected to.

Robson, K.C. and *E. Lewis Thomas* for the appellant.

Sutton for the respondent.

Dec. 21.—KENNEDY, J. read the following written judgment of the court:—The material facts appearing in the special case are these: The claimant duly sent in his declaration annexed to his statement of claim. This was under the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 23, *prima facie* evidence of his qualification. The claimant was objected to on the ground that the lodgings were of insufficient value. The South Hackney list came on for revision in the Registration Court on the 15th Sept. Before that date the revising barrister had made a personal inspection of the larger part of South Hackney with the borough registration officer, who had known the constituency for twenty years. He satisfied himself,

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he states, that the character of the constituency was very poor, and the houses very small, many streets consisting entirely of houses which were little better than hovels, and that consequently the question whether or not any particular lodgings were worth 10*l.* a year unfurnished was an extremely doubtful one. Upon the claim of Jenkins being opposed by the Conservative agent, the registration officer, in answer to a question of the revising barrister, stated that Ada-street was as poor a street as any which the revising barrister had inspected, and it was proved to the satisfaction of the revising barrister that the rateable value of the whole house in which Jenkins lodged was only 14*l.* per annum; that is, 6*s.* less than the amount of the rent which Jenkins in his claim stated to have been paid by him for the lodgings on which his title to be a voter depended. The town clerk, at the request of the revising barrister, had prepared a statement in regard to lodger claimants considered in relation to the rateable value of the houses in which they lodged, and this was also put in evidence. The statement appears in the schedule to the case. The relevant point in it appears to be that no less than 317 lodger claims were like that of Jenkins in respect of lodgings in houses of a rateable value less than 14*l.* per annum, and that in the case of fifty-three claims there were instances of two lodgers claiming in respect of a house whose rateable value ranged from 9*l.* to 20*l.* The revising barrister knew, from the statement of the party agents in the previous year, that they had by agreement then abstained from opposition to lodger claims. In the present year objection was made by the Conservative agent in numerous cases on the ground of insufficiency of value, and to the claim of Jenkins amongst others. The revising barrister ordered all these cases of objection to stand over until the evening sitting of the 18th Sept., stating in court that if the claimants respectively satisfied him that they paid rent amounting to 10*l.* per annum, or that their respective lodgings were of the prescribed value, he would allow the claims, but that otherwise he would not allow them. He also gave to each claimant a notice in writing, which, in the case of Jenkins, ran thus: "To Mr. William Jenkins, of 8, Ada-street, N.E. Take notice that your claim to vote as a lodger has been objected to on the ground that your lodgings are not of the clear yearly value of 10*l.*, if let unfurnished. Your claim will, or may, be disallowed unless you produce, or cause to be produced, to me, at the evening sitting of my court, commencing at 6.30 p.m., on Friday, the 18th Sept. 1903, your rent-book, or other sufficient evidence that your said lodgings are of the clear yearly value of 10*l.* or upwards, if let unfurnished." On the 18th Sept., according to the case, Jenkins did not attend. He sent no letter or other communication. No explanation of this absence was given. The revising barrister disallowed the claim. These being the facts, the appellant contends that the decision was wrong in a point of law necessary to the decision of the case according to the Registration Act of 1843, s. 42. The same statute provides that there could be no appeal on a question of fact only, or upon the admissibility or effect of any evidence or admission adduced or made in any case to establish any matter of fact only. The points of law put forward by the appellant are two. He

says, first, that the revising barrister improperly made the personal appearance of the claimant a condition of his allowance of the claim; secondly, that the claimant having by his declaration given that which by the express terms of the Parliamentary and Municipal Registration Act 1878, s. 23, was *prima facie* evidence of his qualification, and the objector not having given, it is contended, that which is deemed to be *prima facie* proof of objection under sect. 28, sub-sect. 10, of the same statute, the revising barrister was not in point of law entitled to require of the claimant what he did require by his oral notice given in court on the 15th Sept., and by the notice of the same date sent to the claimant in writing, and upon the claimant's failure to comply with these requirements to disallow the claim. As to the first point, we are clearly of opinion that if a revising barrister in such a case as the present made the personal attendance of a claimant a condition of the allowance of his vote, he would be doing that which the law does not authorise. No statutory sanction for such a requirement was cited to us, and we are aware of none. The only way in which the claimant's personal attendance can be compelled is under the provisions of sect. 38, which empowers the revising barrister by summons under his hand to require any person to attend and give evidence or produce documents. Sect. 28, sub-sect. 11, to which we shall refer presently, makes sufficient the appearance of the claimant "by himself or by some person on his behalf." In commenting upon this enactment, Mr. Rogers, in the 16th edition of his work, at p. 322, speaks of the words as dispensing with the necessity of personal attendance of the person objected to, if he is represented by some one in court. "But, of course," he adds, "the absence of a person objected to will in some cases weigh with the revising barrister in deciding as to the facts of the case." If in this case the revising barrister could be shown to have made the allowance of the claimant's vote dependent upon his compliance with a requirement of personal attendance, and had disallowed the claim because the claimant did not personally appear, we should be of opinion that his decision could not be supported. But, as we understand the facts, although the revising barrister seems by the statements of pars. 14 and 21 of the special case to have entertained a mistaken opinion on this point of the personal appearance in court, it appears to us to be the fair interpretation of the special case and of the exhibit "W. J. 3," which we have already cited, that he did not disallow this vote or intimate either by his statement in court or by the written notice that he would disallow it on the ground of the failure of the claimant to appear personally on the 18th Sept. He gave notice that he should require certain evidence to support the claim; but neither orally nor by notice did he insist upon the personal attendance of the claimant; in fact, as the case tells us, in some cases where claimants were unable to attend, he accepted as sufficient evidence letters written by them to him stating that they had paid rent sufficient to satisfy the statutory standard of qualification. We desire to express our view that the statute does not make personal attendance absolutely necessary; such a requirement might entail serious hardship in the case of these lodger claimants who, to a very large extent, form part of a very

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poor class which could ill afford to bear the loss of time involved in personal attendance at the proceedings of the revising barrister's court. We now pass to the second point made by the appellant, that the provisions of sect. 28, sub-sect. 10, have not been complied with. In our view this contention rests upon an erroneous conception of the meaning and intent of this enactment. It is not intended by the Legislature, in our view, absolutely to confine the right of the revising barrister to disallow a claim when the claimant has, by his declaration, given *prima facie* evidence of his qualification to the case of such *prima facie* proof of the ground of objection as is there described. Sect. 28, sub-sect. 10, deals only with one special method of establishing a *prima facie* case against the claim, and then in sub-sect. 11 goes on to say that in case of such *prima facie* proof of objection being given, the revising barrister shall (not may) expunge the name of the person objected to unless the person objected to appears by himself, or by some person on his behalf, and proves his title to inclusion in the list of voters. The section does not prevent the revising barrister from considering, and, if he thinks it just, giving effect to a decision adverse to the claim to any proper evidence against the claim. If, to take a single example, the objector, in order to meet the *prima facie* evidence afforded by the claimant's declaration, at once called the landlord or produced the lodger's rent-book, and by this evidence proved that the rent paid was much below the statutory standard, the revising barrister would, in our view, clearly be entitled in point of law to say that if the matter stood there he had evidence which entitled him to reject the claim. As to the weight of such evidence, and the proper effect to be given to it, he is the constituted judge, and no appeal lies from his decision. Sect. 28, sub-ss. 10 and 11, merely enacts in substance that if the objector's *prima facie* proof of the ground of objection is made out in a particular way, then, unless it is rebutted in a particular way, the revising barrister must disallow the claim. If the objector's case does not satisfy sect. 28, sub-s. 10, it still may consist of evidence against the claim which the revising barrister is entitled to weigh, and may give (and ought to give) effect to if he thinks it weight is sufficient to outweigh the *prima facie* evidence of the claimant's declaration, and any other evidence confirmatory of the declaration which the claimant may think proper to adduce. In this case the revising barrister had on one side the declaration, and on the other side the rating of the house with information as to the character of the street in which it was situated. The rating was not necessarily conclusive evidence against the claim; it was evidence only, as the court pointed out, in regard to the valuation roll in *Kellie v. Little*, reported in *Lawson's Registration Cases 1894-1897*, at p. 132; and the revising barrister decided to give the claimant the chance, if he wished to take it, of "producing or causing to be produced" at a later sitting of the court evidence either by his rent-book or otherwise in support of the declaration. Many other claimants in the like position availed themselves of the chance, and succeeded; this claimant did not do so; and the revising barrister, in this state of things, held adversely to the claim. He had to decide what effect he ought to give to the evidence *pro* and

con; and even if the court could, upon the same evidence, have decided otherwise, it has no power to overrule his decision.

Appeal dismissed.

Solicitors: *Russell Cooke and Co.*; *The Solicitor to the Treasury.*

Dec. 17 and 21, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

RAVEN AND ANOTHER (apps.) v. SOUTHAMPTON JUSTICES (resps.). (a)

Licensing—Objection to licence—Not required—Evidence.

On an appeal to quarter sessions against the refusal of licensing justices to grant the renewal of a licence on the ground that the licence was not required in the locality or neighbourhood, evidence was given by a surveyor, who produced an Ordnance Survey map, that within a certain radius of the licensed house objected to there were a large number of licensed houses and beerhouses, that for ten years the house in question had been licensed, and the neighbourhood, which was thickly populated, had not altered except that the population had increased. It was also proved that the neighbourhood was troublesome to the police.

The objection to the licence had been served by the direction of the licensing justices.

Held (dissentiente Kennedy, J.), that there was no evidence justifying the quarter sessions in refusing to grant the renewal of the licence.

CASE stated by quarter sessions on an appeal against a refusal by the respondents to renew the licence of certain licensed premises called the George and Henry.

The only ground of objection in the notice, given and served by the direction of the respondents, was "that the licence is not required in the locality and neighbourhood."

It was proved by the assistant borough surveyor, W. H. Killick, who produced an Ordnance Survey map marked in colour, that, taking the George and Henry as the centre of a circle of 100 yards radius, there were within the circle two fully licensed houses and seventeen beerhouses; with the same centre and 200 yards as radius there were within this limit twelve fully licensed houses and thirty-seven beerhouses; with the same centre and 300 yards as radius there were within this limit twenty-five fully licensed houses and forty-seven beerhouses.

No notice of objection had been served upon any of the houses or beerhouses prior or subsequent to the annual licensing meeting.

For at least ten years the locality and neighbourhood was very thickly populated, and during the whole of that time the George and Henry had been a fully licensed house and the character of the locality and neighbourhood had not altered except that the population had increased.

In addition, it was stated by a detective in the borough police that the neighbourhood was a troublesome one to the police, and he corroborated the last witness.

No further evidence was adduced by the respondents.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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It was contended on behalf of the appellants that, although the map and facts so proved might be some evidence that there were too many licensed houses in the locality and neighbourhood, yet there was nothing to indicate that the George and Henry was a licence that was not required; and that there was no evidence to support a finding that the licence then held by the appellant George Raven for the sale of excisable and intoxicating liquor at the George and Henry was not required in the locality and neighbourhood.

It was contended on behalf of the respondents that the map and facts so proved as aforesaid were evidence upon which the quarter sessions could find and were evidence to support a finding that the licence was not required, and, although such evidence did not differentiate the George and Henry from the other licensed houses in the neighbourhood, yet, if it was necessary to so differentiate, weight should be given to the fact that the notice of objection had been served by direction of the respondents, who had local knowledge and could therefore and had in fact differentiated between the licensed houses.

The quarter sessions upheld the contention of the respondents and found that the George and Henry licensed house was not required for the wants of the neighbourhood, and accordingly dismissed the appeal.

Avory, K.C. (Temple Cooke and S. H. Emanuel with him) for the appellants.—There was no evidence here which justified the justices in refusing the licence. The notice was given here under sect. 42 of the Licensing Act 1872 (35 & 36 Vict. c. 94), the same section under which notice was given in *Rez v. Farnham Justices*; *Ex parte Smith* (86 L. T. Rep. 839; *sub nom. Rez v. Howard*, (1902) 2 K. B. 363), but there the notices of objection had been served on all the licence-holders in the district. Mere evidence that there are numerous houses in a particular area is no evidence that a particular house is not required. [KENNEDY, J.—Have the justices the same power when a renewal of a licence is asked for as when a first application for a new licence is made? No. There is a large distinction between the two matters. On an application for a new licence the justices may say that there are enough licensed houses already, but no objection can be taken to a renewal unless a notice has been given and the provisions of sect. 42 of the Licensing Act 1872 complied with. He referred to

Sharpe v. Wakefield, 64 L. T. Rep. 180; (1891) A. C. 173.

A licence must be renewed unless there is some cause for refusing it. He referred to

Licensing Act 1872 (35 & 36 Vict. c. 94), s. 42;
Licensing Act 1874 (37 & 38 Vict. c. 49), s. 26.

Lord Hannen in *Sharpe v. Wakefield* (*sup.*) said: "The object of the 26th section of the Act of 1874 appears to be to enforce this duty" [i.e., to consider each individual case on its own special merits] "and to require the justices to particularise the special ground on which they consider the personal attendance of the applicant necessary. The word 'personal' is fully satisfied by construing it as meaning 'for a cause in which the applicant is personally interested and not merely interested as one of the general body of licensed persons.'" The question of the number of houses in a particular area is one in which the general body of

licensed persons is interested. It was recognised in *Evans v. Conway Justices* (82 L. T. Rep. 704; (1900) 2 Q. B. 224) that the quarter sessions must have evidence before them on behalf of the respondents justifying their refusal to renew. That evidence must be given by the respondents, and the quarter sessions cannot act on the fact that the local justices have refused the application to renew. Smith, L.J. in this case says: "And it has been held by Hannen and Quain, J.J. that the requirements of this section [sect. 42 of the Licensing Act 1872] apply equally to the Court of Quarter Sessions when a publican appeals thereto against the refusal of the licensing justices to renew his licence as to a licensing meeting: (*Ruddick v. Justices of Liverpool*, 42 J. P. 406)." The authority of *Evans v. Conway Justices* (*sup.*) was recognised in *Rez v. Farnham Justices* (*sup.*).

C. Tyrell Giles (Bassett with him) for the respondents.—In a case of this kind the justices may use their local knowledge. There is no evidence that the matter was not thoroughly gone into by the quarter sessions, but, on the contrary, the evidence is all the other way. There was the map, the police evidence, and the local knowledge of the justices, and there is abundant evidence to support the findings.

Avory, K.C. in reply.

Dec. 21.—KENNEDY, J.—In this case I have been asked to deliver my own judgment first, as I have the great misfortune to differ from my Lord and my brother Lawrance as to the result of the application. I need not say that, in delivering this judgment with the consciousness that I have the misfortune not to have their concurrence, I feel the greatest possible doubt as to the correctness of my own view; but I feel that, having formed an opinion, I ought all the more to give fully my reasons for the view which I take. In this case the Court of Quarter Sessions have affirmed the refusal of the respondents to grant the renewal of the licence to the George and Henry public-house, in Orchard-lane, Southampton. George Raven is the tenant. Crawley and Co. are the owners of this house. The ground of objection was that the licence was not required in the locality and neighbourhood. On the hearing of the appeal the respondents, according to the proper and universal practice on the hearing of such an appeal, began. They called William Henry Killick, the assistant borough surveyor, and John Neish, a detective in the borough police. Killick proved that, if the George and Henry were taken as the centre of a circle of 100 yards radius, there were within that circle two fully licensed houses and seventeen beerhouses; and if the circle were enlarged so as to have a radius of 300 yards, there would be included within it no less than twenty-five fully licensed houses and forty-seven beerhouses. The same witness stated no notice of objection had been served in regard of any of these other houses; that the neighbourhood was thickly peopled; and that the character of the people had remained the same while its numbers had increased in the course of the last ten years, during the whole of which period the appellant had held a licence. The witness produced an Ordnance map to illustrate his figures and distances, and to show the site both of the George and Henry and of all the other licensed

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houses within the area to which his evidence related by means of marks and circles drawn upon the map. The witness Neish corroborated Killick, and further testified that the neighbourhood was a troublesome one to the police. The appellants thereupon called their witnesses, but neither their names nor the nature of their evidence appear in the special case. The court, as appears on the face of the order of the Court of Quarter Sessions, after hearing, as their statement shows, the evidence and argument of counsel on both sides, affirmed the decision of the licensing justices, and refused the renewal of the licence subject to the opinion of this court upon the point intended to be raised by the statement of this special case. The point is, in substance, that the quarter sessions had not any evidence before them to support their finding that the licence of the George and Henry was not required in the locality and neighbourhood. If there was such evidence, of course we cannot overrule their decision on the appeal. Now, what was the evidence? As it stood it was evidence, first, of the locality of the George and Henry; it was evidence of that which they were bound to consider, a large superfluous number of licensed houses within the area. The position of those houses was before them. The position of the George and Henry in relation both to those houses and to the neighbourhood was before them. In my judgment it is impossible to say that the state of the locality and neighbourhood, and the other matters to which I referred as appearing in the evidence of Killick and Neish in regard to the throng of inns and beerhouses, and the evidence which I have mentioned as to the position of the George and Henry in regard to all those public-houses and to the neighbourhood, did not afford any evidence which legally entitled the Court of Quarter Sessions, acting, of course, judicially, as they are bound, to act as they did in affirming the decision of the licensing justices, and refusing to renew this licence. As I understand the effect of the judgment of the House of Lords in *Sharpe v. Wakefield* (64 L. T. Rep. 180; (1891) A. C. 173), both justices at the licensing meeting, dealing, of course, with each case as it arises upon its merits and exercising their discretion, but exercising it, as Lord Halsbury, L.C. pointed out, judicially, and also the Court of Quarter Sessions on appeal, exercising also, of course, its discretion judicially and subject to their position, which, as it must be held since the decision of the Court of Appeal in *Evans v. Conway Justices* (82 L. T. Rep. 704; (1900) 2 Q. B. 224), is a court of justice, and upon legal evidence are entitled to refuse to renew a licence if they are of opinion that the public-house to which it relates is not required for the wants of the neighbourhood. To my mind there can be no question that the sworn evidence in the present case, with the justifiable inference to be drawn from the position of the public-house in relation both to the neighbourhood and to the other public-houses, might be held by this tribunal before which that evidence was adduced to establish the necessary point unless—and this is the gist of the appellants' contention—it is not merely relevant but absolutely essential to the proof that it must be further shown by evidence that there are some better grounds for refusing the renewal of the licence to this house objected

to than would be shown to exist in regard to the licence of every other house within the neighbourhood under consideration—for example, objections in respect to convenience of site, or business, or character, or any extent of business done. I think I may say in passing that there was evidence which the justices had before them on the evidence of Killick, supported by the illustration of the map, as to the relative convenience of sites in this case. The argument of the appellants comes to this: Given a locality in which the licensing authority, whether in the first instance or on appeal, is satisfied by proper evidence that there is a needless multitude of licensed houses, the case for the objection to the renewal of some particular licence must be held to fail unless it is established by affirmative evidence that the licence objected to less deserves renewal than the licence of any other of the public-houses which are situate in the same locality. Now, speaking for myself, I know of no authority, either in the licensing statutes or any reported case, which can properly be cited in support of this argument. On the contrary, as I have already said, the law accepts as justification for the refusal to renew a licence the fact that in the opinion of the magistrates exercising a judicial discretion, and exercising it, of course, in regard to the particular case (or the Court of Quarter Sessions acting on legal evidence on the appeal), the renewal of the licence is not required by the locality. It may, I think, properly also be borne in mind in considering the appellants' arguments: Firstly, that to attempt really and satisfactorily to compare upon legal evidence the relative claim to continue of some sixty to seventy licensed houses as against the one house objected to would plainly involve a long, most difficult, and probably in most cases an impracticable inquiry; and, secondly, that direct evidence has been adduced in support of the objection on the ground of the wants of the neighbourhood being over-supplied, as it was done by the respondents in the present case. It would in my humble judgment be more natural and more fair that the burden of counterbalancing the weight of this evidence, by showing the particular house is more useful to the locality and less superfluous than all or even some of the other licensed houses, should lie upon the applicants for the renewal of the licence. In the present case the appellants either did not try or, if they tried, the result shows they did not succeed in proving any of these matters on their own behalf. The learned counsel for the appellants dwelt upon the hardship to the appellant of not renewing a licence without evidence of its uselessness or inconvenience as compared with the other licensed houses in the locality which was under consideration. I agree that unless all the houses are compared on evidence it is possible that what might not unreasonably be deemed a hardship may arise as between the licence of the George and Henry and the licences of all or some of the houses within the area. But no court can be swayed by the possibility of resulting hardship if the law is clear. The amendment of the law is the duty of the Legislature. It may be deemed a hardship that the renewal of a licence may be refused under any circumstances whatever other than for the bad character of the appellant or insufficient character of the premises. The one

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duty of all courts is to administer justly the law as it stands; and in my view it is to be borne in mind, when one ponders the appellant's contention, that the main object in proceeding in such a case as the present consists, not in the adjudication of the merits between a number of public-houses, but in adjudicating as to the propriety of the refusal of a licence to a particular house, in regard, of course, to its merits and to the requirements of the neighbourhood. The thing to be decided is whether or not that public-house, owing to the advantages of its situation or of its accommodation or grade, ought to keep its licence in view of the wants of the area in which there are a number of other public-houses. I do not mean to suggest that in coming to a decision the Court of Quarter Sessions may not rightly give heed to such considerations as, for example, the length of time during which a licence has been yearly renewed, or to evidence, if it is given, of the relative superiority of the particular public-house in respect of situation or otherwise as compared with other public-houses in the same locality. But, in dealing with the appellants' contention here, which is that certain evidence is not merely relevant but indispensable before a renewal can justly be refused, it appears to me to be important rightly and accurately to comprehend the nature of that which is after all the real and essential issue. The only other matter, I think, that calls for notice was a subject for discussion at the hearing before us, and is contained in the special case. The paragraph runs thus: "It was contended on behalf of the respondents that the map and facts there proved as aforesaid were evidence on which we could find, and were evidence to support a finding, that the said licence was not required as aforesaid, and, although such evidence did not differentiate the said George and Henry from the other licensed houses in the neighbourhood, yet, if it were necessary so to differentiate, weight should be given to the fact that the said notice of objection had been served as aforesaid by direction of the respondents, who had local knowledge, and could therefore and had in fact differentiated between the said licensed houses." I may say that, as I read the paragraph, it means this: that the appellants here contended that you must do that which I have endeavoured to express—namely, before dealing with this licence, even though you know where it was, show its position in relation to the neighbourhood, and show its position in relation to all the other public-houses referred to in the very narrow area in which they are all so crowded together; you must give evidence to make the case of renewal less desirable in this case as compared with all these other public-houses. And as I read this evidence (and I dwell upon this because I think that my Lord and my brother Lawrance take a different view), I think myself the fair way of reading this case, as it strikes me, is that the justices held that they had sufficient evidence and did not agree with the contention of the appellants that it was necessary to differentiate in the way that I have described, but that, if it was necessary, they thought that they were entitled to look at and consider the fact, which they described there, of the notice of objection having been served by the direction of the local justices. The judgment of the Court of Appeal

in *Evans v. Conway Justices* (*sup.*), to which I have already referred, by which it was decided that the Court of Quarter Sessions are not entitled to refuse a licence without some evidence to support the objection, decided also in my view inferentially that the tribunal ought to proceed as a court of law with regard to the reception of evidence and the requirements of legal proof. Therefore, although to some extent proceedings before it are not an ordinary litigation, it may perhaps be held to partake of the nature, as my brother Channell in his judgment in the Divisional Court in the same case described it, of an administrative tribunal. I feel considerable doubt whether the Court of Quarter Sessions, in such a case as the present, may at all, or, if at all, to what extent, consider as to the differentiation of the George and Henry from other public-houses in the same locality. If it was necessary to consider this point, the fact that the objection in this case was served by the direction of the justices, who, in the language of the present Master of the Rolls in the case of *Rex v. Howard* (1902) 2 K. B. 363)—it is more commonly referred to as *Rex v. Farnham Justices* (86 L. T. Rep. 839) are persons deliberately appointed because from their circumstances they are likely to have local knowledge, might be taken into consideration, but in the view which I have already expressed that the quarter sessions were entitled to decide, as they did, upon the evidence before them, without any evidence to differentiate between the George and Henry and all the other public-houses, it is not necessary to decide this point. There was evidence before the justices which entitled them, in my view, to come to their decision, and we cannot, if there was such evidence, overrule it even if they did have other evidence which they ought to have regarded. I will therefore only say that I am inclined to think that while the origin of the objection to the renewal of the licences could not be treated as itself affording some evidence that the George and Henry was as between itself and the other public-houses—if they could be dealt with together—the one that could best be dispensed with in reference to the wants of the neighbourhood, it does not necessarily follow that the court would be entitled, when considering the worth of a point made by the appellants as to the absence of evidence of comparative merit of the public-houses, wholly to shut out from their consideration that their objection to this renewal did not come from a private or irresponsible objector.

LAWRANCE, J.—Having arrived at a conclusion contrary to that of my brother Kennedy, I will state very shortly and very broadly the grounds which lead up to that conclusion. I think that the magistrates had not before them any evidence which justified them in acting as they did in this case—that is to say, to come to a final determination in this case—for it seems to me impossible to read the case without seeing that the evidence of Neish, the detective, and the other witness who was called—Killick, the surveyor—added nothing whatever to the facts that were already known to the justices with regard to the number of public-houses in the locality. That is to say, they only came, one might say, almost to prove the map and nothing else. The map shows that there was an enormous quantity of public-houses in

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this district, two within 100 yards of this house fully licensed, and twelve within 200 yards; and it seems to me upon that the magistrates acted without the slightest evidence, none of the evidence given by either of the witnesses called before them having any direct bearing as to the George and Henry public-house licence. Now, it seems to me that what the magistrates are bound to do is to act judicially in the matter. I cannot see how it can be said that the justices acted judicially if they have merely taken, as they did in this case, a *prima facie* case. No doubt a man acting as a justice who had the management of the public-houses to see there were not too many, and so forth, taking up that map would be justified in saying there are too many public-houses here. Then comes the question, What is the proper way of dealing with it? Not merely taking the map, like a potentate taking a map of Europe and rectifying the map by saying: "I will take this away and I will take that away," and taking away this public-house. They begin with this public-house, against which, as far as I know, not a word was to be said. If there had been, there would have been evidence forthcoming from the two witnesses who were called. But they took that public-house alone and, without any more evidence than the fact that there are two more public-houses close to it and twelve within a very short distance of it, they deprived it of its licence. Now, the question is: Is that acting judicially? It is impossible, of course, to lay down any rule as to what may be done, but it certainly does appear to me that the case of *Rex v. Howard (sup.)*—the *Farnham* case—does show what might be done and what, I should have thought, in the interests of justice ought to be done in cases of this kind. What the magistrates did there was this: They formed a committee of their own members, who did inquire into all the respective merits of the different public-houses in the district. They made a report to the justices and the justices acted on that, and they were held by the court to have acted rightly in doing so. The words of the Master of the Rolls seem to me most important in that view: "They were of opinion that the only fair and satisfactory way of dealing with the question was to cause objections to be served on all the owners of licensed houses so that the case of each of them might be formally inquired into, and for this purpose authority was given to the justices' clerk to object to such renewals on the general ground that the houses were not required, and also on special grounds set out in the notice." That gave everybody their opportunity. It gave the magistrates the opportunity of weighing the merits—in other words, of acting judicially in the matter, seeing which of the public-houses could remain and from which licences should be taken. That is one step that might be taken, and it seems to me a reasonable and proper step to be taken, in cases of that kind. Nothing of that kind was done here. All that was done was to act upon the map, taking the map alone—acting upon the fact that there were an enormous quantity of public-houses in the neighbourhood and it was necessary to begin with one of them, and as to that one not any evidence was given. That being so, I think that they did not act judicially in the matter; that they did not hear this case of the public-house on the

merits at all, but only the mere fact that it formed one of a large number of public-houses. For that reason I come to the conclusion that the appeal should be allowed. I should be very sorry to say one word to tie the hands of justices who are interested in the good work of putting an end to public-houses in overcrowded districts. That is a different matter. I think they must have before them some evidence on which they could act, and it is fair to the owners of the public-houses that they should have some.

Lord ALVERSTONE, C.J.—I agree with the judgment of my brother Lawrance with one slight exception with regard to the *Farnham* case, which I will point out; but, as the matter is of very great importance, in view of what is now been said with regard to licences, I think it better to state my reasons. I do not demur in substance from the view of the law which my brother Kennedy has so clearly expressed. Where we part company is in the application of that law in this particular case, and I think it well to state one or two preliminary matters that I assume for the purpose of this judgment. I recognise the justices may of their own motion give notices that licences will be objected to on the ground that a particular licence is not required for this locality. That was a matter which was very much discussed both in the Court of Appeal in the *Farnham* case and when that case was before us previously, and we held, and the Court of Appeal affirmed the view, that that course might be taken. But it must, of course, be remembered in this particular case the justices, and the justices only, are respondents to this appeal. I further desire to point out that it by no means follows that it is necessary to differentiate between different houses because the justices are going to refuse, or think they ought to refuse, a particular licence on the ground that the licence is not required. There may be circumstances in connection with the character of the house, with its position, its accommodation, or its credit, that would justify the magistrates in thinking that that house, having regard to all its circumstances, is not required in the neighbourhood, and they may act accordingly. We have got to consider whether or not the Court of Quarter Sessions in this case acted as a court upon the evidence that they could lawfully receive, having regard to the objection that was raised by the justices, that objection being in the terms that my brother Kennedy has stated—"that the licence is not required in the locality or neighbourhood." At the risk of a little length (I hope to be absolutely fair to these justices), I wish to read exactly what they have found, and I must say, in the first instance, I presume the justices of the quarter sessions have stated the whole case. If they have not done so, I may be doing injustice to them, but that is their own fault, because they have stated the case on which our opinion is asked, and I must assume that they have given us all the evidence on which they acted. Mr. Giles suggested there was other evidence. All I can say is they ought not to have stated a case for us and asked our opinion unless that case was stated on the whole of the evidence, and that is why I wish to read the paragraph. "Upon the said hearing the following evidence was adduced before us by the respondents. William Henry Killick, the assistant surveyor of the county borough aforesaid, produced an Ordinance

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Survey map (which is annexed to and is intended to form part of this case) of the locality and neighbourhood of the said George and Henry, upon which map he had marked in colour all the fully licensed houses and beerhouses, and proved that, taking the said George and Henry as the centre of a circle of 100 yards radius, there are within the said circle two fully licensed houses and seventeen beerhouses; with the same centre and 200 yards radius there are within this limit twelve fully licensed houses and thirty-seven beerhouses; with the same centre and 300 yards as radius there are within this limit twenty-five fully licensed and forty-seven beerhouses; and that no notice of objection had been served upon any of the said houses or beerhouses prior or subsequent to the annual licensing meeting; that for at least ten years he had known the said locality and neighbourhood, which was very thickly populated, and during the whole of that time the George and Henry had been a fully licensed house, and that the character of the said locality and neighbourhood had not altered, except that the population had increased. John Neish, a detective in the said county borough police, corroborated the evidence given by the said William Henry Killick, and, in addition, stated that the neighbourhood was a troublesome one to the police, and no further evidence was adduced by the respondents." Now, I take it as the basis of my judgment that it was on that evidence, and that evidence only, the court affirmed the decision of the justices not to renew this licence. Now, having read it, I do not think it is unfair to say, as my brother Lawrance has said, that all that that evidence amounted to was the map, and nothing else. It showed no particulars of the particular house, and it did not even show the surrounding circumstances of the locality of the particular house, its accommodation, or anything to do with it. It was nothing but the map. I think that it is not unimportant to point out that if you look at the map, and speak of it as a map, it at any rate discloses this: that immediately opposite the public-house in the same street, practically opposite—in the same relative position with regard to the house—was another fully licensed house. I mention that, not for the purpose of showing, as I have indicated, it was necessary for the justices to differentiate, but to point out that if they acted upon the map and the map only, as I think they did, it is not very easy to see how, in the absence of evidence about the appellants' house, they could avoid differentiating. I wish to enforce what has been laid down by the Master of the Rolls in the case of *Rez v. Howard* (sup.). I accept it as binding on me as indicating what is the fair thing to be done. In that case, which was a more difficult one than this, there were a great many houses involved, and the Master of the Rolls says this: "It is clear from their report that they"—that is, the justices—"were of opinion that the only fair and satisfactory way of dealing with the question was to cause objections to be served on all the owners of licensed houses so that the case of each of them might be formally inquired into, and for this purpose authority was given to the justices' clerk to object to such renewals on the general ground that the houses were not required, and also on special grounds set out in the notice. These objections were signed

by the clerk, stating that he was acting under the instructions of the justices present at the annual licensing meeting." All I point out is that, in a case much more complicated, the Master of the Rolls at any rate indorses the opinion that the only fair method would be that of having notices served on all the licensed houses. I mention that only for the purpose of showing that, in the absence of circumstances relating to any particular houses, differentiation may be (or comparison rather is the more proper word to use) the only means of fairly dealing with such a question; but I wish again to point out that I do not consider any comparison or differentiation is necessary where there is evidence as to the character of the house in respect of which the licence is refused. Then comes in the one matter which I desire to correct in order that my brother Lawrance's judgment may not create a false impression. In the *Farnham* case the justices did not act on the report. If they had done so, the judgment would not have been quite what it was. The report had collected facts for the information of the justices, and, that report being used to inform their minds, then they dealt with each case judicially. Now, that being so, I come to the conclusion—and this is where my brother Kennedy and I differ—that this Court of Quarter Sessions had no evidence before them except the map, and, if they did not rely upon the differentiation as contended for by the respondents, then they had no evidence on which they could act. I think it is a very serious thing to lay down a rule that justices at quarter sessions may act on evidence which is not evidence in the literal sense of the word. They must act on evidence, discharging such duties as justices in the quarter sessions in these cases have to discharge. I therefore come to the conclusion that there was before these justices no evidence on which they could properly come to the conclusion that this house was not required for that neighbourhood, and that the appeal ought to be allowed.

Appeal allowed.

Solicitors: *Speechly, Mumford, and Craig*, for *Lampport, Bassitt, and Hiscock*, Southampton; *Barlow and Barlow*, for *Bassett*, Southampton.

House of Lords.

Feb. 12 and 15.

(Before the LORD CHANCELLOR (Halsbury),
Lords MACNAGHTEN, SHAND, and LINDLEY.)

MAYOR AND CORPORATION OF EASTBOURNE v.
ATTORNEY-GENERAL. (a)

ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

*Revenue—Stamp duty—Purchase of property
under statutory power—Duty on conveyance—
Finance Act 1895 (58 & 59 Vict. c. 16), sect. 12.*

*The Finance Act 1895 enacts by sect. 12 that
where by virtue of any Act of Parliament any
person is authorised to purchase property, he
shall, within a certain time, produce to the
Commissioners of Inland Revenue an instru-
ment of conveyance of the property duly stamped*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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with the ad valorem duty payable upon a conveyance on sale of the property.

Held (affirming the judgment of the court below), that the "property" mentioned in the section means the property authorised by the Act to be purchased, both real and personal, and that ad valorem duty is payable in respect of the value of the whole of the property so purchased, and not only in respect of such part of it as consists of realty.

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Stirling and Mathew, L.J.J.), reported 85 L. T. Rep. 745; (1902) 1 K. B. 403, who had affirmed a judgment of the King's Bench Division (Kennedy and Phillimore, J.J.), reported 85 L. T. Rep. 219; (1901) 2 K. B. 773, upon a special case stated by consent in the matter of an information on behalf of the Crown.

The question was whether, upon the purchase by the Eastbourne Corporation of the undertaking of the Eastbourne Electric Light Company Limited, stamp duty was payable under the Finance Act 1895 in respect of the whole purchase money, or only in respect of such part thereof as would in any case require a conveyance in writing. Sect. 12 of the Finance Act 1895 provides as follows:

12. Where, after the passing of this Act, by virtue of any Act, whether passed before or after this Act, either (a) any property is vested by way of sale in any person, or (b) any person is authorised to purchase property, such person shall within three months after the passing of the Act or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's printer of Acts of Parliament or some instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped with the ad valorem duty payable upon a conveyance on sale of the property, and in default of such production the duty, with interest thereon at the rate of 5 per cent. per annum from the passing of the Act, date of vesting, or completion of the purchase, as the case may be, shall be a debt to Her Majesty from such person.

On the 19th April 1899 the appellants and the Eastbourne Electric Light Company Limited (who had become the undertakers supplying electricity under the Eastbourne Electric Supply Order 1890) entered into a contract of purchase and sale of that date, which contained the following clauses, amongst others:

Subject to the provisions hereinafter contained, the company will sell, and the corporation will buy, the whole of the undertaking of the company under the said order, and all the powers, rights, and privileges thereby conferred on the company, together with the full benefit of all pending contracts and engagements to which the company are or may be entitled in connection with the said undertaking, together with the freehold piece of land and the building erected thereon situate in Junction-road, Eastbourne, aforesaid, with all the works, engines, and fixed and movable plant and machinery, wires, cables, pipes, instruments, utensils, tools, and all other the goods, chattels, and effects belonging to the said company, which now are or shall at the time of the completion of the said purchase be used and provided by the company for the purposes of the said undertaking, save and except all depreciation and other reserve funds, cash balances, book and other debts, earnings, rights, and credits belonging or due to the company at the time of such completion, and the company's books and papers

and the furniture of their board-room. The purchase shall be completed and the purchase money paid on the 1st day of January, 1900, on which day, subject to the due payment of the said purchase money, the company will convey to the corporation in fee simple, and free from encumbrances, the freehold works and buildings now belonging to the company, subject to and with the benefit of all tenancies of any part or parts of the said premises which now are or then shall be let to or occupied by any tenant or tenants of the company, and also will assign or deliver over to the corporation all the remainder of the premises hereby agreed to be sold.

The contract was sanctioned by the Eastbourne Electric Supply Order 1899, and the purchase has since been carried out. The appellants admitted that the above enactment required them to produce a conveyance of the property in all the subject-matters of the purchase the property in which could not be transferred without a written conveyance, but contended that it did not apply to goods, wares, and merchandise included in the purchase which could be transferred without writing, by delivery. The total purchase money was 88,749*l.* 2*s.* 9*d.*, of which 37,929*l.* was admitted by the Crown to have been paid in respect of personal chattels. The courts below decided, in favour of the Crown, that the duty was payable on the whole amount.

Danckwerts, K.C. and Ritchie Macoun appeared for the appellants.

The Solicitor-General (Sir E. Carson, K.C.) and Rowlatt, for the respondents, were not called on to address their Lordships.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: We have had a very long and ingenious argument on this question, which seems to me to be a very plain one. I certainly do not mean to go through all the different and ingenious hypotheses which have been put forward in order to show that the plain words of the Act of Parliament may be cut down and reduced to an absurdity. I think, so far as there is any argument at all, that the whole question turns upon the word "conveyance," and, although with some hesitation, and a considerable amount of circumlocution, the learned counsel has addressed to us what I must admit to be a learned and ingenious argument, it simply comes to this: That the statute is intended in its operation to apply only to land, or what would be equivalent to land in its natural sense. But the whole of that argument seems to depend upon the use of the word "conveyance," which he says only means, according to the technical view of the question, a conveyance of land, or realty in some form, whether it be land or not. My answer to that is that it is not true. The word "conveyance" means what it says. It conveys any property. I find that Wharton, in his Law Lexicon, defines it as "an instrument that transfers property from one person to another." That is all; and although it may be perfectly true to say that where you are dealing with personal property it may pass, and does pass, completely by mere delivery, it is a very illogical consequence of that proposition to suggest that it may not pass in any other way, and that you may not convey it by an ordinary conveyance. I think you may. I think that

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really disposes of the whole argument. When I look at the statute itself and see what it does, I am content to apply it to the particular facts with which your Lordships have to deal. It seems to me that it would be impossible to say, having regard to the particular facts with which your Lordships have to deal, that the case is not included in the language of the statute. We have heard a great deal about ambiguity, about confusion, and about alternative constructions; but when I apply the language of the statute to the transaction which is engaging our attention, it appears to me to be as clear as possible that in the ordinary natural meaning of the words therein employed, the statute does apply to this transaction. I decline to go into hypotheses about other cases in which it might be supposed that this language would be too wide, and would include something else. It is enough for me to say that, as applicable to this particular transaction the words seem to me to be absolutely clear, without confusion and without any alternative construction at all, and to apply literally and strictly to the transaction in question. For these reasons I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Lord MACNAGHTEN: My Lords: I am of the same opinion.

Lord SHAND.—My Lords: I also am of the same opinion. It appears to me that the very purpose of the Act of 1895 was to enlarge the subject of taxation, so that personal property bought by sale should be liable to duty just as heritable property was previously liable. The Act, I think, succeeded in its purpose, and I agree in the opinions of their Lordships in the courts below, and with the Lord Chancellor and Lord Macnaghten, that the judgment must be affirmed, and the appeal dismissed.

Lord LINDLEY.—My Lords: I am of the same opinion. I think that the case becomes absolutely clear if you read the section shortly, leaving out the words which are not applicable to the present case. The section runs thus: "Where (after the passing of this Act), by virtue of any Act (whether passed before or after this Act), any person is authorised to purchase property, any such person shall (within three months after the completion of the purchase) produce to the Commissioners of Inland Revenue an instrument of conveyance of the property"—that is, of the property which the purchaser is authorised by an Act of Parliament to purchase, "duly stamped with the *ad valorem* duty payable upon a conveyance on sale of the property." Now, what is that? What is the property of which an instrument of conveyance is to be produced? And what is the property the value of which is to govern the *ad valorem* stamp? It is obviously the property which the purchaser is authorised by an Act of Parliament to purchase. I think it plain beyond all question that this Act was not intended to affect ordinary purchases made in the ordinary course of business. It was confined, and was intended to be confined, to purchases authorised by some special Act of Parliament, expressly authorised, the property, if not accurately defined, being at all events described in such Act of Parliament. That gets rid of the whole difficulty. There is no ambiguity about it at all. Every

word in this section has its natural meaning, and requires no forced construction whatever. The whole fallacy of the argument on behalf of the appellants appears to me to be this: That because personal chattels pass, or can pass, by delivery without any instrument at all, you cannot have an instrument of conveyance for them. That is not the case. In this case the Act of Parliament is addressed to cases where an instrument is required, and, being required, it must be stamped. The little difficulty, if there is any difficulty about it, comes entirely from not seeing that it does not apply to ordinary purchases in the ordinary course of business, but to special purchases, specially authorised.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Sharpe, Parker, Pritchards, Barham, and Lawford*, for H. W. Fovargues, Town Clerk of Eastbourne.

Solicitor for the respondent, Sir F. C. Gore, Solicitor of Inland Revenue.

Feb. 18 and 19.

(Before Lords MACNAGHTEN, JAMES OF HEREFORD, and LINDLEY.)

MACKUSICK v. FLEMING (a).

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Vendor and purchaser—Voidable contract—Assignment of contract—Failure of consideration—Money had and received.

APPEAL from a judgment of the Court of Appeal (Williams, Romer, and Stirling, L.JJ.), reported under the name of *Fleming v. Loe* (87 L. T. Rep. 213; (1902) 2 Ch. 359), who had reversed a decision of Cozens-Hardy, J., reported 85 L. T. Rep. 480; (1901) 2 Ch. 594, where the facts are fully set out.

On the 16th July 1896, Neill agreed to sell to Loe some mining property in Western Australia.

On the 18th July Loe agreed to sell the property to the appellant Mackusick. This contract was afterwards assigned to the respondent Fleming, and he brought an action against Mackusick and Loe for specific performance. Mackusick pleaded that the contract had been obtained by misrepresentation, and was not binding, and counter-claimed for certain payments made by him under it.

The action failed, and Cozens-Hardy, J. held that Mackusick was entitled to recover on the counter-claim.

Fleming appealed, and the Court of Appeal gave judgment in his favour on the ground that, on the facts and correspondence, Loe was the person really liable. Loe was a person of no means and was dead.

Mackusick appealed to the House of Lords.

Upjohn, K.C. and Robertson appeared for the appellant.

Eve, K.C. and Martelli for the respondent.

Their Lordships took the same view as that

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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taken by the Court of Appeal, and dismissed the appeal on the facts.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Last and Sons*.
Solicitors for the respondent, *Swann, Bradley, and Co.*

Judicial Committee of the Privy Council.

Thursday, Feb. 4.

(Present: The Right Hons. Lords MACNAGHTEN, ROBERTSON, and LINDLEY, and Sir ARTHUR WILSON.)

AMYOT v. DWARRIS AND OTHERS. (a)

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE OF JAMAICA.

Will—Construction—Gift “to the eldest son of my sister”—Intestacy.

A testator by his will made in 1822 devised real estate in strict settlement, and, in the event of the failure of the previous limitations, which happened, “to the eldest son of my sister, F. M. G., and his heirs for ever.” The testator died in 1860. At the date of the will F. M. G. had two sons, both of whom died in the lifetime of the testator intestate and without issue. Two other sons, born after the date of the will, survived the testator. One died intestate and without issue before the failure of the previous limitations. The fourth born son of F. M. G. was her eldest surviving son at the time of the failure of the previous limitations.

Held (reversing the judgment of the court below), that there was an intestacy.

APPEAL from a judgment of the Supreme Court of Judicature of Jamaica (in Equity) dated the 1st May 1903 upon a special case agreed by the parties.

The question was as to the proper construction of a devise contained in the will of Sir Fortunatus William Dwarria, deceased, upon the failure or determination of certain limitations therein expressed in favour of the testator's wife and issue, of a plantation and the hereditaments and appurtenances thereto belonging, hereinafter referred to as Golden Grove, situate in the Island of Jamaica.

The facts of the case are as follows:—

Sir F. W. Dwarria duly made his will, dated the 11th Oct. 1822, and thereby gave and devised Golden Grove subject to certain trusts that were declared by the will of the testator's late father, which may for the purposes of this appeal be deemed to have since been satisfied, to certain trustees for the term of 1000 years from the testator's death, upon trusts which may also for the purposes of this appeal be deemed to have since been satisfied, and subject thereto the testator gave and devised Golden Grove to the use of his eldest son, Fortunatus William Dwarria, for his life, with remainder to the use of trustees to support contingent remainders, with remainder to the use of the first and other sons of the said F. W. Dwarria (the son) successively in tail, with remainder to the use of the testator's second son, Brereton Edward

Dwarria, for his life, with remainder to the use of trustees to support contingent remainders, with remainder to the use of the first and other sons of the said B. E. Dwarria successively in tail, with remainder to the use of the testator's third son, Denman Adams Dwarria, for his life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the first and other sons of the said D. A. Dwarria successively in tail, with remainder to the testator's fourth son, Henry Parr Dwarria, for his life, with remainder to the use of trustees to support contingent remainders, with remainder to the use of the first and other sons of the said H. P. Dwarria successively in tail, with remainder to the use of every other son of the testator by his then wife, Alicia Dwarria (who, in fact, predeceased the testator), or any woman with whom he might intermarry, successively in tail, with remainder to the use of the testator's daughters, Alicia Dwarria and Honoria Dwarria, and every other daughter of the testator by his then wife or any other woman with whom he might intermarry, in equal shares as tenants in common in tail with cross remainders between them in tail, with remainder to the use of the testator's said wife, Alicia Dwarria, for her life, and the testator then proceeded to devise Golden Grove as follows: “And immediately from and after the decease of my said wife to the eldest son of my sister Frances McKeand Gibney and his heirs for ever, he and they taking and bearing the surname of Dwarria, and paying the sum of 500*l.* apiece” to each and every of the persons thereafter mentioned their executors and assigns. The will did not contain any devise of the testator's residuary real estate.

The testator died on the 20th May 1860 without having revoked or altered his will, and letters of administration, with the will annexed, were on the 6th Aug. 1860 granted to one of the testator's daughters out of the principal registry of the Court of Probate. The will was entered in the Record Office in Jamaica on the 23rd May 1900.

All the limitations in the will contained of Golden Grove, in favour of the testator's wife and issue, prior to the limitation in favour of the eldest son of the testator's sister, F. M. Gibney, failed or determined, the last survivor of the testator's children being B. E. Dwarria.

The testator's heir-at-law was his eldest son, F. W. Dwarria, who died intestate on the 22nd Jan. 1876.

B. E. Dwarria (who was the heir-at-law of his brother, F. W. Dwarria) died on the 10th May 1901, having by his will, dated the 10th Aug. 1895, appointed the appellant and the Rev. Anthony Johnson (who died on the 6th Sept. 1903) his executors and trustees. The will was proved by the appellant and the Rev. A. Johnson on the 6th Aug. 1901.

The two first born sons of F. M. Gibney were William Gibney and George Gibney, who were twins (William Gibney being the elder), and were born in April 1822. William Gibney and George Gibney were both living at the date of the will of Sir F. W. Dwarria, but both predeceased him without leaving issue.

The third born son of F. M. Gibney was John Wallington Bonner Gibney, who was born in the lifetime of Sir F. W. Dwarria, but after the date of the will. J. W. B. Gibney survived the tes-

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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tator and died on the 25th Oct. 1867, intestate, and without having had any issue. The heir-at-law of J. W. B. Gibney was his father, Dr. Gibney, who died in 1872, having by his last will disposed of his estate in such a manner that his children, the respondents, were the only persons beneficially entitled thereto.

The fourth born son of F. M. Gibney was the respondent Robert Dwaris Dwaris, formerly Robert Dwaris Gibney.

On the 14th Feb. 1902, the respondent R. D. Dwaris commenced an action by writ in the Supreme Court of Judicature in Jamaica (in Equity) against the respondents Georgiana Mary Anne Charlotte Sparkes, Frances Anne Gibney, Sylvia Caroline Owen, Harriette Brereton Gibney, and the appellant and the Rev. A. Johnson claiming to have the will of the testator in so far as the same related to Golden Grove construed and the rights and interests of the parties to the action in such estate declared.

A special case was agreed upon by the parties and filed on the 12th March 1903, for the determination by the court of the following questions, viz.: (a) Whether the testator, Sir F. W. Dwaris, died intestate as regarded the fee simple of Golden Grove expectant upon the failure or determination of the limitations above mentioned, and if so, in whom such estate was vested. (b) If the testator did not die intestate, whether J. W. B. Gibney died seized under the testator's will of a vested estate of inheritance in fee simple in remainder expectant upon the determination of the limitations referred to above, and whether upon the death and intestacy of J. W. B. Gibney, such estate vested in Dr. Gibney as the heir-at-law of J. W. B. Gibney. (c) Whether the plaintiff, R. D. Dwaris, on the failure of the limitations, became and was entitled for an estate in fee simple in possession to Golden Grove in virtue of the limitations contained in the will of the testator in favour of the eldest son of F. M. Gibney.

In pursuance of an order of the Supreme Court the special case was set down for hearing before the full court.

By a judgment of the full court (Sir F. Clarke, Chief Judge in Equity, Northcote, and Lumb, JJ.) dated the 1st May 1903, on the hearing of the special case, the questions raised therein were (in effect) answered as follows: (a) That the testator, Sir F. W. Dwaris, did not die intestate as regarded the fee simple of Golden Grove expectant upon the failure or determination of the limitations above mentioned; (b) that J. W. B. Gibney died seized under the testator's will of a vested estate in fee simple in remainder expectant upon the determination of the prior limitations and upon the death and intestacy of J. W. B. Gibney such estate vested in Dr. Gibney as the heir-at-law of J. W. B. Gibney; and question (c) was answered in the negative.

The appellant and the Rev. A. Johnson applied to the Supreme Court for leave to appeal to His Majesty in Council, and such leave was duly granted.

The Hon. E. C. Macnaghten, K.C. and J. Austen-Cartmell for the appellant, argued that the devise "to the eldest son" of Mrs. Gibney must be construed in its natural sense of "first born" son, and there being such a person in existence at the date of the will, it was a devise

to a *persona designata* which has failed, and therefore there is an intestacy. They cited

Hervey-Bathurst v. Errington, 35 L. T. Rep. 338; 2 App. Cas. 698;

Trafford v. Ashton, 2 Vern. 659;

Meredith v. Trefry, 12 Ch. Div. 170;

Re Harris' Trust, 2 W. R. 689;

Ogle v. Lord Sherborne, 56 L. T. Rep. 71; 34 Ch. Div. 446.

Norton, K.C. and J. F. Waggett for the respondents, contended that "the eldest son" of Mrs. Gibney meant the person who answered to that description at the time when the will took effect, and that was J. W. B. Gibney. The will should be construed so as to avoid an intestacy if possible. They cited

Coleman v. Seymour, 1 Ves. Sen. 269;

Lomax v. Holmden, 1 Ves. Sen. 290;

Thompson v. Thompson, 1 Coll. 388.

No reply was called for.

At the conclusion of the argument for the respondents their Lordships' judgment was delivered by

LORD MACNAGHTEN.—The point raised on this appeal is a very short one, and in their Lordships' opinion free from difficulty. The question, such as it is, turns on one passage in the will of Sir Fortunatus William Dwaris. After certain limitations which have failed or determined, he disposed of a property called Golden Grove by giving it in these words: "To the eldest son of my sister, Frances McKeand Gibney, and his heirs for ever." It appears that at the time when the testator made his will Mrs. Gibney had two sons. There was, therefore, at that time in existence a person answering the description of the "eldest son" of his sister Frances. It was contended that the word "eldest" was not properly applicable to the elder of two persons, and that, if the testator had really meant Mrs. Gibney's first born son, he would have said "elder" not "eldest." In their Lordships' opinion that objection savours of hypercriticism. If a man has two sons, and only two, the ordinary way of speaking of the first born, if not designated by name, is to call him the eldest son of so-and-so. There being then a person in existence at the time answering the description in the will, their Lordships are of opinion that that person, though he died afterwards in the testator's lifetime, was the object of the testator's bounty. There is nothing in the context to warrant any departure from the proper and ordinary meaning of the words employed. All the authorities from *Lomax v. Holmden* (1 Ves. Sen. 290) to *Meredith v. Trefry* (12 Ch. Div. 170) point in the same direction. The case of *Re Harris' Trust* in 2 W. R. 689, on which the Appellate Court seems to place some reliance, cannot be regarded as an authority to the contrary. The learned Vice-Chancellor (Wood, V.C.) who decided that case was, at the time of the decision, under a misapprehension as to the operation of the Wills Act. He seems to have thought that with reference to the objects of testamentary bounty the Act had an effect similar to that which it has "with reference to the real and personal estate comprised in it (sect. 24), an error afterwards corrected by the Court of Appeal in *Bullock v. Bennett* (7 D. M. & G. 283). Their Lordships will therefore humbly advise

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His Majesty that the appeal ought to be allowed, and that question 1 ought to be answered by saying that the testator died intestate as regards the fee simple expectant upon the failure or determination of the limitations set out in the special case, and that upon the facts stated in the special case the estate is now vested in the appellant. As an arrangement has been made as to costs there will be no order as to costs except that the parties are to be at liberty to apply for an order to tax their costs.

Solicitors for the appellant, *Parkes and Browne*.

Solicitors for the respondents, *Guscombe, Wadham, and Co.* for *Sparkes, Pope, and Thomas*, Exeter.

Dec. 9, 1903, and Feb. 5, 1904.

(Present: The Right Hon. the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN and LINDLEY, and Sir ARTHUR WILSON.)

MINISTER FOR PUBLIC WORKS v. HART AND ANOTHER. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Public Works Act—Land taken for public purposes—Valuation—Costs.

By the Public Works Act of New South Wales (1900, No. 26) land for authorised works may be taken by the Government, and persons claiming compensation are to serve a notice of the particulars of their interest in the land, and of their claims for damages. The Minister for Public Works is then required to cause a valuation to be made, and to give notice to the claimant of the amount of such valuation. If the Minister and the claimant do not agree as to the valuation, the claimant may bring an action to recover the amount of compensation claimed by him. If the verdict is for a sum equal to or less than the amount of the notified valuation, the claimant is to pay the costs; but if for a greater sum, the costs are to be paid by the Minister.

In a case in which land belonging to the respondents was taken under the Act, and the Minister gave them notice of a valuation, and afterwards, at the respondents' request, reconsidered the valuation, and wrote a letter to the respondents' agent to the effect that he was prepared to pay a sum larger than the original valuation, but gave no formal notice of the increased sum under the Act, and the respondents declined the increased offer:

Held (reversing the judgment of the court below), that the letter was a sufficient amendment of the previous formal notification, and as in the subsequent proceedings the respondents only obtained a verdict for a sum equal to the amended offer made in the letter, they were not entitled to costs.

APPEAL from a judgment of the Supreme Court of New South Wales (Stephen, Acting C.J., G. B. and A. H. Simpson, JJ.). The case is reported 2 N. S. W. State Rep. 1902, 309. The facts, which were not in dispute, appear sufficiently from the headnote above, and from the judgment of their Lordships.

Asquith, K.C. and *Vaughan Hawkins* appeared for the appellant.

Levell, K.C. and *Wood Hill* for the respondents.

Vaughan Hawkins was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Feb. 5—Their Lordships' judgment was delivered by

LORD LINDLEY.—The question raised by this appeal originates in the compulsory purchase of some land in Sydney, and the question is, who is to pay the costs of an action brought to recover compensation for the land taken? This depends on the statutes of the colony of New South Wales, and on what was done. The statutes are (1) a special Act called the Darling Harbour Wharves Resumption Act (No. 10 of 1900), and (2) the Public Works Act (No. 26 of 1900). This last Act repeals and consolidates former Acts to the same effect, and, although not in force when the land in question was taken, it may for convenience be regarded as the governing Act in the case. Under these Acts, land for authorised works may be taken by notification of the Governor published in the *Gazette* (Public Works Act, Part 5, sects. 36 to 40). Upon such publication the land vests forthwith in the Minister who is the constructing authority; and persons claiming compensation (Part 5, sects. 94 to 99) are to serve on the Minister within ninety days, or further extended time, particulars of their estate and interest in the land resumed and of their claims for damage. The Minister (sect. 96) is then required to cause a valuation to be made of the land or of the claimant's interest, and to notify to the claimant as soon as practicable the amount of such valuation in the form scheduled to the Act, which is as follows (see sched. 6): "To A. B., claimant in respect of the land hereunder described, taken under the Public Works Act 1900. Take notice that the land hereunder described, being that in respect of the taking whereof under the authority of the aforesaid Act your claim for compensation has been lodged, has been valued at the sum of £. (Signed) A. B., constructing authority." If (sect. 97) within ninety days after service of notice of claim the Minister and claimant do not agree, the claimant may commence an action in the supreme court against the Minister to recover compensation. Under the Darling Harbour Wharves Resumption Act (sect. 6) this action is to be tried in the supreme court by a supreme court judge and two district court judges (which court is to have the powers and duties of a jury), and power is given to the supreme court to make rules as to motions for a new trial of any such action. The court is to determine the amount to be paid to the claimant. If the amount recovered by him is a sum equal to or less than the amount of the valuation notified to the claimant, he is to pay the costs of the action, but if it is a greater sum, the costs are to be paid by the Minister (see Act No. 26 of 1900, sect. 99). In the present case land was taken (by *Gazette* notification of the 3rd May 1900) belonging to the respondent Peter Francis Hart, who had built a street of houses thereon. The respondent Francis Faucett Moran is Hart's mortgagee. The land was valued by the Government valuers, and the Minister on the 31st

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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Dec. 1900 gave a notice of valuation in the scheduled form, the amount notified being 9460*l*. It appeared from the evidence at the trial that, after receiving the notice of valuation and before taking any proceedings to enforce his claim, Hart, accompanied by Mr. Ferris, a member of the Legislature, went to see Mr. Sievers, the official Government valuer, and asked that the Government valuers should reconsider their valuation. Hart urged that the cost or value of some foundations to the houses and a retaining wall had not been taken into account. The Government valuers, having considered Hart's request, increased the amount to 9900*l*. Hart requested that the result when arrived at should be notified to Ferris on his behalf. The valuers then reported to the Minister, who thereupon sent to Ferris the following letter: "Public Works Department, Sydney, 18th Feb. 1901.—Sir,—With reference to your interview with the Government land valuer respecting the claim of Peter Francis Hart, junior, requesting that the offer of compensation of 9460*l*. for property resumed at Darling Harbour be increased, I am directed by the Minister for Public Works to inform you that he has approved of the payment of 9900*l*. to the claimant in lieu of 9460*l*. previously offered.—I have the honour to be, sir, your obedient servant, ROBERT HICKSON, Under Secretary and Commissioner for Roads.—W. J. Ferris, Esq., M.P., Castlereagh-street."—This letter was received by Hart shortly after it was written, and he communicated it to his solicitors on the 5th March 1901. Mr. Hickson, who wrote the letter, referred to it in a letter to Hart's solicitors; and, on the 11th March 1901 they wrote to Mr. Hickson, saying, "Mr. Hart is not willing to accept the offer made through Mr. Ferris." No further notification of the sum offered was made, nor was the notification of the 31st Dec. 1900 formally amended by substituting the sum of 9900*l*. for 9460*l*. Moreover, it appears from the evidence of Mr. Sievers, the principal Government valuer, that although Mr. Hart's request for an increased sum was considered by Mr. Sievers and his colleagues, they did not make any fresh valuation. His words were "in making the amended offer we gave way generally to what Mr. Hart stated, but did not increase our valuation." The whole question before their Lordships turns upon the effect of the foregoing letter of the 18th Feb. 1901; but before considering this point it will be convenient to state shortly what afterwards took place. Hart refused the offer of 9900*l*. and he and his mortgagees brought an action against the Minister and claimed 16,500*l*. In his declaration he stated that his claim for compensation had been valued at 9460*l*., and no mention was made of the increased offer of 9900*l*. The Minister put in a plea stating that the amount of the valuation which he caused to be made and notified to the plaintiffs was 9900*l*., and that this sum exceeded the compensation to which the plaintiffs were entitled. The plaintiffs in their reply denied both statements in the plea. The action was tried before a judge of the Supreme Court and two District Court judges. Evidence was gone into on both sides, and the court fixed the compensation to be paid at 9900*l*., the amount offered by the letter of the 18th Feb. 1901. The defendant then signed judgment

for the costs of the action. The court considered that any irregularity in the notification of the 9900*l*. had been waived by the plaintiffs. The judgment was signed on the 21st April 1902. On the 22nd May 1902 the plaintiffs obtained from the full court (Stephen, Acting C.J. and G. B. and A. H. Simpson, JJ.) a rule nisi to enter a verdict for the plaintiffs on the issue as to the notified valuation on the grounds (1) that the verdict on the said issue was against evidence, (2) that the only valuation made and notified to the plaintiffs in accordance with the Act was for 9460*l*., (3) that the court was wrong in holding that the plaintiffs had waived the requirements of the Act as to making and notifying the valuation, and (4) that the waiver had not been pleaded. The application to make the rule absolute was heard on the 5th and 6th Aug. 1902. The court held that the Darling Harbour Resumption Court had no jurisdiction to determine the question on which the right to the costs of the action depended, viz., what was the amount of the notified valuation, and that the findings of the amended *postea* on that question were a nullity. They did not hold as a matter of law that the valuation notified on the 31st Dec. 1900 could not be informally amended, but held that there had not been in fact any new valuation, and that the letter of the 18th Feb. 1901, was not a notice of any valuation. They made an order, dated the 6th Aug. 1902, that the judgment signed on the 21st April 1902, be amended by striking out all the findings as to notification of value, and by converting it into a judgment simply in favour of the plaintiffs for 9900*l*., interest and taxed costs, thus deciding, in effect, that the only notified valuation was for 9460*l*., and that the Minister should pay the costs of the action. From this decision the Minister appeals to His Majesty in Council. Their Lordships are of opinion that the appeal should be allowed. The requirements of the statute were all properly complied with in every matter of substance. There was a proper valuation of the property, and a sufficient notification of the result of such valuation. No further valuation was necessary. The valuers had all the materials for reconsidering the amount of compensation which should be offered, and neither as a matter of business nor as a matter of statutory obligation was any second valuation required. If without any further valuation a fresh notification in the form of the schedule to the statute had been sent in with the sum of 9900*l*. substituted for 9460*l*., their lordships can hardly conceive that any objection could have been taken to it. Certainly none could have been legally sustained. The objection to the proceedings is thus reduced to a question of form, and form only. No doubt it would have been more regular if the letter of the 18th Feb. 1901, had been in the form of the schedule; but it emanated from the proper authority after a sufficient valuation by a properly constituted board of valuers and on their advice. The letter is open to no ambiguity; it refers to the previous offer, and in their Lordships' opinion the Government could not legally have repudiated that letter even before they formally bound themselves to it by their plea in the action. In their Lordships' opinion the letter of the 18th Feb. 1901 was an amendment of the previous formal notification, and was sufficient.

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The statutory enactment, which refers to the form of the notice to be given of the amount of valuation, is sect. 96 of the General Act, No. 26, of 1900. That section, no doubt, requires the Minister to inform the claimant "of the amount of such valuation by notice in the form of the 6th schedule hereto"; and the schedule states that the claim for compensation has been valued at £1. There was, no doubt, a non-observance of this form, and an irregularity. But it was attributable to the unusual manner in which the Minister was approached by the claimant, who threw the Minister off his guard; and it would be most unjust to allow the claimant to take advantage of this irregularity. But without it he has no case whatever. Under these circumstances their Lordships do not feel compelled by the language of sect. 96 to hold that the mere irregularity in form vitiates all that has been done and defeats the evident object of the Statute. Their Lordships will humbly advise His Majesty to reverse the judgment or order appealed from with costs, and to restore the judgment or order of the Darling Harbour Resumption Court signed on the 21st April 1902. The respondents will pay the costs of the appeal.

Solicitor for the appellant, *G. M. Light.*

Solicitors for the respondents, *Fooks, Chadwick, Arnold, and Chadwick.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Jan. 29.

(Before Lord ALVERSTONE, C.J., COLLINS, M.R., and ROMER, L.J.)

BRANDTS, SONS, AND CO. v. DUNLOP RUBBER COMPANY LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Assignment of debt—"Absolute assignment by writing"—Request to debtor to pay third person—Judicature Act 1873 (36 & 37 Vict. c. 66), s. 25 (6).

The defendants being indebted to K. for the price of goods sold, K. sent to the plaintiffs, for them to forward to the defendants, a letter, signed by him and addressed to the defendants, as follows: "Kindly sign the attached letter and forward the same to" the plaintiffs. The attached letter, addressed to the plaintiffs, was as follows: "Herewith we beg to confirm that we shall remit, subject to the approval of the goods, the amount of invoices—viz., 369l. and 3263l.—for seventy-five packages . . . received from K. and Co., when due, direct to your good selves, for account of K. and Co."

The plaintiffs sent these two documents to the defendants with a request to sign and return the counterpart. The counterpart was returned to the plaintiffs, but was signed by a person who had no authority to sign on behalf of the defendants.

Held (reversing the judgment of Walton, J.) that the two documents did not constitute "an absolute assignment" of the debt, within sect. 25 (6) of the Judicature Act 1873.

lute assignment" of the debt, within sect. 25 (6) of the Judicature Act 1873.

APPEAL of the defendants from the judgment of Walton, J. at the trial of the action without a jury.

The plaintiffs brought this action to recover from the defendants the sum of 3263l., either under an assignment from Kramrisch and Co., or, alternatively, under an agreement by the defendants to pay that sum to the plaintiffs.

In Nov. 1902 the plaintiffs, who were bankers, made arrangements with Kramrisch and Co. for the purpose of financing the latter's commercial transactions. Kramrisch and Co., who carried on business at Liverpool, bought goods for shipment from abroad and sold them to customers in England.

The plaintiffs accepted bills drawn by the foreign sellers for the price of the goods sold to Kramrisch and Co.; and Kramrisch and Co. directed their customers in England to pay the invoice price to the plaintiffs. Many transactions of this kind took place.

In Jan. 1903 Kramrisch and Co. had bought two parcels of rubber, and the plaintiffs had accepted bills drawn by the sellers for the price, amounting to 3430l.

Kramrisch and Co. resold these two parcels of rubber to the defendants for 369l. and 3263l. respectively.

On the 3rd Jan. Kramrisch and Co. wrote to the plaintiffs a letter saying, with respect to these goods, "We engage to grant you the sole and absolute lien on said goods and their proceeds until you have received full payment, plus charges, of the advance granted to us on said goods for 3430l., and we further engage to hold this transaction separate from any other."

On the 6th Jan. 1903 Kramrisch and Co. wrote to the plaintiffs inclosing a document, which by the covering letter they asked the plaintiffs to forward to the defendants.

The document was in the following form, the two parts being detachable the one from the other:

To the Dunlop Rubber Company Limited. To Messrs. Brandts, Sons, and Co.

Jan. 6th, 1903.

..... 1903.

Dear Sirs,

Kindly sign the attached letter, and forward the same to Messrs. Brandts, Sons, and Co.

Yours truly,

KRAMRISCH AND CO.

Dear Sirs,

Herewith we beg to confirm that we shall remit, subject to the approval of the goods, the amount of invoices—viz., 369l. and 3263l.—for seventy-five packages of raw rubber received to-day from Messrs. Kramrisch and Co., when due, direct to your good selves, for account of Messrs. Kramrisch and Co.

Yours truly,

On the 7th Jan. the plaintiffs forwarded this document entire to the defendants at their works at Birmingham, where the rubber had been delivered, with a letter requesting them to sign and return the counterpart.

On the 8th Jan. the second part of the document was returned to the plaintiffs signed "(sgd.) For the Dunlop Rubber Company Limited (Para Mills). John Gooding, A. G. P.," this being impressed by a rubber stamp. Gooding was the manager of the defendants' works.

The head office and registered office of the defendants was in London, and Gooding omitted to inform the head office of the above document.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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Kramrisch and Co. sent to the defendants' works at Birmingham two invoices for the two sums of 369*l.* and 3263*l.*, stamped with a direction to pay the amount to the plaintiffs. The invoice for 369*l.* was forwarded to the head office, and the amount was paid to the plaintiffs. The invoice for 3263*l.* was returned to Kramrisch and Co. for correction, and the corrected invoice which they sent did not bear any direction to pay the amount to the plaintiffs. This corrected invoice was forwarded to the defendants' head office in London, and they paid the amount to Kramrisch and Co.'s general bankers instead of to the plaintiffs.

The plaintiffs claimed to be entitled to recover the sum of 3263*l.*, either upon the undertaking signed by the defendants, or under the assignment from Kramrisch and Co. to them contained in the document sent to them by Kramrisch and Co. and forwarded by them to the defendants.

The defendants contended that Gooding had no authority to sign the undertaking, and that they were not bound by it; and that the document in question was not an absolute assignment, within sect. 25 (6) of the Judicature Act 1873.

The Judicature Act 1873 (36 & 37 Vict. c. 66) provides:

Sect. 25 (6). Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal *choses in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *choses in action*, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or *choses in action* from the date of such notice, and all legal or other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

The action was tried before Walton, J. without a jury.

J. A. Hamilton, K.C. and Loehnis for the plaintiffs.

R. M. Bray, K.C. and Schiller for the defendants.

April 2, 1903.—WALTON, J.—[The learned judge stated the facts, and then proceeded:] Now, in the first place, it is necessary to decide whether the undertaking given by Gooding for the Dunlop Rubber Company is binding upon the company. The defendants say that Gooding had no authority in fact to give any such undertaking. The plaintiffs say that he had, and that, if he had not, at any rate he was held out as a person having such authority, and the defendants are bound as if he had authority. I have come to the conclusion that in fact Gooding had no authority to act in this matter. His duty was to send a document of this kind to London, or to get authority from London before signing it. Therefore I find that in fact he had not any authority to sign the document. The next question is whether he was held out as having authority to sign. It seems to me that it would be carrying the doctrine of holding out very far to say that there was sufficient evidence here of holding out. I do not, however, think that it is necessary for the purposes of my judgment to say more than that I feel a very

great difficulty in accepting the argument that there was such a holding out here as would be binding upon the defendants. Then the case is put in another way. It is said that this double document of the 6th Jan., together with the letter of the 7th Jan., with which they were sent to the defendants by the plaintiffs, amount to an assignment to the plaintiffs of the debt of 3263*l.* Kramrisch and Co. sent these two documents on the 6th Jan. to the plaintiffs, in order that the plaintiffs might send them on to the defendants, undoubtedly in order that the plaintiffs might obtain payment direct to themselves of this sum of 3263*l.* I think that there can be no doubt at all about that. The plaintiffs forwarded them to the defendants with a letter saying that they had received them from Kramrisch and Co., and requesting the defendants to sign. Now, does that amount to an assignment of the debt by Kramrisch and Co. to the plaintiffs? I think that the debt was assigned by Kramrisch and Co. to the plaintiffs, and that that is the effect of these documents. I have no doubt that the intention of Kramrisch and Co. was to make over to the plaintiffs the right to receive this money for themselves and to give a good discharge for it. Was there notice of that to the defendants? It seems to me that the whole transaction was submitted to the defendants, and I think that Gooding had authority to receive notice of such an assignment. I think that notice was given to the defendants that Kramrisch and Co. had made over to the plaintiffs the right to receive this sum of money, and had given them power to give a good discharge for it. Now, is that an absolute assignment within sect. 25 (6) of the Judicature Act 1873? A number of cases have been cited, but I do not know whether they assist us very much, because the general principles applicable to a question of this kind are now, I think, fairly clearly ascertained. Perhaps the most important case upon the general principles which has been cited is the case of *Durham v. Robertson* (78 L. T. Rep. 438; (1898) 1 Q. B. 765). In that case Chitty, L.J. laid down very clearly the law and the doctrines of equity with regard to documents of assignment of *choses in action*. He said: "Dealing with the case apart from the Judicature Act, there is here unquestionably a valid equitable assignment. To operate as a valid equitable assignment no particular form of words is required in the document; an engagement or direction to pay, out of a debt or fund, a sum of money constitutes an equitable assignment, though it does not operate as an assignment of the whole fund or debt. A mere charge on a fund or debt operates as a partial equitable assignment. As is well known, an ordinary debt or *choses in action* before the Judicature Act was not assignable so as to pass the right of action at law, but it was assignable so as to pass the right to sue in equity. . . . Now, in order to afford some remedy for this state of the law that sub-sect. 6 was passed. It is plain on reading it that it does not apply to every case of equitable assignment of a debt or *choses in action*. . . . To bring a case within the sub-section transferring the legal right to sue for the debt and empowering the assignee to give a good discharge for the debt, there must be (in the language of the sub-section) an absolute assignment not purporting to be by way of charge only. It is requisite that the

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assignment should be, or at all events purport to be, absolute, but it will not suffice if the assignment purport to be by way of charge only. It is plain that every equitable assignment in the wide sense of the term as used in equity is not within the enactment." Was this an absolute assignment? In support of the view which I take that it was an absolute assignment, the case of *Harding v. Harding* (17 Q. B. Div. 442) was cited, and I refer to that case because the document in that case is not dissimilar from the document relied on in the present case. The headnote of that case is this: "The defendants, who were executors and trustees under a will, sent to G., one of the residuary legatees, a statement of account showing a balance to be due to him on account of his share of the residuary estate. G., who lived in Australia, sent this account to his daughter, the plaintiff, with the following direction on it in his handwriting: 'I hereby instruct the trustees in power to pay to my daughter L. H. the balance shown in the above statement. . . . ' Notice in writing of this document was given by the plaintiff to the defendants, but they refused to be bound by it. Held, that the document was a valid assignment of the balance in the hands of the defendants, and that the plaintiff was entitled to recover the amount." Wills, J. in his judgment said: "In the present case it was proposed to assign a sum of money due from the trustees, the defendants; and probably before the Judicature Act it would have been impossible to give a legal title to Laura Harding so as to enable her to sue in her own name in respect of this right of action; she could have maintained a suit in equity, but the legal title could not have been completed in her. Now it can be done; and it seems to me that the legal title has been so completed by the notice signed by George Harding and sent by him to the plaintiff. If it is to be regarded as an equitable assignment, he has done all that he could to make it complete; if as a legal assignment, he has completed it; and under sect. 25, sub-sect. 6, of the Judicature Act 1873, the assignee of a *chose in action* may sue in his own name, the law as to the necessity for a consideration not applying, as it seems to me, if the assignment is completely made." The direction given in that case cannot, to my mind, be distinguished from the direction given in the present case. It makes no difference if this was given by way of security, if it was an absolute assignment, as I think it was. Mr. Bray contended that this was not an absolute assignment because it must be read by the light of the letter of lien which was not an absolute assignment. I agree that the letter of lien was not an absolute assignment, but that is not the assignment relied on. This document of the 6th Jan. was sent to the plaintiffs in order that they might be assured that they would be the proper persons to receive the money and to give the receipt for it, and if it had been paid to them they would clearly have been the proper persons to give the receipt. That being so, I think this was an absolute assignment of which notice was given, and that on this ground the plaintiffs are entitled to recover. With regard to the other cases which were cited, the document in *Mercantile Bank of London v. Evans* (79 L. T. Rep. 496; 81 L. T. Rep. 376; (1899) 2 Q. B. 613) was different from the document in this case, and the same

considerations do not apply. As to *Ex parte Hall; Re Whitting* (40 L. T. Rep. 179; 10 Ch. Div. 615), there, again, the document was very different from this document. In the present case I attach great importance to the fact that the document is not merely an authority or direction to pay, but is a document asking in terms for an undertaking that payment will be made; whether that undertaking is given or not does not affect the meaning of the document sent. It differs in that respect from *Ex parte Hall* (*ubi sup.*). There is also another difference which I think underlies the decision in that case. It was there contended that the document was an assignment of the rent, and it was held that, if it was given in pursuance of an agreement to assign the rent, that agreement would be within the Statute of Frauds, and that the court therefore could not take notice of the existence of any such agreement. For that reason also I think that case is distinguishable from the present case. For the reasons which I have stated I think that there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

The defendants appealed.

B. M. Bray, K.C. and *Schiller* for the appellants.—The learned judge was wrong in holding that there was an "absolute assignment by writing," of which express notice in writing was given to the defendants, within sect. 25 (6) of the Judicature Act 1873. The real questions on this appeal are whether the two attached documents were an absolute assignment, and whether express notice in writing was given to the defendants of that assignment. These documents cannot be said to be an assignment at all. There is, on their face, merely a request to the debtors to assent to a new contract, in the form attached, to pay their debt to the plaintiffs. There is nothing said about an assignment in these documents. They might refer to any other kind of arrangement besides an assignment between Kramrisch and the plaintiffs. The intention and meaning of the words in sect. 25 (6), "absolute assignment by writing of which express notice in writing shall have been given to the debtor," is that the debtor may not be left in any doubt as to what his position is with regard to his creditor, and what he may safely do to discharge his debt. Now, these documents do not on their face purport in terms to assign anything or in any way to transfer the property in the debt. The document to be signed by the defendants purports to be, and was intended to be, only a document by which the defendants might consent to a new contract with the plaintiffs. There was a request to sign that document, but the defendants were not bound to sign it. If there was an absolute assignment, that request would have been unnecessary, for the defendants would have been bound to pay the plaintiffs whether they signed or not. There are authorities which show that this cannot be construed as an absolute assignment. In *Ex parte Hall; Re Whitting* (40 L. T. Rep. 179; 10 Ch. Div. 615) the creditor gave to his bankers a letter addressed to his debtor, in which he said: "I hereby authorise and request you to pay to . . . 200l. to my credit for which I will accept their receipt as so much of your rent discharged"; and it was held by the Court of Appeal that this was only a

revocable authority to pay and not an assignment. The words in the present case are not so strong as they were in that case. That case shows that a mere request or authority by the creditor to the debtor to pay a third person is not an absolute assignment, but is only a revocable authority to pay. The case of *Harding v. Harding* (17 Q. B. Div. 442), upon which the plaintiffs rely, is clearly distinguishable, because there was in that case an irrevocable authority to pay. The case of *Durham v. Robertson* (78 L. T. Rep. 438; (1898) 1 Q. B. 765) does not really affect the question in the present case, the decision there being on the question whether the assignment was by way of charge only. In *Fisher v. Calvert* (27 W. R. 301) the only question was whether there was a sufficient equitable assignment in a case where the assignor was made a party. Even if this was an absolute assignment, there was not a sufficient notice to the defendants. The head office and registered office of the defendants is in London, and these documents were sent to their works at Birmingham. Sect. 62 of the Companies Act 1862 provides that "any summons, notice, . . . required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company, at their registered office." The notice must reach the company at some place where there is an official whose duty it is to receive and act upon it, and in this case that would be at the London office of the defendants from which all payments were made. If the procedure given by sect. 62 is not followed, the person giving notice in some other way takes the risk of the notice not coming to the hands of the proper official.

J. A. Hamilton, K.C. and *Loehnis* for the respondents.—The learned judge rightly decided that there was an absolute assignment within sect. 25 (6). This document as a whole cannot fairly be read as being a mere request by Kramrisch to the defendants to pay the money to the plaintiffs. Its real effect is that it is an instruction to the defendants to pay the plaintiffs, as was the case in *Harding v. Harding* (17 Q. B. Div. 442). This document is unconditional in its terms, and it intimates to the debtors that Brandt Sons, and Co. are the persons who are entitled to receive this money. When this document was sent by Kramrisch to the plaintiffs it was an absolute assignment by him to them as soon as it came to their hands; and, when it was sent on to the defendants, the assignment was completed by notice to them. The ordinary simple construction of this document is that it is an absolute assignment by Kramrisch to the plaintiffs; and the defendants could not reasonably think that it was anything else. Though the defendants may not be bound to sign the undertaking and may refuse to sign, yet the document is still an assignment, and they are bound to pay the plaintiffs as assignees. If the defendants did sign, they would be liable upon a different basis and would have undertaken a different personal liability to the plaintiffs from that under which they were before by reason of the assignment. The words "for account of Kramrisch" only show that the plaintiffs could discharge the defendants from all claims by Kramrisch, and they support the view that this was an assignment. The case of *Harding v. Harding* (ubi

sup.) is a clear authority in favour of the plaintiffs that a document in this form is an assignment within sect. 25 (6). In *Ex parte Hall; Re Whitting* (40 L. T. Rep. 179; 10 Ch. Div. 615) there was in fact a verbal assignment which was invalid by reason of sect. 4 of the Statute of Frauds; and it was not decided that words of request or authority could not be an absolute assignment. The decision in *Brice v. Bannister* (33 L. T. Rep. 739; 3 Q. B. Div. 569) is also a clear authority that this document is an absolute assignment within sect. 25 (6). In *Percival v. Dunn* (32 L. T. Rep. 520; 29 Ch. Div. 128) the distinction was pointed out between a request to a debtor to pay a specific debt to a third person, and a mere general request to pay money to a third person. There was good notice of this assignment given to the defendants. Sect. 62 of the Companies Act 1862 does not affect the question; it merely gives an optional mode of service. The learned judge has found as a fact that Gooding had authority to receive notice, and there was ample evidence upon which he could properly so find. If the defendants did sign the undertaking, they were trustees of the money for the plaintiffs and are liable. The facts show that Gooding had authority to sign on their behalf, or, at any rate, that he was held out as having authority. Even if there was no assignment within sect. 25 (6), yet the plaintiffs are equitable assignees and can, in the circumstances, sue without making Kramrisch a party, inasmuch as he had fully discharged the defendants before this action was commenced.

Bray, K.C. in reply.—The learned judge has found as a fact that Gooding had no authority to sign the undertaking, and that finding cannot be impugned. There was no evidence that he was held out as having authority, or that the position of the plaintiffs had been made any worse thereby.

Lord ALVERSTONE, C.J.—This is, I think, a case of considerable difficulty, and the main point raised is one of great importance. I have little doubt that such documents as these are used to a considerable extent in commercial transactions. The respondents ask us to say that the documents here in question are so clearly only consistent with there having been an assignment of the debt that they can only be construed as an absolute assignment either legal or equitable. After full and careful consideration, and after hearing the very able arguments on both sides, I cannot come to that conclusion. To establish their case it is necessary for the plaintiffs to show, within the terms of sect. 25 (6) of the Judicature Act 1873, that there is an "absolute assignment by writing (not purporting to be by way of charge only) of the debt . . . of which express notice in writing shall have been given to the debtor." The document, therefore, must be an absolute assignment in writing under the hand of the assignor. The respondents endeavoured to make that out by reading together the two documents of the 6th Jan. which were sent on by the plaintiffs to the defendants. Those two documents were attached to each other; the one addressed by Kramrisch to the defendants being, "Kindly sign the attached letter and forward the same to" the plaintiffs; the other, addressed by the defendants to the plaintiffs,

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being. "Herewith we beg to confirm that we shall remit . . . the amount of invoices—viz., 389l. and 3263l. . . . when due, direct to your good selves, for account of Messrs. Kramrisch and Co." Now, if that reasonably indicates an assignment, it is signed by the assignor. It has been argued on behalf of the plaintiffs that the words "for account of Messrs. Kramrisch and Co.," really mean that the plaintiffs might give a receipt for the money, and that that is the proper construction of the document and one which removes all difficulties. But, looking at the earlier part of the document, I do not think that that is its true business meaning. The document does not in terms purport to be an assignment; it only purports to be a request to the defendants to pay the amount to the plaintiffs. If it had really been signed by the defendants, they would have been liable to pay the amount to the plaintiffs, for the same reasons as the defendants were liable in *Harding v. Harding* (17 Q. B. Div. 442). I cannot, however, see any valid answer to the contention of the defendants that it cannot be assumed as the foundation of this document that there was any assignment at all of the debt, and there is nothing whatever to show that this document must be treated as an assignment, because Kramrisch only requests the defendants to sign it and give it to the plaintiffs. The document seems to be quite consistent with there having been a verbal bargain that the money should be received by the plaintiffs on Kramrisch's account, or that there should be a lien on the money in favour of the plaintiffs. I think that business men of experience in these matters would have no difficulty in suggesting various different ways in which the plaintiffs might claim that the proceeds of these goods should come to their hands without there being an assignment of the debt. Therefore this document is consistent with there being something other than an assignment of the debt, and it is for that reason impossible to take the document itself as being a document of assignment. I do not base my judgment upon the fact that there had been a document of lien given by Kramrisch to the plaintiffs a few days before. If, however, we cannot see that this document is an absolute assignment upon its face, and if we can look at other matters outside of the document itself, we must see at once that there was no assignment of the debt unless this particular document was an assignment. I have come to the conclusion that this document is not upon the face of it an assignment of the debt; there is merely a request to the defendants to sign the undertaking to pay the plaintiffs. It is nothing more than an authority to the defendants to pay the debt to the plaintiffs, and it is not an assignment of the debt. I have, therefore, come to the conclusion that this document does not fulfil the conditions which are necessary to entitle the plaintiffs to sue in their own names as assignees of the debt, because it is not an absolute assignment, or an assignment at all, within sect. 25 (6) of the Judicature Act 1873. I do not think that any of the cases which have been cited do more than illustrate how the principles governing this question are to be applied. In *Harding v. Harding* (*ubi sup.*) it is true that Wills, J. did express an opinion that the document there in question might be an assignment within sect. 25 (6); but I think that the real ground of

the decision in that case was the fact that the debtors had assented to the arrangement that they should pay the money to the plaintiff, and were therefore bound upon equitable principles to do so. With regard to the case of *Ex parte Hall; Re Whitting* (40 L. T. Rep. 179; 10 Ch. Div. 615), I doubt whether it can be treated as doing more than illustrating the general principles applicable to cases of this kind, because the decision of that case was complicated by the fact that sect. 4 of the Statute of Frauds was applicable to the agreement which was there relied upon. I do not think that that case should be treated as an authority showing that the words, "I hereby authorise and request you to pay," are to be decided, one way or the other, as being or not being an assignment. I am now satisfied, with regard to the case of *Brice v. Bannister* (38 L. T. Rep. 739; 3 Q. B. Div. 569), that the difficulty which has been felt as to the main ground of the judgment is because there was not an assignment of the whole of the debt, but of a part only, and therefore only a charge. The language of the document in *Brice v. Bannister* (*ubi sup.*) was different from that in the present case; the words in that case were: "I do hereby order, authorise, and request you to pay to . . . the sum of . . . and his receipt for same shall be a good discharge." That was quite a different kind of transaction and a different kind of document from that in this case, which, as I have already pointed out, might indicate many things besides an assignment. Therefore I feel no doubt that this document was not an assignment within sect. 25 (6). Upon the question whether a good notice was given, if this had been an assignment, I am not prepared to differ from the decision of the learned judge, but it is not necessary for us to decide that question. As to whether Gooding had authority to sign this document on behalf of the defendants, I entirely agree with the judgment of the learned judge, and I can see nothing to justify the suggestion that there was a holding out of Gooding as having authority to sign. This appeal must, therefore, be allowed, and judgment be entered for the defendants.

COLLINS, M.R.—I am of the same opinion, though I have felt some hesitation in differing from the judgment of the learned judge. I have, however, come to the conclusion that this appeal must be allowed, and I will add but a few words upon the main question in the case. It seems to me that, upon a critical examination of these two documents, they do not fulfil the description in sect. 25 (6) of "any absolute assignment by writing under the hand of the assignor." Upon the face of these documents there is no absolute assignment at all. There is upon the face of the document a request from Kramrisch, addressed to the defendants, to make an agreement with the plaintiffs to pay to the plaintiffs the sum which would be payable by the defendants to Kramrisch. Kramrisch suggests to the defendants that they shall make a fresh contract to pay the plaintiffs instead of him. It may be that the letter rather assumes that some arrangement has been made before the letter was written, but the letter itself suggests an agreement to be made, and makes no reference to an absolute assignment. It presupposes some arrangement between Kramrisch and the plaintiffs, but that is not enough to make it an absolute assign-

ment. The document itself must be an absolute assignment. Here we have a letter addressed by Kramrisch to the defendants and sent by him to the plaintiffs to forward to the defendants. It runs thus: "To the Dunlop Rubber Company.—Dear Sirs,—Kindly sign the attached letter and forward the same to Messrs. Brandts, Sons, and Co."; and then the attached letter is as follows: "To Messrs. Brandts, Sons, and Co.—Dear Sirs,—Herewith we beg to confirm that we shall remit, subject to the approval of the goods, the amount of invoices—viz., 369*l.* and 3263*l.*—for . . . received from Kramrisch and Co., when due, direct to your good selves, for account of Messrs. Kramrisch and Co.—Yours truly, —" Now, that appears to me to express just what it says—that is, the confirmation by the defendants of some existing arrangement between Kramrisch and the plaintiffs. The one document is an undertaking by the defendants to pay direct to the plaintiffs the money which would become due from the defendants to Kramrisch; and the other is a request by Kramrisch to the defendants to become liable by contract to pay the money to the plaintiffs; there is no absolute assignment to be found in those documents. Therefore, as we do not find an assignment on the face of the documents, we are really asked to collect one from the surrounding circumstances. If we do look at the surrounding circumstances, the inference seems to be that the arrangement, by which a lien was given by Kramrisch to the plaintiffs, was referred to in the documents. It is, however, enough for us to say that we cannot here find upon these documents an absolute assignment, and that the case is therefore not within sect. 25 (6). Farther, we find in the document the words, "for account of Messrs. Kramrisch and Co.," which suggests that some interest in the money was retained by Kramrisch, and therefore there was not an absolute assignment. I agree, therefore, that this appeal must be allowed.

ROMER, L.J.—I am of the same opinion, and desire to add only a few words upon the main point. I ask myself the broad question whether these documents constituted in themselves an assignment of the debt or notice of an assignment. When I say an "assignment," I include an equitable assignment even if not an "absolute assignment" within sect. 25 (6). There is difficulty in dealing with the documents by themselves without bringing in the other relations between Kramrisch and the plaintiffs. Now, on the face of the documents themselves, they amount only in terms to a request by Kramrisch to the defendants to bind themselves to pay the money to the plaintiffs. Why Kramrisch did this does not appear upon the documents, nor the relations between Kramrisch and the plaintiffs, except that the plaintiffs were to receive the money "for account of" Kramrisch. There is no suggestion on the documents of any previous assignment by Kramrisch to the plaintiffs. The defendants were not bound to speculate why these documents were being given by Kramrisch. The defendants were not bound to sign the document. Were the defendants bound to assume that, if they did not sign this document, Kramrisch had by these documents alone given an irrevocable mandate to them to pay the money to the plaintiffs? Although the question is not free from difficulty, I am of opinion that they were

not so bound. I do not think that the defendants were bound to regard these documents themselves as being an assignment in the broad sense which I have indicated. These documents give no notice of any kind of any previous assignment. For these reasons I agree that the appeal must be allowed.

Appeal allowed.

Solicitor for the appellants, John B. and F. Purchase.

Solicitors for the respondents, Hollams, Sons, Coward, and Hawksley.

Monday, Feb. 8.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

STOCKDALE v. ASCHERBERG. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Landlord and tenant—Lease for three years—Covenant by tenant to pay "outgoings"—Reconstruction of drainage by order of local authority—Liability of tenant.

*By an agreement in writing the plaintiff let a house to the defendant for a term of three years, and then from year to year until either party should give three months' notice, at a yearly rent of 55*l.*; and the defendant agreed to pay "all outgoings of every description for the time being payable in respect of the premises."*

*During the term of three years the plaintiff expended 83*l.* in reconstructing the drainage of the house in compliance with a notice from the local authority.*

Held (affirming the judgment of Wright, J.), that the tenant was liable to pay the expense of doing this work as an "outgoing" within the meaning of the agreement, although the term was short and the rent small.

APPEAL of the defendant from the judgment of Wright, J. at the trial of the action without a jury.

The plaintiff brought this action to recover from the defendant the sum of 83*l.*, being the amount of the expense incurred by the plaintiff in reconstructing the drainage of premises of which the defendant was tenant to the plaintiff.

By an agreement in writing, dated the 25th March 1902, the plaintiff let to the defendant a house, No. 68, Brondesbury-villas, Kilburn, for a term of three years, and then from year to year until one of the parties should give to the other three calendar months' notice in writing, at the clear net yearly rent of 55*l.*, to be paid on the usual quarter days free from deductions except landlord's property tax.

By this agreement the defendant agreed to pay "all taxes, rates, assessments, and outgoings of every description for the time being payable in respect of the premises as they become due, landlord's property tax only excepted."

The defendant also agreed to keep and leave the premises, including the fixtures, in as good condition as they were at the date of the agreement, reasonable wear and tear excepted, and to keep the gutters, stack-pipes, water-closets, and cisterns clean, and to keep in repair all sash-lines and internal pipes and taps.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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STOCKDALE v. ASCHERBERG.

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On the 4th Sept. 1902 a notice was served upon the plaintiff by the Willesden Urban District Council, under the provisions of the Public Health Act 1875, stating that a nuisance existed on the premises and requiring him to abate it, and for that purpose to take up and relay throughout the premises the existing drains, which were defective.

In compliance with that notice the plaintiff carried out the required work, and thereby incurred expense to the amount of 83*l*.

This action was brought to recover that sum of 83*l*. from the defendant under the terms of the agreement of tenancy.

The action was tried before Wright, J. without a jury, and the learned judge held that the defendant was liable to pay the amount claimed, as an "outgoing," under the terms of the agreement: (88 L. T. Rep. 767).

The defendant appealed.

E. Foa for the appellant.—The judgment of the learned judge was wrong. It is true that, since the decision of the Court of Appeal in *Foulger v. Arding* (86 L. T. Rep. 488; (1902) 1 K. B. 700), it cannot be contended that in some cases a covenant by a tenant to pay "outgoings" will not cover an expense of this kind. But that rule is not applicable to every lease or agreement of tenancy. In *Foulger v. Arding* (*ubi sup.*) Collins, M.R. said: "Underlying the whole matter is the consideration that we are dealing with a contract of demise between landlord and tenant, and the covenant must be assumed to relate only to matters which may reasonably be supposed to have been contemplated by the parties as being within the purview of such a contract." A covenant of this kind must, therefore, be construed by having regard to that which the parties might reasonably be supposed to have contemplated. For that purpose the length of the term, the character of the premises, and the amount of the rent ought to be taken into consideration. The rule laid down in *Foulger v. Arding* (*ubi sup.*) has been considered in several subsequent cases. In *Valpy v. St. Leonards Wharf Company* (1 L. G. R. 305), where there was a lease of a cottage upon a yearly tenancy at a rent of 20*l*., Farwell, J. held that a covenant by the tenant to pay "outgoings" would not include the expense of paving a yard, in compliance with a notice from the local authority, at a cost of 58*l*.. Then the present case was decided by Wright, J., and the learned judge held that it was materially different from the case decided by Farwell, J. The question next arose in *Re Wariner; Brayshaw v. Ninnis* (88 L. T. Rep. 766; (1903) 2 Ch. 367), and there Eady, J. followed the present case, the lease being for a term of three years at a rent of 54*l*.. The last case upon the question was again decided by Wright, J., and in *Harris v. Hickman* (89 L. T. Rep. 722; (1904) 1 K. B. 13) that learned judge followed *Valpy v. St. Leonards Wharf Company* (*ubi sup.*) and held that a covenant to pay "outgoings" of this description was not applicable to a yearly tenancy which arose through the tenant holding over after the expiration of a term of three years. Before *Foulger v. Arding* (*ubi sup.*) there were eight cases decided in which the word "outgoings" was used, but in all but one of those cases the term was a long term. The exception was *Batchelor v. Bigger*

(60 L. T. Rep. 416), but in that case the expenses in question were for paving a street, and the fact that the street had not been paved must have been apparent to the tenant when he took the premises, whereas the defective condition of drains is not apparent. In the case of a short tenancy of small premises it ought to be held that it could not have been in the contemplation of the parties that the tenant, by a covenant to pay "outgoings," should be liable to heavy expenses of this kind incurred for improvements of a permanent character. In this case the covenant to repair on the part of the tenant is very material, for it shows that it was intended that he should be liable only to a very slight extent for anything in the nature of repair. The words of this covenant are "outgoings for the time being payable . . . as they become due," and those words show that in this agreement the word "outgoings" ought to receive a more limited meaning as intended to include only temporary and recurring expenses. The Public Health Act 1875 clearly and expressly imposes the liability to pay these expenses upon the landlord, and that liability ought not to be transferred to the tenant unless it is perfectly clear that the parties intended that it should be so transferred.

G. F. Hohler, for the respondent, was not called upon to argue.

COLLINS, M.R.—Whatever sympathy we may feel for a tenant under an agreement like this, who is called upon to pay a sum which in fact he never anticipated that he would be liable to pay, yet the question is whether he is bound by the terms of his contract to accept that liability. It seems to me to be too clear for argument that it is now settled by the authorities that a covenant such as this does cover such a class of expense as this, which is rendered necessary by reason of the order of the local authority to do sanitary works. The order of the local authority in this case was that the owner should take up and relay the drainage throughout the premises. No doubt that was a very drastic order. But the defendant took premises the drainage of which was in point of fact defective, and it is, it seems to me, impossible at the present day to say that it cannot be in the contemplation of the parties to a contract of tenancy that the local authority may at some time during the term insist upon the execution of sanitary works upon the demised premises. We cannot say that this kind of expense was so clearly outside of the contemplation of the parties at the time of the agreement that it would be unreasonable to suppose that it was the intention of the parties that the terms of the agreement should cover such an expense. If a landlord and tenant come to an agreement in clear and express terms whereby the tenant accepts the obligation to pay "outgoings," the tenant will be liable to pay such expenses as this. It seems to me that to hold otherwise would be straining the language of the agreement, and introducing into the consideration an element, which it would be impossible to limit or analyse, as controlling the clear words used by the parties. In my opinion the judgment of the learned judge was correct, and this appeal fails.

ROMER, L.J.—I agree.

MATHEW, L.J.—I am of the same opinion. I think that the judgment of Wright, J. was per-

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Re KECK'S SETTLED ESTATES.

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fectly correct, for the reasons which have been given by the Master of the Rolls.

Appeal dismissed.

Solicitors for the appellant, *Potter and Heath*.
Solicitors for the respondent, *Sharpe, Parker, Pritchard, Barham, and Lawford*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Monday, Jan. 11.

(Before FARWELL, J.)

Re KECK'S SETTLED ESTATES. (a)

Settled land—Settled Land Acts—Scheme for improvement—Capital money in hands of trustees—Approval of scheme by court—Evidence—Jurisdiction—Settled Land Act 1882 (45 & 46 Vict. c. 38), ss. 21, 22, 25, 26, 44, 53—Settled Land Act 1890 (53 & 54 Vict. c. 69), s. 15.

In a case in which the tenant for life submitted a scheme to the trustees of the settlement for the purposes of the Settled Land Acts for the expenditure of capital moneys in their hands on the improvement of the estate and the trustees sanctioned the scheme, but the next remainderman objected to the same on the ground that it was improvident, while not alleging either that it was ultra vires of the powers of a tenant for life under the Settled Land Acts or conceived in bad faith, and the tenant for life applied for the sanction of the court under the Settled Land Act 1882, s. 26, sub-s. 2 (iii.):

Held, that before making an order the court had a duty cast upon it under the Settled Land Act 1882 to satisfy itself that the scheme was such as could in the interest of the remainderman be reasonably sanctioned.

SUMMONS.

Certain real estate in the county of Leicester together with certain moneys and investments liable to be laid out in the purchase of land were settled under the will of George Anthony Keck, deceased. Under the settlement so created Harry Leicester Powys Keck, of Kingston Hill, Surrey, was tenant for life in possession, and Thomas Charles Leicester Keck was tenant for life in remainder, and Charles Marriott and Thomas Palmer were trustees of this settlement for the purposes of the Settled Land Acts. In July 1901 H. L. P. Keck presented to the trustees a scheme for the improvement of the settled estate; the scheme comprised (*inter alia*) the making of a road, and its general object was the improvement of the estate for building purposes. In August of the same year both trustees sanctioned the scheme, and certain moneys were expended on it by H. L. P. Keck, who subsequently applied to the court by summons under the Settled Land Acts 1882 to 1890 in which he asked (*inter alia*) that the trustees (who, with the remainderman T. C. L. Keck, were respondents to the summons) might be authorised or directed to pay to him out of capital moneys in their hands certain sums in respect of his expenditure upon these improvements. T. C. L. Keck, as remainderman, opposed the application on the ground that the

proposed scheme was improvident and not calculated to benefit the estate. A number of affidavits was filed on both sides by surveyors and land agents.

Upjohn, K.C. and *E. P. Hewitt* for the applicant.—In this case the trustees have accepted the scheme of the tenant for life, and it is not urged against the scheme either that it is *ultra vires* for a tenant for life under the Settled Land Acts or that it has been conceived in bad faith. There can be no question but that this is a matter on which capital money arising under the Settled Land Acts may be properly applied:

Settled Land Act 1882, s. 21 (x.).

They referred also to

Sects. 22, 26, 25, and 31, sub-s. 1 (v.);

Re Lord Coleridge's Settlement, 73 L. T. Rep. 206; (1895) 2 Ch. 704.

The trustees in this case act upon a certificate, and it is irrelevant to consider here the nature of the improvement. That is a matter for the trustees. They stand in a fiduciary position. They are practically managers of the estate. The Settled Land Act 1890, s. 15, points in the same direction. It enables the court to authorise the expenditure of capital moneys on improvements although no scheme has been submitted to the trustees. Sect. 26, sub-sect. 2, of the Settled Land Act 1882 clearly shows that the duty of determining whether or not capital moneys shall be applied in any improvement is imposed by statute on the tenant for life and the trustees:

Re Partington; Reigh v. Kane, 86 L. T. Rep. 194; (1902) 1 Ch. 71.

The remainderman can only successfully resist such an application if he can show (1) that the improvement contemplated is not within the improvements authorised by the Settled Land Acts; (2) that the tenant for life is not acting *bonâ fide*.

C. E. E. Jenkins, K.C. and *H. S. Preston* for the trustees.

Danckwerts, K.C., and *G. Henderson* for the remainderman.—The tenant for life and the trustees between them are responsible under sect. 53 for acting properly in reference to the making of any improvement. All the sub-clauses of sect. 26, sub-sect. 2, have the same effect as to legalising the application of capital moneys. When, therefore, the trustees have been directed or authorised by the court to apply a specified portion of the capital money on an improvement, they are thenceforward protected by the order. It is, therefore, right that they should satisfy the court that the scheme is in all respects proper:

Clarke v. Thornton, 56 L. T. Rep. 294; 35 Ch. Div. 307;

Re Duke of Norfolk's Parliamentary Estates, 82 L. T. Rep. 613; (1900) 1 Ch. 461.

Upjohn, K.C. replied.

FARWELL, J.—This is an application by a tenant for life for an order of the court directing or authorising the trustees to apply the sum of 2300*l.* out of capital moneys in their hands, after a scheme has been approved by them for the making, not of a road, but for the making of the part on which that sum has been expended. The question that I have to determine on the construction of the Act is whether it is sufficient for the tenant for life and the trustees to come here

(a) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

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and say, "Here is the scheme approved, and this money has been spent; be good enough to make an order directing or authorising the trustees to pay a specified portion of capital money accordingly." To that I say I quite agree, if the court has no other function to perform than to make an order on being satisfied, that the scheme has been approved and the money spent. Mr. Danckwerts, however, who appears for the next remainderman, opposes, and says that he wishes to go into evidence to show that the scheme is improvident. I should say that there is no question here of the scheme being *ultra vires* or *mali fide*; but Mr. Danckwerts wishes to go into evidence to show that the scheme is improvident; that the general trend of the tenant for life's action in respect to the management of the estate has been to a too speedy development, to the great detriment of the same. That is the case that he wishes to put forward, and I have had lengthy affidavits of surveyors read to me, and the result is that if I have to determine this question of fact, it is perfectly impossible to do so on the affidavits, and I must see the witnesses in the box. The question now is whether under the Act of Parliament I have to be satisfied as to the facts or not. Now, there is no doubt but that the Settled Land Act 1882 has given to tenants for life very large powers that they never had before. Under sect. 3 they have general power to sell the fee simple of the land of their own free will without the consent of the trustees and without the order of any court. That is qualified by sect. 15, which negatives the sale of the mansion-house without the consent of the trustees of the settlement or an order of the court. That has been repealed by the Act of 1890 and replaced by sect. 10 of that Act. It is also qualified by sect. 37 of the Act, which says that no sale or purchase of chattels under that section—that is, the heirloom section—shall be made without an order of the court. The tenant for life has therefore in these two cases, when he wishes to deal with the settled land, to get an order of the court. He has also (I think it is under sect. 53) to have regard to the interests of all parties entitled under the settlement, and he is, as regards the exercise of those powers, in the position of a trustee. When the settled land has been sold, the next question which arises is what is to be done with the purchase money; and that is provided for by a series of sections, beginning with sect. 21. A number of investments are specified; first of all, Government securities and trust securities; the discharge of incumbrances on the settled estate; the payment for any improvement authorised by the Act; payment for equality of exchange; for the purchase of the seignory of any part of the settled land being freehold, or in the purchase of the fee simple of any part of the settled land being copyhold; in the purchase of the freehold reversion of any part that is leasehold, and so on; and in the purchase of land in fee simple or copyhold, or of mines and minerals; in the payment to a person absolutely entitled in payment of costs, charges, and expenses; and, lastly, in any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder. All these matters are at the discretion of the tenant for life. The extent of the duties which the trustees will have to perform in considering the desirability of the investments proposed by the tenant for life has been recently dealt with by

the court in *Lord Coleridge's* case and the other cases cited by Mr. Upjohn before the Court of Appeal. Sect. 22 provides that "capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court at the option of the tenant for life, and shall be invested or applied by the trustees or under the direction of the court, as the case may be, accordingly." The tenant for life has therefore the option of saying whether the money shall be paid to the trustees or into court. Then sub-sect. 2 says: "The investment or other application by the trustees shall be made according to the direction of the tenant for life, and, in default thereof, according to the discretion of the trustees; but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement, and any investment shall be in the names or under the control of the trustees." The tenant for life therefore has power to direct the expenditure, and, as in the case to which I have just referred, the mode in which the money shall be invested or applied. Then, when you come to deal with the improvements, you find a fresh fasciculus of clauses put under Part 7 of the Act, beginning with sect. 25. The improvements are described. They are very numerous, and I will not go through them; but new roads made for the development of land and building estates are amongst them. Then there comes sect. 26: "Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorised by this Act, he may submit for approval to the trustees of the settlement or to the court as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon." Then sub-sect. 2 says: "Where the capital money to be expended is in the hands of the trustees," then "after a scheme is approved by them [that is this case] the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement on (1) a certificate of the Land Commissioners [now the Board of Agriculture] certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by themselves in pursuance thereof; or on (2) a like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the commissioners or by the court, which certificate shall be conclusive as aforesaid; or on (3) an order of the court directing or authorising the trustees to apply a specified portion of the capital money." Now, it will be observed that, with regard to those first two sub-clauses of sub-sect. 2, they deal with matters of fact—that is to say, with an examination, whether the work has been properly executed, which is a matter which will be best seen to by some able practical surveyor, or a man of experience of that sort; and that the amount is properly payable by the trustees in respect thereof. These are matters of fact, and are not matters of law. With respect

to those two matters, the trustees get a discharge for any payment made by them on the certificate. But then there is the third sub-head, an order of the court. Now, I cannot think that the intention was merely to put in a formal application to the court, asking the court to make an order which would have the effect of the certificate of the able, practical surveyor, and nothing more than that. I cannot resist the conviction that, inasmuch as these improvements are of a very expensive nature and so require a very considerable amount of discretion, it has been thought advisable to insert a provision by which, although the trustees may have approved the scheme and although the tenant for life may direct the money to be so employed, it is competent for any person to bring the matter before the court—not first to act on either of these two certificates. That is really the case. If the trustees had chosen to obtain the certificate of an able, practical surveyor or other person mentioned in the 2nd sub-section, the matter could only have been brought before the court by the remainderman challenging the proceedings, as something which ought not to have been done. But if, as the case now is, the tenant for life and the trustees together—when I say together I mean agreeing together—not joining in the application are asking the court to make an order, electing themselves not to rely on any certificate for reasons which may or may not be excellent, then I think that the court has cast upon it a discretion which I think is exceedingly difficult to discharge—namely, a discretion to see whether the remainderman has, in fact, well-founded grounds for saying that the improvements are, although honestly intended, so utterly wrong-headed that they ought not to be sanctioned. I think that what Byrne J. said in the case *Re Duke of Norfolk's Parliamentary Estates*, cited to me by Mr. Danckwerts, throws some light on this. His Lordship says (1900) 1 Ch., at pp. 467, 468: "The scheme of the Act is to give wide powers to the tenant for life and to give power of consent to the trustees, upon the footing that they will act fairly in the exercise of their respective powers, and that neither trustees nor the court will sanction schemes which are improvident or which will unduly fetter any discretion which ought to be exercised at a later date, and there is always this safeguard, that tenants for life and trustees joining in improvident schemes, or not acting with a due regard to the interest of remaindermen, are running the risk of the possibility of the establishment of a personal liability against themselves." I can only say that, if this be so, the court cannot make an order under sub-sect. 3 without excluding any such claim of personal liability, because, if the payment is made under the order of the court, it is impossible, while that order stands, for any remainderman to challenge such payment. Neither the trustees nor the tenant for life or anybody else is liable for having made it. It is quite true that there is some slip in the report of what Chitty J. said about this in *Clarke v. Thornton*, but I think that he was referring to this particular section, and I think that the view that he expresses explains his ideas as to the meaning of this particular section. At p. 313 of 35 Ch. Div., his Lordship says, referring to sect. 26: "If the money had been in the hands of trustees, it appears to me that the tenant for life might have said: 'It

is my option that these capital moneys shall be applied on improvements under the Act.' If he had done that, it would have been his duty to submit, under the 26th section, a scheme to the trustees." Then his Lordship reads from sect. 26 and sect. 22, sub-sect. 2, and says: "If the tenant for life was desirous of exercising his option in the manner I have mentioned, he would have had to submit a scheme to the trustees, and the trustees, in my opinion, notwithstanding this discretionary trust, might, without breach of duty, have acceded to the application and approved of his scheme." Then his Lordship goes on to use some words which look as if he were referring to the later sections and not to this: "But they might have thought, for some reason or other, that it was more safe for them to have the sanction of the court; and consequently they might have declined to approve of the scheme, unless there was an order of the court directing or authorising them, under the 3rd sub-section of the 2nd sub-section of sect. 26, to apply the capital money in that manner"; and, inasmuch as that section only applies after the scheme has been approved, I think it is only fair to say that there must be some slip in this report; but what the learned judge really meant to say was not merely that not only might the trustees have objected to approve the scheme, but that they might have declined to act on any certificate under sub-sect. (i.) or sub-sect. (ii.) of sub-sect. 2, and said that they required an order of the court. They might have thought that, for some reason or other, it was safer for them to have the sanction of the court; they might have said: "So far as we are concerned, we are satisfied; we sanction the scheme, but we know that the remainderman in this case is objecting, and therefore we do not choose to act on the certificate, and we must invite you to apply to the court for an order." That being so, it seems to me that the court is driven to exercise the discretion which the Legislature has conferred upon it, and to do the best that it can to see whether this proposed mode of managing the estate is or is not compatible with due regard to the interest of all parties. There is a difficulty, no doubt, in this view, created by the language of sect. 31, which authorises the tenant for life to enter into a contract relating to the execution of any improvement authorised by the Act. It appears to me that that may very well be got over by supposing that it applies to the great majority of cases where the tenant for life does contract, and where no question may arise and an order of the court is not sought for. When an order of the court has to be obtained, it appears to me that any such contract must be at the risk of the tenant for life. The result is that I think I have to be satisfied as to the scheme, and I will take the evidence to-morrow.

[His Lordship heard evidence the following day and sanctioned the scheme.]

Solicitors: *Stow, Preston, and Lyttelton*, for *Berridge and Sons*, Leicester; *Taylor, Son, and Humbert*.

K.B. Div.] LONDON SCHOOL BOARD (apps.) v. FULHAM BOROUGH COUNCIL (resps.). [K.B. Div.]

KING'S BENCH DIVISION.

Wednesday, Dec. 16, 1903.

(Before Lord ALVERSTON, C.J., LAWRENCE and KENNEDY, JJ.)

LONDON SCHOOL BOARD (apps.) v. FULHAM BOROUGH COUNCIL (resps.). (a)

Metropolis — New drainage — Removal of old disused drains — By-law or regulation and direction — Metropolis Management Act 1855 (18 & 19 Vict. c. 120), ss. 76, 83.

By regulation 29 of the respondents all disused drains were to be broken up and destroyed, and the materials and foul earth removed and dry earth, ballast, or brick rubbish substituted.

By sect. 83 of the Metropolis Management Act 1855 a penalty is provided if any drain thereinbefore mentioned is found not to have been provided according to the directions or regulations of the respondents.

The appellants constructed new drains, which were connected with the respondents' sewer. On the premises were old disused drains which were not physically joined or connected with the new drains. The old drains were not taken out. Held, that the regulation was rightly made, and the appellants were properly convicted for constructing the new drain not in accordance with the directions of the respondents.

CASE STATED.

The appellants are the School Board for London and the respondents are the council of the metropolitan borough of Fulham.

On the 13th Feb. and the 15th May 1902 the appellants appeared to answer a complaint made by John Charles Jackson, medical officer of health for the respondents, for that they, being the owners of certain premises known as the Everington-street Board School, in the borough, did, when reconstructing the drainage thereat, make and provide the drains and connected work and apparatus at the premises not according to the directions of the council of the metropolitan borough of Fulham, whereby the defendants, the present appellants, were, in pursuance of the Metropolis Local Management Act 1855, s. 83, directed that in making and providing the drains and connected works and apparatus all brick and other disused drains at the premises should be broken up and destroyed, and the materials forming them and all the foul and sewage-charged earth and other substances carefully removed from the premises, dry earth or ballast or brick rubbish being brought in, if necessary, in place of them, contrary to the statute in that case made and provided.

The following facts were admitted and proved:—

The vestry of the parish of Fulham had in or about the year 1894 made certain regulations and directions as to drainage of houses and buildings and the construction of water-closets in their district, which purported to be made pursuant to 18 & 19 Vict. c. 120, ss. 73 to 79, 82, 85; 25 & 26 Vict. c. 102, s. 88; and the Public Health Act 1891 (54 & 55 Vict. c. 76), ss. 37, 39.

Regulation and direction No. 29 is as follows:

All old brick and other disused drains shall be broken up and destroyed, and the materials forming them and all

foul and sewage-charged earth and other substances carefully removed from the premises, dry earth or ballast or brick rubbish being brought in, if necessary, in place of them.

The respondents are the successors of the Fulham Vestry, and adopted and confirmed the regulations and directions.

The school board as the owners of the premises were carrying out new drainage works thereat. The premises consisted of the school buildings and playgrounds affording accommodation for 1200 children. The old drains of the premises had been laid, made, and provided by the appellants in accordance with the requirements of, and with the approval of, the Fulham Vestry about twenty years ago.

In carrying out the new drainage scheme the old drains were from 4ft. to 14ft. underground, and the playground which surrounded the school buildings and was immediately over the old drains was covered with tar paving.

It was to be taken for the purposes of this case that the new drains were not physically joined to or connected with the old disused drains, and were of themselves fit and proper.

On the 11th Dec. 1901 the respondents passed the following resolution:

(a) That all brick and other disused drains at Everington-street Board School be broken up and destroyed, and the material forming them and all foul and sewage-charged earth and other substances carefully removed from the premises, dry earth or ballast or brick rubbish being brought in, if necessary, in place of them, and that a copy of this order and requirements be served upon the School Board for London on this behalf; (b) that, in the event of the School Board for London refusing to comply with the terms of the foregoing order, the town clerk and medical officer of health be instructed to take, if necessary, legal proceedings with respect to such default.

A copy of such resolution, order, and requirement was duly served on the appellants.

In carrying out the new drainage scheme all old drains, so far as known, were taken out and removed from inside the buildings and to a distance of 8ft. from the external walls, but certain parts of the old drains were left in the ground under the playground and were not used in the new drainage scheme. They were cleaned out as far as possible without taking them up, and filled up at the ends with concrete.

These drains were constructed for use and were used until so dealt with as aforesaid, and they formed the soilpipes of the children's closets.

All the drains and other connected works of the premises were from time to time inspected on behalf of the respondents, and it was then found that the regulation and order of the respondents had not been complied with.

The contentions of both parties appear in the judgment of the magistrate, which was as follows:

By the Metropolis Management Act 1855, s. 83, in case any drain or other connected works thereinbefore mentioned be found on inspection not to have been made or provided according to the directions and regulations of the vestry, every person so offending shall forfeit and pay a sum not exceeding 10l. The vestry of Fulham made and gave certain regulations and directions purporting to have been made and given under sects. 82 to 85 of the Act. Those regulations and directions having been notified to a builder, they were, in a case

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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against him arising on sect. 76, held sufficient: (*Frost v. Fulham Vestry*, 82 L. T. R.p. 720; 19 Cox C. C. 519). They have since been formally adopted by the consent of the borough, which has succeeded the vestry of Fulham. Regulation and direction No. 29, that all the brick and other disused drains shall be broken up and destroyed and the matters removed from the premises, purports to have been made under the sections of the Metropolis Management Act 1855, of which the said sect. 83 is one, and the defendant school board are summoned for making and providing drains and connected works or apparatus not according to the regulations or directions of the council. The regulations or directions were given to the school board when making a new drain, and they have been required to break up a certain disused old drain near the new one. It was argued for the school board that the old drain is not a work connected therewith, and that the words "made and provided" in sect. 83 are inapplicable to the breaking up of the adjacent old drain on the premises. But, good reasons having been given for the removal of the old disused drains from the vicinity of the new ones, I think that regulation and direction No. 29 may fairly be referred to sect. 83 and treated as having been made and given under it, and that they are valid. If so, the new drain has not been made or provided according to the directions or regulations of the borough council, because the old drains have not been destroyed and removed, and the defendants are liable to a penalty.

The case having come on for argument, it was remitted by the court to the magistrate for additional facts to be found by him, which were as follows:—

On the 11th Dec. 1900 the council served intimation notices under the Public Health (London) Act 1891 on the school board that the drains at Everington-street School were defective, and on the 29th April 1901 the council served on the school board a statutory notice requiring them to relay and ventilate the drains according to the regulations of the council, and the notice was acknowledged by the school board on the following day.

On the 21st June 1901 the medical officer of health to the council, by letter of that date, inquired when the board proposed to do the redrainage works, and the school board replied on the 25th June 1901, by letter of that date to the medical officer of health, stating that the redrainage of the school had been intrusted to the London Sanitary Protection Association.

On or about the 15th July 1901 a representative of the London Sanitary Protection Association had an interview with the medical officer of health, and produced to him the plan showing the proposed reconstruction of the drainage, on which was marked, in reference to the old or then existing drains, the words "old drains to be destroyed." The medical officer of health suggested certain alterations with regard to the plan generally, which the representative undertook to make, and to amend the plan in accordance therewith. The medical officer of health subsequently received information that it was not the intention of the London Sanitary Protection Association to remove the old drains.

On the 24th July 1901 Messrs. Fleming and Co., on behalf of the London Sanitary Protection Association, wrote inclosing a plan of the proposed new drainage works at the premises, and on the 25th July 1901 the medical officer of health wrote to the secretary of the London Sanitary Protection Association, informing them

that with respect to the old drains it must be clearly understood that all these must be taken up.

On the 29th July 1901 the engineer to the London Sanitary Protection Association wrote a letter to the town clerk giving certain reasons for not taking up the old drains, and, at a meeting, held on the 1st Aug. 1901, of the public health committee of the council, the last-mentioned letter was considered, and it was resolved as follows:

That the plans submitted be approved subject to the whole of the old drains proposed to be abandoned being removed and the portion proposed to be used from the boiler-house being made water-tight.

On the 2nd Aug. 1901 the engineer to the London Sanitary Protection Association was informed by the town clerk, by letter of that date, of the terms of the resolution, and that the council's regulations could not be relaxed and that the old drains must be taken up and destroyed.

On the 10th Aug. 1901 the secretary to the London Sanitary Protection Association wrote a letter to the town clerk, promising to take such steps as were necessary to comply with the council's regulations and their by-laws.

After the receipt of the last-mentioned letter, instructions were given by the medical officer of health to the council's workmen to make the necessary connections of the new drains to the council's sewer so as to enable the London Sanitary Protection Association to commence and carry on the new drainage works, and the connection was accordingly commenced on the 19th Aug. 1901 and completed on the 24th Aug. 1901.

By the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 76:

Before beginning to lay or dig out the foundation of any new house or building within any such parish or district, or to rebuild any house or building therein, and also before making any drain for the purpose of draining directly or indirectly into any sewer under the jurisdiction of the vestry or board of or for any such parish or district, seven days' notice in writing shall be given to the vestry or board by the person intending to build or rebuild such house or building or to make such drain; and every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with this Act and as the vestry or board shall order, and every such drain shall be made in such direction, manner, and form and of such materials and workmanship and with such branches thereto and other connected works and apparatus and water supply as hereinbefore mentioned and as the vestry or board shall order, and the making of every such drain shall be under the survey and control of such vestry or board; and the vestry or district board shall make their order in relation to the matters aforesaid and cause the same to be notified to the person from whom such notice was received within seven days after the receipt of such notice, and in default of such notice, or if such house, building, or drain, or branches thereto, or other connected works and apparatus and water supply, be begun, erected, made, or provided in any respect contrary to any order of the vestry or board made and notified as aforesaid or the provisions of this Act, it shall be lawful for the vestry or board to cause such house or building to be demolished or altered, and to cause such drain or branches thereto and other connected works and apparatus and water supply to be relaid, amended, or remade, or, in the event of omission, added as the case may require, and to recover the

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expenses thereof from the owner thereof in the manner hereinafter provided.

And by sect. 83:

In case any drain . . . or other connected works or apparatus hereinbefore mentioned be found, on inspection, not to have been made or provided according to the directions or regulations of the vestry or district board or contrary to the provisions of this Act, or in case any person, without the consent of the vestry or district board, construct, rebuild, or unstop any sewer, drain . . . which may have been ordered by them not to be made, or to be demolished or stopped up, or in case any person discontinue any water supply or destroy any connected works or apparatus as aforesaid, or in case any person, without the consent of the vestry or district board, break into any sewer vested in such vestry or board, every person so offending shall forfeit and pay any sum not exceeding 10*l.*; and in case the person so making any sewer, drain . . . which may have been ordered to be demolished or stopped up, or discontinuing any water supply or destroying any connected works or apparatus as aforesaid, or breaking into any sewer as aforesaid do not within fourteen days after notice in writing by the vestry or board cause such sewer, drain . . . to be altered or reinstated in conformity with the directions of the vestry or board, or, as the case may be, to be demolished or stopped up . . . or such connected works or apparatus to be restored, then and in every such case the vestry or board may cause the work to be done, and the expenses thereof shall be paid by the person who has so offended.

George Elliott for the appellants.

Danckwerts, K.C. and *Courthope-Munroe* for the respondents.

LORD ALVERSTONE, C.J.—The restatement of this case has removed the only doubt that existed in the mind of any member of the court on the last occasion. What has been really proved before us now was stated partly by Mr. Courthope-Munroe and partly by Mr. Danckwerts, but it was very properly objected that it was not raised in the case. As I understand, the position was this: There was a drainage system of very complicated character. There were privies for both boys and girls in the middle of the yard. There were a number of old drains underneath the yard, and the school board most properly determined, there being a nuisance with these old closets, to remodel it in a way which partly used for some purposes, with some manholes, the old drainage system, and all the pipes shown in blue on the plan we have seen were drains reused for the rain and surface water. Of course it is very important that even with regard to those drains they should be in a proper condition. That is all that need be said as to that. As to pipes marked red on the plan—the new drains—they were laid, and then there were many other hundred of feet of old drains that were left in the grounds. A portion of them were taken up—up to 8ft. from the building and under the building—and therefore, of course, the question of what should be removed had to be considered, because the plans were submitted with the suggestion that a portion of the old drains should be taken up. Then the others were ultimately cleansed and sealed off. Of course the fact that they had to be dealt with in that way shows that some judgment as to what ought to be done had to be brought to bear upon the subject. In that state of things the school board have to come under sect. 76 and have to ask permission to lay the

new drains connected with the sewer. That being so, this section provides for it being done in accordance with the directions that are given. Now, I only wish to speak for myself, because I may be going perhaps further than my brothers do. I think regulation 29 is a perfectly reasonable and proper regulation, and one which, in that state of things, the authority is entitled to consider. It says: "All old brick and other disused drains shall be broken up and destroyed, and the materials forming them and all foul and sewage-charged earth and other substances carefully removed from the premises, dry earth or ballast or brick rubbish being brought in, if necessary, in place of them." In my opinion, when they applied to the Fulham authority, the respondents, under sect. 76, it was perfectly competent for them to say: "But mind, if you do this, you have got to obey regulation 29." But they went a great deal further than that. They actually presented a plan with a statement that the old drains were going to be taken up, and although I do not think it is quite right to speak of it as a contractual arrangement, I do not know why that should not be one form in which the permission may be given. It is a condition of the sanctioning of the plans that the old drains are to be taken up, and when the agents of the school board, I daresay perfectly *bonâ fide*, changed their minds and thought they could do it equally well without taking them up, they wrote a long letter to the respondents on behalf of the school board, asking that they might not be bound to take them up, because there was no danger to health, and there had been no smell nor sufficient ground for taking them up. That being considered by the public health committee of the council, there is a formal resolution that the plans submitted be approved subject to the whole of the old drains proposed to be abandoned being removed. Under those circumstances it seems to me that the one point that was made on behalf of the appellants on the last hearing, that this was the removal of something which had no connection with the old drains (because, as Mr. Elliott pressed on us to-day, what was left in the ground was disused and in no way connected with or physically joined to or united with what was put in the ground), and that, that being so, there was no jurisdiction in the respondents to impose the condition, has gone. I am clearly of opinion that the approval of the plans obtained under sect. 76 might be coupled either with the observance of the regulation (which I think, for anything which has been argued before me, is perfectly reasonable), and with the express condition that, if the plans are sanctioned, it is subject to some work being done in connection with these old drains which are being changed, and I only wish to adopt the argument of Mr. Danckwerts that the conditions as to the materials that may be allowed to be used, where the manholes are to be, and whether or not there should be any protection against possible leakage in the drains are all matters which have to be considered or might have to be considered differently according as to whether the old drains are left in the ground or not. I am of opinion that the view taken by the learned magistrate is quite right, and the further facts which have been stated in consequence of questions put by the court and agreed to at the time by the two learned counsel have

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made the matter clear and removed the only doubt that ever existed in the mind of any member of the court. I think the appeal should be dismissed.

LAWRANCE, J.—I agree.

KENNEDY, J.—I wish to add some remarks because I do not feel, and I have not felt, so clear about this matter as my brethren. I admit that we have to deal with this according to the strict letter of the law. I certainly do not dissent from their view, and I am not prepared to say I cannot agree with it. It is to be borne in mind and it is important, it seems to me, in these magisterial proceedings to see exactly what is the charge. Now, the charge before the magistrate was, as he states it in the case: "That the appellants appeared before me to answer a complaint made by John Charles Jackson, medical officer of health for the metropolitan borough of Fulham, for that they, being the owners of certain premises known as the Everington-street Board School, in the said borough, did when reconstructing the drainage thereat make and provide the drains and connected apparatus at the said premises not according to the directions of the council of the metropolitan borough of Fulham," and so on. It appears, as I understand the restatement of the case, that what was relied upon was this regulation No. 29. Now, if it had rested there, I should not have been content to leave the matter where it was left by Mr. Danckwerts in his argument, but what in substance I think is covered by the complaint is that there was a breach of sect. 83. I think, on the whole, that it does cover, not merely regulation No. 29, but it appears to cover also the directions which it is in the power of the authority to give under sect. 76. It seems to me, according to regulation No. 29, that in every case all that which has to be done would have, at any rate, required consideration as to its applicability or its propriety to a case of this kind in which they were seeking really to put in a new system of drainage in substitution of the old. Under sect. 76, it seems to me that they have power in each separate case to give directions where drains have to be made before making any drains. The words are: "For the purpose of draining directly or indirectly into any sewer under the jurisdiction of the vestry or board." That means the authority has the power to say how that shall be done, and, although I can see considerable danger in making terms which may cause very great expense, against the imposition of which it is difficult to struggle, and in regard to which they may not be matters directly connected with drains, I think in this case what was ordered to be done in the removal of the old drains altogether and everything connected with them may be fairly brought within those words of sect. 76 which give the power to insist upon those terms and conditions. Therefore I do not dissent from the judgment, but I do so expressly on that ground. But to say, quite apart from a direction in a particular case, that in all cases where new drainage works are to be put into a place "all old brick and other disused drains shall be broken up and destroyed and the materials removed, together with all foul and sewage-charged earth, dry earth or ballast or brick rubbish being brought in, if necessary, in place of it," is rather severe, if it is intended to be

applied in all circumstances and without modification as an absolute regulation of the authorities. I think in this particular case it is clear that, whether you call it contractual or otherwise, it would be contractual as regards the engineering body who were employed by this school board, it becomes effectual as a direction under sect. 76 as regards the body employing them, which is here the school board. Under the special terms that were made in this case, I am not prepared to dissent from the view which I think my Lord and my brother Lawrance, J. hold is the true one—namely, that the direction under sect. 76 covers what was ordered to be done in this case, and which the school board has not complied with.

Appeal dismissed.

Solicitors: C. E. Mortimer; R. M. Prescott.

Thursday, Dec. 17, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

CLAYTON AND ANOTHER (apps.) v. PEIRSE (resp.). (a)

Fishery — By-law — "Description of nets" — Salmon Fishery Act 1873 (36 & 37 Vict. c. 71), s. 39 (3).

Under sect. 39 of the Salmon Fishery Act 1873 "a board of conservators may make by-laws . . . for all or any of the following purposes . . . (3) to determine the length, size, and description of nets."

A by-law made under this section forbade the use of certain particular kinds of nets by name in parts of the fishery district, and then gave a definition and description of these nets.

Held, that the by-law was not ultra vires. The word "description" in sect. 39 (3) is not confined to the characteristics of any particular kind of net.

CASE stated on an information preferred by the respondent against the appellants under a by-law made by the Board of Conservators for the Wye Fishery District pursuant to the Salmon and Freshwater Fisheries Acts 1861 to 1892 on the 27th Feb. 1901, and confirmed by the Board of Trade on the 27th Feb. 1902, for that they (the appellants) in the river Wye, above a line drawn across that river along the lower side of Bigawear Bridge (that river then being within a fishery district formed under the above-mentioned Acts) unlawfully used a net other than a beating net—namely, a draft or seine net—for taking salmon in that part of the river, contrary to the by-law duly made in that behalf.

Upon the hearing of the information it was proved:

That the by-laws in force on the 13th May 1903 in the Wye Fishery District included the by-law under which the information was laid.

That the appellants John Clayton and Sidney Thomas on the 13th May 1903 at Goodrich unlawfully used a net other than a beating net—namely, a draft or seine net—for taking salmon in that part of the river wherein the use of such net was prohibited by the by-law.

On the part of the appellants, the use of the draft or seine net was admitted, but it was

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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contended that they were the servants of Charles Haines, the lessee of the Huntsham Ferry and Salmon Fishery, within which the appellants used the net, and that Charles Haines held a licence granted by the Wye Board of Conservators to use a draft net, for which licence he had paid 5*l.*; that the only net which the new by-laws allowed in that fishery was a beating net, which was practically impossible, useless, and unremunerative, and that in only allowing a beating net the conservators were allowing a net which would be of no use at any time in a considerable part of the middle fisheries of the river, including the Huntsham Fishery, and in wet seasons in no part of the middle fisheries; that the by-law was in restraint of trade; that the by-law was unfair, because it injured the middle waters of the river Wye, including the Huntsham Fishery, for the advantage of the owners of the upper waters and of the tidal waters of the Wye thereby unduly favouring certain parts of the river at the expense of another part; that the by-law was unnecessary, because it had not been proved that there had been any decrease of salmon in the river; that the by-law was unreasonable, because to allow a beating net, which was practically of no utility and to prohibit the use of a draft net, the accustomed form of net theretofore used in the Huntsham Fisheries, amounted to a total prohibition of net fishing in a large proportion of the middle fisheries of the river, including the Huntsham Salmon Fisheries; that the by-law was invalid and contrary to law as being *ultra vires*, having regard to the true construction of the Salmon Fishery Acts 1861 to 1873 and particularly to sect. 30 of the Act of 1873, sub-ss. 3, 8, 11, and 12, and sect. 40 of the Act of 1873.

On the part of the respondents it was contended that the by-law was good and was not *ultra vires*, and that the beating net could be used with profit in the waters above Bigweir Bridge, including the Huntsham Fishery; that the Huntsham Fishery extended only for a short distance in the river above Bigweir Bridge; that the use therein of a draft net injured all the fisheries above the Huntsham Fishery; that by the by-law the Huntsham Fishery was improved for rod and line fishing; that Charles Haines had renewed his lease of the Huntsham Fishery after the making of the by-law and with full knowledge of it; that, having been specially warned that the licence to use a draft net would be of no use to him, he insisted on taking out the licence, and that there was no power under the Acts to refuse him the licence if he demanded it: (see sect. 34 of the Act of 1865, sub-sect. 5).

Upon the above contentions and on the evidence produced before the justices by the parties, they found the following facts: (a) That the bye-law under which the appellants were convicted was a good and valid by-law, and not *ultra vires*; (b) that the by-law was reasonable, having been approved after a public inquiry at which all the fishing interests in the river were or might have been represented; (c) that the draft net was used contrary to the by-law; (d) that the appellants were using the net as servants to Charles Haines; (e) that they and Charles Haines were not protected by the licence, as he took it out after warning that it was illegal to use it in the Huntsham Fishery, and the licence was limited to

waters in which and at the times at which he is otherwise entitled so to fish; (f) that the Wye Fishery Board had no dispensing power and could not issue a valid licence to fish contrary to their own by-laws: (*Yabbicom v. King*, 80 L. T. Rep. 159: (1899) 1 Q. B. 444).

They therefore convicted the appellants.

The question upon which the opinion of the court was desired was whether the justices, upon the above statement of facts, came to a correct determination and decision in point of law in holding that the by-law in question was a valid by-law, and that they rightly convicted.

By the Salmon Fishery Act 1873 (36 & 37 Vict. c. 71), s. 39:

Subject to the provisions hereinafter contained for the confirmation and publication of the by-laws, a board of conservators may make by-laws for the better execution of the Salmon Fishery Acts 1861 to 1873, and for the better protection, preservation, and improvement of the salmon fisheries within their district, and alter the same from time to time for all or any of the following purposes—that is to say: . . . (3) To determine the length, size, and description of nets and the manner of using the same (not being fixed engines) for taking salmon, provided that no by-law made under the authority of this section shall limit the length of a hang net or limit the length of a draft net so as to be less than 200 yards . . . (8) To prohibit the use of nets within a certain district of the mouth of any river, and of the point of confluence of rivers in any part of the district (not being a fishery) and to erect and fix posts, buoys, and landmarks to indicate such distances respectively.

And by sect. 40:

A board of conservators may make any by-law to supply to the whole or to any part or parts of their district, and to the whole or any part or parts of the year, and may from time to time by any new by-law revoke, vary, or alter, either in whole, in part, or as to its application to the whole or to any part or parts of the district any by-law previously made, and may from time to time vary any by-law made in respect of the whole or any part or parts of the district, and may from time to time except or exclude from the operation of all or any of the by-laws any part or parts of the district to the whole or other parts of the district.

By-law 2 of the Board of Conservators of the Wye Fishery District provided:

The length, size, and description of nets and the manner of using the same (not being fixed engines) which may be lawfully used for taking salmon in the Wye Fishery District shall be as follows: (a) In that part of the said district which includes so much of the river Wye as lies below a line drawn across the said river Wye along the lower side of the Bigweir Bridge, together with all tributaries of the said river flowing into it below such line, the description of such nets shall be draft or seine nets, beating nets and lave nets, as hereinafter determined. Draft or seine nets shall be unarmoured nets consisting of a single sheet or wall of netting not more than 200 yards in length, measured along the head-rope when wet, and not more than 8 yards in depth, and shall be used by holding one end of the net on the shore or bank, and by shooting the net from a boat which shall start from such shore or bank, and return without delay to such shore or bank from which it started, and then draw in the net on to such shore or bank. Each draft or seine net shall be fully drawn in and landed at least twenty minutes before another net is shot or begun to be shot within 100 yards from any point along the line of shot of the first net. Beating nets shall be nets made with a linnet or inner net armed on one or both sides with walling-out holes or armour, and shall not exceed 40 yards in length, measured along

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the head-rope when wet, and 8 yards in depth, and shall be used by extending the same from a point at or near one bank of the river to another point at or near the same bank, and by driving therein the fish which may have been thereby inclosed. No portion of any such net shall be in the water for more than thirty minutes at one time. Lave nets shall be nets suspended so as to form a bag or purse from a wooden frame consisting of a pole or handstaff or handle with two movable arms, each not more than 5ft. 6in. in length, and having a space of not more than 7ft. 6in. between their outer extremities when fully extended; each such net shall be used by one person only, who shall place or hold the same in the water and lift or scoop the fish that may be inclosed therein. No such net shall be used by any person within a distance of less than six yards from any other person using another net. (b) In all other parts of the said district except as aforesaid and until the 16th day of August 1906 inclusive the description of such nets shall be beating nets, as above described, to be used in manner above mentioned. Any person using any net (not being a fixed engine) of any other length, size, or description than as above determined, or using any net (not being a fixed engine) in any other manner than as above determined and described respectively shall be liable for each offence to a penalty not exceeding 5*l*.

By the by-laws the licence for a draft or seine net was 5*l*. and for a beating net 20*l*.

Robson, K.C. (J. Lloyd with him) for the appellants.—This by-law is made under the powers conferred on the board of conservators by sect. 39 (3) of the Salmon Fishery Act 1873, which allows a by-law to be made to determine the length, size, and description of nets. This by-law purports to prohibit the use of a particular kind of net and is *ultra vires*, for the word "description" means the characteristics of the net. A by-law therefore made under this power may only authorise a net with a particular mesh, but it cannot prohibit a particular net. If sub-sect. 3 of sect. 39 bore the interpretation the respondent contends there would be no necessity for sub-sect. 8. The by-law is also oppressive, as it compels a fisherman to pay 20*l*. for a licence instead of 5*l*. If the by-law is good it practically prevents net fishing where it applies.

W. D. Benson for the respondent.—The word "description" means "kind," and the by-law is good. The board of conservators can forbid any particular kind of net to be used in a particular part of the fishery. The nets in the by-law are both named and described.

Robson, K.C. in reply.

Lord ALVERSTONE, C.J.—We are asked to say that this by-law, made under sect. 39 of the Salmon Fishery Act 1873 is *ultra vires* and unreasonable; but, as was pointed out in *Kruse v. Johnson* (78 L. T. Rep. 647; (1898) 2 Q. B. 91) a strong case must be made out to support that contention. Under that section the conservators have power to make by-laws for determining the length, size, and description of nets, and by sect. 40 they can apply these by-laws to any part of their district. In this case they have said that below a certain point certain nets may be used, but above that point only beating nets can be used. Whether they have the right to make such a by-law depends upon whether they can say that a particular kind of net may not be used as regards the whole river. It is said that sub-sect. 3, of sect. 39, which enacts that the board

may make by-laws "to determine the length size, and description of nets and the manner of using the same," does not give any such power, and that the conservators, by their by-law, cannot prohibit the use of a particular kind of net, but only the length, size, or make of such net. I do not think that the word "description" means description of a particular kind of net, but I think the conservators can prohibit the use of any kind of net altogether. In my opinion "description" means kind, as comparing one kind with another. This is borne out by the proviso to sub-sect. 3, which regulates the limitations of hang nets and draught nets, and that suggests that hang net and draught net may be descriptions of nets within the section. I think that if we were to hold that the conservators could not prohibit the use of a particular kind of net altogether, that would be cutting down their powers unduly. It is further said that sub-sect. 3 cannot give them this power, because, by sub-sect. 8, the conservators may prohibit the use of nets altogether in certain places. However, sub-sect. 3 of sect. 39 and sect. 40 give power to the conservators to deal with nets all over the river, and I think sub-sect. 3 of sect. 39 ought to be construed as giving them power to make this by-law. It is further said that if this by-law is upheld that will practically prohibit fishing, because the licence for a beating net is four times as much as for a draft net. A by-law, however, cannot be *ultra vires* because it allows a net to be used, the duty on which is four times as much as a net which is forbidden.

LAWRENCE, J. agreed.

KENNEDY, J.—In order to be a good by-law it must be shown that it was made under the powers given by sect. 39 of the Salmon Fishery Act 1873. It is said that the word description in sub-sect. 3 of sect. 39 does not allow the conservators to prohibit the use of a particular kind of net altogether, but only allows them to make a by-law with regard to the characteristics of the various nets. There is no reason, however, why description should not mean the generic description as well as the particular characteristics of nets. I think that the by-law can say that a particular description of net may not be used, and it may further describe what a particular net shall be. There is no reason why the word "description" should be limited to the description of the characteristics of the net. A by-law under sub-sect. 3 of sect. 39 could, by setting out the characteristics of a net which is forbidden, prohibit the use of that net altogether, and so the by-law could forbid the use of a net described by enumerating its characteristics, but not if it were merely called by its name. If the arguments of the appellants were sound, the by-law would be good if the net were described without naming it, but *ultra vires* if it named it without describing it. There is no conflict between sub-sects. 3 and 8 of sect. 39, and they are not inconsistent, and I do not see how the powers given under sub-sect. 8 can make a by-law under sub-sect. 3 *ultra vires*. *Appeal dismissed.*

Solicitors: Meredith, Roberts, and Mills, for E. L. Wallis, Hereford; Norris and Norris, for R. J. Owen, Builth.

K.B. Div.] DIXON v. BRADFORD, &C., RAILWAY SERVANTS' COAL SUPPLY SOCIETY. [K.B. Div.]

Tuesday, Jan. 12.

(Before Lord ALVERSTONE, C.J. and
KENNEDY, J.)DIXON v. BRADFORD AND DISTRICT RAIL-
WAY SERVANTS' COAL SUPPLY SOCIETY
LIMITED. (a)*Landlord and tenant—Tenancy—"Three months'
notice . . . to terminate agreement"—
Tenancy from year to year.**Premises were let to the defendants "at an inclu-
sive rental of 25l. per annum from the 1st Oct.
1894. The company to pay rates and taxes
in addition. Three months' notice on either side
to terminate this agreement."**Held, that the tenancy was a yearly one terminable
by three months' notice at the end of a year of
the tenancy.*APPEAL from His Honour Judge Bompas sitting
at the Bradford County Court.The action was brought to recover one quarter's
rent from the 1st Jan. 1903 to the 31st March
1903.

The tenancy agreement was as follows:

*Agreement for letting house and shop.—The Bradford
and District Railway Servants' Coal Supply Society
limited to have the tenancy of the house and shop
24 and 24A, Wakefield-road and Regent-square at an
inclusive rental of 25l. per annum from the 1st Oct. 1894.
The company to pay rates and taxes in addition. Three
months' notice on either side to terminate this agreement.
—Sept. 14, 1894.*Notice purporting to determine this agreement
was given by letter dated the 24th Sept. 1902 as
follows:*I beg to give you three months' notice that we shall
cease the tenancy of the premises No. 24, Wakefield-
road.*The County Court judge found for the defen-
dants.

The plaintiff appealed.

*Naldrett for the plaintiff, the appellant.—The
notice to quit was bad whether this was a yearly
or a quarterly tenancy. If it was the latter, then,
as the tenancy commenced on the 1st Oct., the
three months' notice must expire then or at some
period of three months from that date, and not on
the usual quarter days. It was decided in *Kemp
v. Derrett* (3 Camp. 510; 14 R. R. 828) that where
premises are taken under an agreement by which
the "tenant is always to be subject to quit at
three months' notice," this constitutes a quarterly
tenancy which may be determined by a three
months' notice to quit, expiring at the same time
of the year it commenced, or any corresponding
quarter day. Further, although the tenant under
such an agreement enters in the middle of one of
the usual quarters, if there appears to be no agree-
ment to the contrary, he will be presumed to hold
from the day he enters, and the notice can only
be determined by a notice expiring that day of
the year, or some other quarter day calculated
therefrom. That case shows that this notice is
bad even if this is a quarterly tenancy, but I
submit that on the true construction of the agree-
ment this is a tenancy from year to year, but
instead of, as is usual, being terminable by a six
months' notice, all that is required is a three
months' notice which must expire on the day of
the year when the tenancy commenced. Where**the rent is expressed to be reserved at so much
a year, the presumption is that the tenancy is
a yearly one, although that presumption may be
rebutted by other parts of the instrument. But
here the provision as to rates and taxes supports
that presumption. He referred to**Wilkinson v. Hall*, 3 Bing. N. C. 508; 43 R. R.
728;*Doe d. King v. Grafton*, 18 Q. B. 496;*Fox on Landlord and Tenant*, p. 3, 3rd edit.*As to the date when the notice ought to expire,
Doe d. Spicer v. Lea* (11 East, 312) and *Sidebotham
v. Holland* (72 L. T. Rep. 62; (1895) 1 Q. B. 378)
are in point. In *Doe d. Pitcher v. Donovan* (1 Taunt.
555; 2 Camp. 78) it was held that on the letting
of a house from year to year "to quit at quarter's
notice," the quarter must expire with a year of the
tenancy. There the premises were let from
Michaelmas 1802 at 50l. a year. In *Soames v.
Nicholson* (85 L. T. Rep. 614; (1902) 1 K. B. 157)
the words were, "subject to three months' notice
on either side at any time to terminate," while in
Kemp v. Derrett (*sup.*) they were, "always to be
subject." These cases are very different from the
present, and I submit that the learned County
Court judge was wrong.*Geoffrey Ellis for the defendants, the respon-
dents.—The tenancy here being subject to "three
months' notice on either side to terminate this
agreement," the notice can be given at any time.
In *Doe d. King v. Grafton* (18 Q. B. 496) the
premises were let at a yearly rent payable quar-
terly, "until one of the said parties should give
the other six calendar months' notice to quit,"
and it was held that notice might be given to
quit at the expiration of any six months. He
also referred to**Doe d. Williams and Ayrane v. Smith*, 5 Adol. &
El. 350; 44 R. R. 442;*Chambre, J. in *Doe d. Pitcher v. Donovan* (*sup.*)
points out that it is only if the tenancy is from
year to year that the quarter's notice must end
with the year, but if the demise was for one year
only and then to continue tenant afterwards and
quit at a quarter's notice, then it would be a quarter
ending at any time. Here the tenancy was a
quarterly one, terminable at a quarter's notice, and
the notice to quit was good.**Lord ALVERSTONE, C.J.—Cases which turn on
the effect of notices to quit are in one sense
unsatisfactory, for the court has often to apply
rules of law to the construction of documents
drawn up in colloquial language. There are,
however, certain rules of law which show that we
cannot accept the view taken by the learned
County Court judge. The tenancy was in terms
a yearly one, and the authorities are sufficient to
establish that it would be a yearly tenancy ter-
minable on the 1st Oct. by six months' notice,
apart from the clause which says: "Three months'
notice on either side to terminate this agreement."
Further, the clause as to the payment of rates and
taxes rather points to a yearly tenancy, for they
are paid yearly or half yearly. I think that
the reasoning and language in *Doe d. Pitcher v.
Donovan* (1 Taunt. 555; 2 Camp. 78) apply here,
and in that case it was in effect decided that a
clause like this only cut down the period of notice
from six to three months, but that no incidents
of the tenancy were otherwise affected, and that
the tenancy remained a yearly one and that the*

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

K.B. Div.] SURREY COMMERCIAL DOCK CO. v. MAYOR, &C., OF BERMONDSEY. [K.B. Div.]

term ended at the end of a year. Looking at *Doe d. King v. Grafton* (18 Q. B. 496), the point upon which that case was decided was not that the tenancy was not a yearly one, but that the words "until one of the said parties shall give unto the other six calendar months' notice in writing to quit" were sufficient to rebut the presumption of a yearly tenancy which would have arisen from "at the yearly rent of 42l. payable quarterly." Here there is nothing to rebut the presumption of a yearly tenancy, and we must therefore hold that the notice given was not a good notice. I hold that the tenancy is not properly determinable until the end of a year of the tenancy, and then by a three months' notice.

KENNEDY, J.—On the whole, I am of the same opinion.

Appeal allowed.

Solicitors: *Jaques and Co., for S. Wright, Morgan, and Co., Bradford; Farmer, Rawson, and Co., for Banks, Newell, Rawstorne, and Hammond, Bradford.*

Dec. 21, 1903, and Feb. 1, 1904.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

SURREY COMMERCIAL DOCK COMPANY (apps.)
v. MAYOR, &C., OF BERMONDSEY (resps.). (a)

Local government—Private Act—Inconsistency with public Act—Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 76—Surrey Commercial Dock Act 1894.

By a private Act of 1894 the appellants were specially authorised to do certain works and to make and maintain in connection with the works so authorised (inter alia) all necessary and proper buildings and other works on any lands within the limits of deviation.

The erection of a certain building on lands within the limits of deviation was rendered necessary by works so authorised.

Held, that the interference and control involved in sect. 76 of the Metropolis Management Act 1855 was inconsistent with the powers conferred by the private Act, and so the appellants were not bound to serve on the respondents a notice under that section in respect of such building.

CASE stated on a complaint charging the appellants with unlawfully and without having given seven days' notice in writing to the respondents, beginning to lay or dig out the foundation of a new building, contrary to sect. 76 of the Metropolis Management Act 1859.

The appellants are a company constituted and incorporated under the Surrey Commercial Dock Act 1864 for the purpose of carrying on the undertaking defined in sect. 15 of such Act, and for executing the works authorised by such Act, and for maintaining such undertaking and works.

The docks, basins, lands, buildings, and other premises, conveniences, and works defined in sect. 15, and authorised by sect. 53 of the Surrey Commercial Dock Act 1864, are surrounded by and contained within dock fences and gates within which the appellants have and exercise all the powers conferred upon them by the Surrey Commercial Dock Act 1894 and the Acts incor-

porated with such respective Acts or amending the same.

Portions of the appellants' premises, upon which warehouses, workshops, and other buildings are erected, are entirely surrounded by water, and none of the portions so surrounded can be drained by gravitation into any sewer of the respondents outside the appellants' premises. It would, however, be possible to drain them by syphons under the locks, but this would necessitate pumping, and be very expensive.

The respondents are under and by virtue of the London Government Act 1899 the successors of the vestry of the parish of Rotherhithe, which parish now forms part of the borough of Bermondsey, where the appellants' premises are situate, and are the local authority for the purposes of sect. 76 of the Metropolis Management Act 1855, and sects. 37 and 38 of the Public Health (London) Act 1891 within the appellants' premises under certain orders hereinafter referred to.

By the Surrey Commercial Dock Act 1894 the appellants were empowered to make and maintain the works described in sect. 4 of such Act, which works include (e) a new road (No. 1) "and sewer commencing in Swing Bridge-road and terminating in Rotherhithe Lower-road, and the raising and alteration of the levels of the Swing Bridge-road between the western end of the swing bridge and the commencement of such new road (No. 1) and sewer."

In connection with the works specially authorised by the section or any of them, the appellants were empowered by the section to make and maintain (*inter alia*) all necessary and proper embankments, approaches, roads, buildings, yards, and other works and conveniences, and to alter, break up, stop up, and divert any pipes, wires, tubes, sewers, drains, and other works on or under any lands within the limits of deviation shown on the deposited plans which might be acquired by or belong to them.

Pursuant to the powers conferred on them by sect. 4 of the Surrey Commercial Dock Act 1894, the appellants made the works mentioned in sub-par. (e) of such section, and raised the level of the Swing Bridge-road. The raising of the level of the Swing Bridge-road has rendered it necessary for the appellants to construct an inclined approach for wheeled vehicles from such road to a yard belonging to the appellants, called Tinland Yard, on the south side of the Swing Bridge-road. Such inclined approach will, when completed, occupy the site of certain buildings in the yard. The buildings consist of an engineer's office and workshop for fitters and blacksmiths, and in order to construct the approach, it is necessary that the appellants shall demolish the buildings and erect other buildings instead thereof in the yard. The appellants have demolished the engineer's office, and are about to demolish the workshop for fitters and blacksmiths. They have constructed a temporary approach from and to the Swing Bridge-road to and from the yard, and have erected a new workshop in the yard, which is to be used in connection therewith for the purposes of the appellants' undertaking instead of the fitters and blacksmiths' shop.

The appellants did not give to the respondents any notice of their intention to lay or dig out the foundation of the new buildings, but prior to erect-

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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ing the same the appellants deposited with the Port of London sanitary authority detailed plans and specifications thereof. Such plans and specifications were duly approved by the port sanitary authority, and the new building was erected in conformity therewith.

Certain of the powers of a local authority under the Public Health (London) Act 1891 and the Public Health (Amendment) Act 1890 have been conferred upon the Port of London Sanitary Authority by orders of the Local Government Board under sect. 112 of the Public Health (London) Act 1891, but not (*inter alia*) sects. 37 and 38. The port sanitary authority claims to be the local authority within the dock walls of the appellants, and on the 5th Sept. 1896 the medical officer of health of the port sanitary authority wrote to the appellants' manager a letter, of which the following is a copy :

In order to avoid any uncertainty in the minds of your officers as to the exact position of the port sanitary authority with reference to sanitary matters, I have to point out that the port sanitary authority is the local authority within the dock walls. Will you kindly give instructions to your dock officials that no sanitary works should be carried out without first submitting detailed plans and specifications thereof to this office and obtaining official sanction? Sanitary works will include all works in connection with the erection, alteration, and repair of water-closets or privies, urinals, drains, etc. Such an instruction will save the dock company much trouble and expense.

On behalf of the appellants it was contended that the erection of the new building was rendered necessary by the raising and alteration of the level of the Swing Bridge-road; that such erection was a work the appellants were authorised by sect. 4 of the Surrey Commercial Dock Act 1894 to make; that the respondents had no power to control them in the exercise of their powers under that section; and that the appellants were under no obligation to serve notice on the respondents of their intention to lay or dig out the foundations of the new building under sect. 76 of the Metropolis Management Act 1855, that section, so far as buildings erected pursuant to their special Act were concerned, having been repealed by implication by the special Act.

In support of the appellants' contention the following cases were cited: *City and South London Railway Company v. London County Council* (65 L. T. Rep. 362; (1891) 2 Q. B. 513); *London County Council v. London School Board* (1892) 2 Q. B. 606).

On behalf of the respondents it was contended that the appellants were bound to give them notice under sect. 76 of the Metropolis Management Act 1855, which section provides (*inter alia*) that before beginning to lay out or dig the foundation of any new house or building within any parish or district seven days' notice in writing shall be given to the vestry by the person intending to build such house or building; that there was no clause in the Surrey Commercial Dock Act 1894 expressly repealing sect. 76 of the Metropolis Management Act 1855; that the powers conferred by the Surrey Commercial Dock Act 1894 nor any other Act conferring powers upon the dock company could not be held to repeal by implication sect. 76 of the Metropolis Management Act 1855 unless it could be shown that the two Acts were inconsistent; that there was no

inconsistency in the appellants having power to erect buildings and giving the respondents the notice specified in sect. 76 of the Metropolis Management Act 1855.

The following cases were quoted in support of the respondents' contention: *Whitechapel Board of Works v. Crow* (84 L. T. Rep. 595); *Uckfield Rural District Council v. Crowborough District Water Company* (81 L. T. Rep. 539; (1899) 2 Q. B. 644); *Grand Junction Waterworks Company v. Hampton Urban District Council* (78 L. T. Rep. 673; (1898) 2 Ch. 361); *London County Council v. Wandsworth and Putney Gas Company* (64 J. P. 500); and *Charing Cross and Strand Electricity Supply Corporation v. Woodthorpe* (88 L. T. Rep. 772).

They also contended that the contention of the port sanitary authority that they are the sole local authority with reference to sanitary matters was not true, in view of the fact that the particular powers conferred upon the port sanitary authority by the orders issued by the Local Government Board, dated the 29th March 1892, the 29th Dec. 1894, and the 30th June 1898, neither specifically excluded the powers of the respondents arising under the Metropolis Management Act 1855 nor their powers as a sanitary authority arising under the Public Health (London) Act 1891 other than those transferred by those orders. Among the powers not so transferred are the powers under sects. 37 and 38 of the Act of 1891, and it was urged on behalf of the respondents that unless they were entitled to notice under sect. 76 of the Metropolis Management Act 1855 buildings might be erected without the knowledge, as in the present case, and so without any opportunity on their part of securing in their construction compliance with the provisions of the sections.

The magistrates found as a fact that the new building was a building within the meaning of sect. 76 of the Metropolis Management Act 1855, and had been erected by the appellants upon land belonging to them within the limits of deviation shown on the deposited plans referred to in sect. 4 of the Surrey Commercial Dock Act 1894, and that the erection of the new building had been rendered necessary by the raising and alteration of the levels of the Swing Bridge-road authorised by the last-mentioned section.

He was, however, of opinion the provisions of sect. 76 of the Metropolis Management Act 1855 were not inconsistent with the provisions of sect. 4 of the Surrey Commercial Dock Act 1894, and he therefore held that the provisions of sect. 76 of the Act of 1855 requiring notice to be given to the respondents before beginning to lay out or dig out the foundations of any buildings within that section were not repealed with regard to buildings erected by the appellants pursuant to sect. 4 of the Act of 1894, and that the appellants had been guilty of the offence alleged in the summons, and he accordingly convicted the appellants.

By the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 76 :

Before beginning to dig or lay out the foundation of any new house or building within any such parish or district or to rebuild any house or building therein, and also before making any drain for the purpose of draining directly or indirectly into any sewer under the jurisdic-

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tion of the vestry or board of or for any such parish or district, seven days' notice in writing shall be given to the vestry or board by any person intending to build or rebuild such house or building or to make such drain, and every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with this Act and as the vestry or board shall order, and every such drain shall be made in such direction, manner, and form and of such materials and workmanship and with such branches thereto and other connected works and apparatus and water supply as hereinbefore mentioned and as the vestry or board shall order, and the making of every such drain shall be under the survey and control of the vestry or board; and the vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified to the person from whom such notice was received within seven days after the receipt of such notice, and in default of such notice or if such house, building, or drain or branches thereto or other connected works and apparatus and water supply be begun, erected, made, or provided in any respect contrary to any order of the vestry or board made and notified as aforesaid or the provisions of this Act, it shall be lawful for the vestry or board to cause such house or building to be demolished or altered, and to cause such drain or branches thereto and other connected works and apparatus and water supply to be relaid, amended, or remade or in any event of omission added as the case may require, and to recover the expenses thereof from the owner thereof in the manner hereinafter provided.

Macmorran, K.C. (R. Cunningham Glen with him) for the appellants.—The Surrey Commercial Dock Act 1894 authorises the appellants to execute these works, and *pro tanto*, so far as the appellants are concerned, sect. 76 of the Metropolis Management Act 1855 is repealed, and does not apply. Here the special Act and the Metropolis Management Act cannot be read together so as to harmonise, and so the later special Act impliedly repeats the former general Act:

City and South London Railway v. London County Council, 65 L. T. Rep. 362; (1891) 2 Q. B. 513;
London County Council v. London School Board (1892) 2 Q. B. 606.

When the powers of the special Act are looked at they are inconsistent with the rights of the respondents under sect. 76 of the Metropolis Management Act 1855, and so the Surrey Commercial Dock Act 1894 governs this case. The case of *Charing Cross and Strand Electricity Supply Corporation v. Woodthorpe* (88 L. T. Rep. 772) does not apply, as the magistrate seems to have thought, for there the different authorities might have interfered so far as their departments were concerned, but here, even although notice was served on the respondents, they could do nothing.

Avory, K.C. (H. C. Biron with him) for the respondents.—There is no inconsistency between the special and the general Acts here, for the former only gives a general authority to build, and does not say how the buildings are to be erected. That is provided for by the general Act. In that respect the present case is different from *City and South London Railway v. London County Council* (sup.) and *London County Council v. London School Board* (sup.). There are no provisions as to drainage in the special Act. *Charing Cross and Strand Electricity Supply Corporation v. Woodthorpe* (sup.) applies.

Feb. 1.—Lord ALVERSTONE, C.J. read the following judgment of the court:—This is a

special case stated by Mr. Paul Taylor, one of the metropolitan magistrates, and raises a point of some importance under sect. 76 of the Metropolis Management Act 1855. The appellants are the Surrey Commercial Dock Company and the respondents the corporation of Bermondsey, the successors of the vestry of Rotherhithe. The area of the appellants' docks is within the area of the borough. The appellants are a company incorporated under the Commercial Dock Act 1864, for the purpose of carrying on the undertaking mentioned in sect. 15 of that Act. The statute of 1864 does not appear to contain any clause dealing specially with the Metropolis Management Act, unless it be sect. 125, upon which no reliance was placed by the respondents. In the year 1894 the appellants obtained statutory powers to make certain alterations in their dock premises, all of which were situated within the area of their undertaking under the Act of 1864, and by sect. 4 of the Act of 1894 the company were authorised to make and maintain, among other works, "a new road (No. 1) and sewer commencing in Swing Bridge-road and terminating in Rotherhithe Lower-road, and the raising and alteration of the levels of the Swing Bridge-road between the western end of the swing bridge and the commencement of such new road (No. 1) and sewer." This section, in enumerating the particular works, gave the company power, subject to the provisions of the Act, to make and maintain all necessary and proper sewers, drains, culverts, buildings, yards, and other works, and to alter, break up, stop up and divert any pipes, sewers, drains, and other works on or under any lands within the limits of deviation. The appellant company subsequently raised the level of the Swing Bridge-road, as they were empowered to do under this section, and constructed the new bridge, and this alteration involved the occupation of the site of certain buildings in the yard, among others a workshop for fitters. In consequence the appellants demolished the workshop for fitters, and erected a new workshop upon another site within the ambit of their dock premises such site as the plans attached to the case show, being wholly surrounded by docks. It was contended on behalf of the respondents that, prior to the commencement of digging out the foundation of the new workshop it was incumbent upon the appellants to give notice to the respondents under sect. 76 of the Metropolitan Local Management Act 1855, and that the foundations must be laid at such a level as would permit the drainage of the workshop in accordance with the Act and as the respondent board should order, and that any drain from the workshop must be constructed in accordance with the directions of the vestry under that section. It was contended on behalf of the appellants that, having regard to the statutory powers already referred to, it was not incumbent upon the appellant company to give notice under sect. 76, but the power and responsibility of deciding as to any drains within the statutory area was vested in the appellant company, and that the respondents had no jurisdiction, at any rate as far as sect. 76 was concerned, in that area. Beyond the sections to which we have already referred, no direct assistance can be gathered from any other sections, but it is not unimportant to observe that sect. 19 does require notice to be given to the respondents

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where any work to be done by virtue of the Act of 1894 may pass over, under, or by the side of or interfere with any sewer under their control, and sect. 27 imposed restrictions with regard to the building line upon buildings erected upon land purchased by the company, and sub-sect. 8 of sect. 29 subjected any buildings erected or provided by them to the provisions of the Metropolitan Building Act 1855 and the Metropolitan Management Act 1855. The learned magistrate decided that the new workshop was a building within the meaning of sect. 76, that it had been erected on land belonging to the appellants within the limits of deviation shown in the deposited plans referred to in sect. 4 of the Act of 1894, but he held that the provisions of the Act of 1894 were not inconsistent with sect. 76 of the Metropolitan Management Act 1855, and that therefore the appellants ought to have given notice. The question appears to us to be one of considerable difficulty. In favour of the respondents it may be urged that the new workshop is not a work specially authorised by the Act of 1894, but is only consequential on the demolition of the old workshop in consequence of the alteration of the Bridge-road necessitated by the raising of the level of the Swing Bridge-road; and if this be so, there does not seem to be any reason why the provisions of a general Act applicable to the area in which the proposed building is intended should not apply. Upon the other hand, it may be urged that the control of the respondents in the matter of foundations is inconsistent with the power and duty of the dock company's property to maintain the works within their area, and that the statute clearly contemplates that the duty of providing the necessary works, and of taking the proper precautions for their construction and maintenance, should rest with the dock company. In this view it would, of course, be inconsistent with this argument that the Metropolitan Board should be able to deal with the question of the depth of foundations, which might in some cases affect the stability of other works which the dock company had been authorised and empowered to maintain. In favour of the appellants the judgment in the *City and South London Railway Company v. London County Council* (sup.) was relied upon, and to a certain extent it is an authority in their favour. It does not, however, seem to conclude the case altogether. That was a case in which the London County Council complained that a station erected by the City and South London Railway Company did not conform with the general building line. The Court of Queen's Bench and the Court of Appeal decided that the company were not bound by the provisions of the Metropolitan Management Act in this respect, and that notwithstanding that the building could have been erected within the general line of buildings without any inconvenience, except a considerable exercise of expense. In that case the Court of Appeal held that if the buildings which the railway company were erecting were buildings necessary for the statutory purposes, it was not within the power of the county council to dictate how in particular the company should arrange their buildings, and how in particular they should construct them. That case cannot be regarded as a direct authority for the point raised in the present case, because, as we have already pointed out, the work here constructed was not a work expressly

authorised as in the *City and South London* case, but it was only something which the company found it necessary to do in consequence of a building previously existing having been destroyed by the courts specially authorised. It is, however, found by the learned magistrate in the case that the erection of the new building had been rendered necessary by the raising and alteration of the levels of the swing bridge authorised by sect. 4 of the Act of 1894. Upon the whole we are of opinion that the principle ought to be extended to this case. It seems to us that dealing with a statutory undertaking as to which the rights and the obligations are imposed by statute upon a particular body, express enactment or a clear implication is necessary in order to transfer the responsibility to a body acting under a general statute. We think also that to a certain extent the reference to the Metropolitan Management Acts in the latter sections of the statute to which we have referred confirm this view. We, however, decide the case upon the broad principle that the interference and control involved in sect. 76 of the Metropolitan Management Act 1855 is inconsistent with the powers conferred upon the appellants under their statutory authority. It was said that this view was contrary with the decision of this court in the *Charing Cross and Strand Electricity Supply Corporation v. Woodthorpe* (88 L. T. Rep. 772); but when that case is examined this will not found to be so. In that case a question arose as to notice being given to a number of public authorities, and it was alleged that because the provisional order confirmed by Act of Parliament gave the Board of Trade and the Postmaster-General certain rights of control over the character of the structures that excluded the necessity of complying with the provisions of the London Building Act 1894. The court decided in that case that the protection given to one class of the public by the control of those two authorities—namely, the Board of Trade and Postmaster-General—ought not to deprive the public of the protection given to them by the London Building Act 1894. That decision obviously in no way conflicts with the judgment which are giving. For the above reasons we are of opinion that the appeal should be allowed.

LAWRANCE and KENNEDY, JJ. concurred.

Solicitors: W. R. Millar and Sons; Frederick Ryall.

Dec. 7 and 8, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

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Shipping—Pilotage—Port of Bristol—Compulsory pilot—Vessel bound from Newport to Bristol—Vessel in Newport pilotage district, but within port of Bristol—Necessity of Bristol pilot—Bristol Wharfage Act 1807 (47 Geo. 3, sess. 2, c. xxiii.), s. 9—Bristol Channel Pilotage Act 1861 (24 & 25 Vict. c. cxxxvi.), ss. 4, 29—Pilotage Order Confirmation (No. 1) Act 1891 (54 & 55 Vict. c. clx.), schedule, s. 3.

By the Bristol Wharfage Act 1807 it was provided in sect. 9 that all vessels navigating or

(a) Reported by W. W. Oak, Esq., Barrister-at-Law.

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passing up, down, or upon the Bristol Channel to the eastward of Lundy Island, except coasting vessels and Irish traders, should be piloted and navigated by pilots licensed by the Bristol Corporation.

By the Bristol Channel Pilotage Act 1861 it was provided in sect. 4 that so much of the 9th section of the Bristol Wharfrage Act 1807 as related to vessels navigating or passing up or down the Bristol Channel, bound to or from either of the ports of Cardiff, Newport, or Gloucester should be repealed, and by the same Act pilotage boards and pilotage districts—which in some cases overlapped the port of Bristol—were created for the ports of Cardiff, Newport, and Gloucester, and power was given to these boards to license pilots for their districts.

By the Pilotage Order Confirmation (No. 1) Act 1891 it was provided that, notwithstanding anything contained in the Bristol Wharfrage Act 1807, a vessel navigating or passing up or down the Bristol Channel to or from the port of Bristol should be exempted from all obligation to be piloted by pilots licensed by the Bristol Corporation, except when within the limits of that port, which were therein defined.

Held, that the Act of 1861 was not intended to deal with and did not deal with or include vessels going to or from the port of Bristol, although such vessels were bound from or to one of the ports of Cardiff, Newport, or Gloucester, and that therefore in the case of a vessel which is not exempt from compulsory pilotage in the port of Bristol there is still the obligation under the Bristol Wharfrage Act 1807 to have a compulsory pilot licensed by the corporation of Bristol when the vessel, bound to the port of Bristol, gets within the limits of that port, although the vessel may be bound from Cardiff, Newport, or Gloucester, and may still be within one of those three pilotage districts which overlaps the port of Bristol. Consequently, when a vessel on her voyage puts into Newport, and then proceeds from Newport with a Newport pilot on board to the port of Bristol, as soon as the vessel gets within the limits of the port of Bristol the Newport pilot is bound to give up the charge of the vessel to a Bristol pilot demanding such charge, although the vessel is still within the Newport pilotage district, and within the district for which the Newport pilot is licensed.

CASE stated by justices of the peace in and for the city of Bristol.

At a petty sessions held in the city of Bristol on the 31st Jan. 1903 an information was preferred by John Reed (the appellant) under the statute 47 Geo. 3, sess. 2, c. xxxiii., s. 9, against Henry Goldsworthy (the respondent), for that the respondent on the 29th Jan. 1903, within the limits of the port of Bristol, unlawfully continued in charge of a certain steamship or vessel, called the *Beacon Grange*, not exempted from compulsory pilotage navigating within the port of Bristol, after a pilot licensed by the Lord Mayor, aldermen, and burgesses of the city of Bristol, namely, the appellant—had offered to take charge of the steamship or vessel, contrary to the form of the statute in that case made and provided.

The information was heard and determined by the justices on the 19th Feb. 1903, when they dismissed the same.

By an Act of Parliament 47 Geo. 3, sess. 2, c. xxxiii. (the Bristol Wharfrage Act 1807), being an Act for (amongst other things) "the better regulation of pilots and pilotage of vessels navigating the Bristol Channel," it was provided as follows:

Sect. 9. And be it further enacted that, from and after the first day of October next after the passing of this Act, all vessels sailing, navigating, or passing up, down, or upon the Bristol Channel to the eastward of Lundy Island, except coasting vessels and Irish traders, shall be conducted, piloted, and navigated by pilots duly authorised and licensed by the mayor, burgesses, and commonalty of the said city of Bristol, by warrant under their corporate seal; and that the master, owner, or owners of every ship or vessel which shall be navigated in the limits aforesaid, without a pilot licensed as aforesaid, shall forfeit double the sum which would have been demandable for the pilotage of such ship or vessel, together with five pounds for every fifty tons burthen of such ship or vessel.

Sect. 11. And be it further enacted, that no person shall take charge of any vessel or in any manner act as a pilot, or receive any compensation for acting as a pilot within the limits aforesaid, unless authorised by licence under the seal of the said mayor, burgesses, and commonalty (which licence it is hereby declared shall express the name of the pilot so acting and the district aforesaid); and no such pilot shall act without having his licence at the time of his so acting in his personal custody, ready to be produced, which shall actually be produced to any person who shall lawfully require to see the same, or shall act in the British seas out of the limits expressed in his licence, on pain of forfeiting a sum not exceeding ten pounds, for the first offence, and for any second or subsequent offence any sum not exceeding twenty pounds.

Sect. 14. Provided always, and be it further enacted, that it shall be lawful for any licensed pilot to supersede any person not licensed as a pilot in charge of any ship or vessel within the limits aforesaid; and every master who shall within the limits aforesaid continue any person not licensed as hereinbefore mentioned after any pilot licensed as aforesaid to act within the said limits shall have offered to take charge of such ship or vessel, and every person assuming or continuing in the charge or conduct of any ship or vessel within the limits aforesaid, without being duly licensed as hereinbefore mentioned, after any other pilot licensed as aforesaid shall have offered to take charge thereof, shall respectively forfeit for every such offence a sum not exceeding ten pounds.

By the Bristol Channel Pilotage Act 1861 (24 & 25 Vict. c. cccxxvi.)—which was "an Act for establishing a separate system of pilotage for the several ports of Cardiff, Newport, and Gloucester in the Bristol Channel"—after reciting in the preamble the 9th section of 47 Geo. 3, sess. 2, c. xxxiii., and also reciting that "owing to the great extension of trade in the several ports of Cardiff, Newport, and Gloucester since the passing of the said Act it is expedient that a separate system of pilotage should be established in the Bristol Channel in connection with those respective ports, under the supervision of local boards for each of such ports," it was provided:

Sect. 4. From and after the first Wednesday in the month of January next after the passing of this Act, so much of the ninth section of the said Act of the second session of the forty-seventh year of King George the Third, chapter thirty-three, as relates to vessels navigating or passing up or down the Bristol Channel, bound to or from either of the said ports of Cardiff, Newport, or Gloucester, shall be and the same is hereby repealed.

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By sects. 5, 6, and 7 pilotage boards for Cardiff, Newport, and Gloucester respectively were appointed.

Sect. 8. The district over which the Newport board shall have jurisdiction shall be that portion of the Bristol Channel which lies eastward of Lundy Island up to and including Kingroad, and the river Ussk as far as the Caerleon Bridge.

Sect. 23. Subject to the provisions of the Merchant Shipping Act 1854 the board may from time to time license and appoint such number of proper persons to act as pilots within the pilotage district and to or from the port for which such board may have been appointed as they may think necessary, and may remove or suspend the licence of any such pilot at their pleasure, and may establish such rates and fees to be levied and paid for the risk, trouble, and labour of such pilots as to such board shall from time to time seem just and reasonable; and if any person shall pretend or hold himself out to be a licensed pilot, or in any manner act as a pilot without having been so licensed, or after his licence may have been revoked or suspended, he shall be liable to a penalty of not exceeding fifty pounds.

Sect. 29. The master of every vessel bound from any of the ports of Cardiff, Newport, or Gloucester may, if he shall think it expedient so to do, require the assistance of any pilot licensed by the board for that port, and on being so required any pilot shall take on himself the charge of such vessel, and shall pilot the same for such distance within the pilotage district for which he may be licensed as the master of such vessel shall require, and any pilot who shall in any such case refuse to pilot such vessel to any such distance as aforesaid shall forfeit his right to receive any sum of money for piloting such vessel, and may also, at the discretion of the board by whom he may have been licensed, be suspended or deprived of his licence.

Sect. 3 [the interpretation clause]. The word "pilot" shall mean any person licensed under this Act to act as a pilot for piloting vessels into or out of the port for which such licence has been granted.

By the Pilotage Order Confirmation (No. 1) Act 1891 (54 & 55 Vict. c. clx)—an Act to confirm a provisional order made by the Board of Trade under the Merchant Shipping Act Amendment Act 1862, relating to the pilotage district of Bristol—it was provided (in sect. 1) that the order set out in the schedule should be and the same was thereby confirmed. The order was an "order for exempting from compulsory pilotage, except within the port of Bristol, vessels bound to and from that port," and was called the Bristol Pilotage Order 1891.

Clause 3 of this order provided:

Notwithstanding anything contained in the Bristol Wharfrage Act 1807, the masters and owners of all vessels sailing, navigating, or passing up or down the Bristol Channel to or from the port of Bristol shall be and they are by this order exempted from all obligation to be conducted, piloted, or navigated by pilots authorised or licensed by the mayor, aldermen, and burgesses of the city of Bristol, except when within the limits of that port, which limits are as follows—namely, from the westwardmost part of the Flat and Steep Holms, up the course of the Bristol Channel eastward to Aust in the county of Gloucester, and from the said Holms southward athwart the channel to Uphill, and from thence along the coast eastward in the counties of Somerset and Gloucester to Aust aforesaid, and also from Holesmouth in Kingroad up the Avon to the city of Bristol, together with the several pills lying on the said river.

Clause 4. All existing by-laws, rules, and orders of the mayor, aldermen, and burgesses of the city of Bristol relating to pilotage shall be read and have effect in

accordance with the provisions of the Bristol Wharfrage Act 1807, as amended by this order.

The appellant was a pilot duly licensed by the Lord Mayor, aldermen, and burgesses of the city of Bristol by warrant under their corporate seal, pursuant to the Act of the second session of 47 Geo. 3, c. xxiii., s. 9.

The respondent was a pilot duly licensed by the pilotage board for the port of Newport, pursuant to the Bristol Channel Pilotage Act 1861.

On the 29th Jan. 1903, the steamship *Beacon Grange* was in course of a voyage from Liverpool to the River Plate *via* Newport and Avonmouth Dock, which is in the port of Bristol, and in the prosecution of her voyage the steamship entered the port of Newport for the purpose of taking in a portion of her cargo and coal for bunkering purposes, and was piloted into the Newport Dock by the respondent. Upon leaving Newport the steamship was piloted out of Newport Dock by the respondent, and proceeded on her voyage towards Avonmouth.

The appellant offered his services to pilot the vessel to Avonmouth Dock, which is in the port of Bristol, but his services were not accepted until Kingroad was reached, and with the permission of the master the appellant remained on board the steamship, and after entering the port of Bristol (but within that portion of the Bristol Channel which lies to the eastward of Lundy Island up to Kingroad) the appellant again offered his services with all proper formalities, and claimed to supersede the respondent. The respondent, however, claimed to pilot the steamship to Kingroad, and the master allowed him to do so.

Upon arriving at Kingroad, which is an anchorage immediately outside the mouth of the river Avon, the respondent gave up charge of the steamship, and the appellant took her into the Avonmouth Dock.

The steamship was not a coasting vessel or an Irish trader, and when within the port of Bristol was not exempt from compulsory pilotage.

On the part of the appellant it was contended: (1) That, inasmuch as the vessel had commenced a voyage under foreign articles from Liverpool to the River Plate and only touched at Newport in the performance of such voyage, she was not bound "from" Newport within the meaning of the Bristol Channel Pilotage Act 1861. (2) That the Bristol Channel Pilotage Act 1861 does not in any case contemplate a vessel as bound "from" Newport when she is proceeding from that port to Bristol. (3) That after entering the port of Bristol the steamship was then (even if not previously) a vessel bound for Bristol, and that the Bristol Channel Pilotage Act 1861 left all vessels bound for Bristol subject to the provisions of the Act 47 Geo. 3, sess. 2, c. xxiii. (4) That the Pilotage Order Confirmation (No. 1) Act 1891 confirmed the rights of the appellant and other pilots licensed by the Lord Mayor, aldermen, and burgesses of Bristol.

On behalf of the respondent it was contended: (1) That from and after the first Wednesday in the month of Jan. 1862, so much of sect. 9 of the Act 47 Geo. 3, sess. 2, c. xxiii., as related to vessels navigating or passing up or down the Bristol Channel, bound to or from either of the

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ports of Cardiff, Newport, or Gloucester, was repealed. (2) That the steamship came from Liverpool without any cargo to the port of Newport on the 25th Jan. 1903, for the purpose of taking in a portion of her cargo and coal for bunkering (that is, for her own steaming purposes), and left the port of Newport for Bristol on the 29th Jan. 1903, and was therefore a vessel bound "from" Newport within the provisions of sect. 29 of the Bristol Channel Pilotage Act 1861, and might, if the master thought it expedient, be piloted within the district of the Newport Pilotage Board (which extends to Kingroad) by the respondent. That, the master having required the assistance of the respondent, the respondent was entitled to pilot the steamship up to Kingroad. (3) And, further, that if the respondent had refused to pilot the steamship he would have rendered himself liable to forfeit all his pilotage fee, and, at the discretion of the Newport Pilotage Board, might have been suspended, or deprived of his licence. (4) That the Pilotage Order Confirmation (No. 1) Act 1891 was merely an Act for exempting from compulsory pilotage, and did not repeal, and was not intended to repeal, sect. 4 of the Bristol Channel Pilotage Act 1861. (5) That the steamship was under the circumstances in question as much bound from Newport as she was bound for Bristol.

All the provisions of the Acts of Parliament and Pilotage Order, so far as applicable to the circumstances, were deemed part of this case.

The justices held that, upon the facts as found and stated in the case, the respondent had not, in point of law, committed an offence, and they therefore dismissed the information.

The question for the opinion of the court was whether, upon the facts above stated, the justices came to a correct determination in point of law. If so, their determination was to stand; if otherwise, the case was to be remitted to the justices with the directions of the court thereon.

After the Act of 1807, already referred to, came the Bristol Dock Act 1848 (11 & 12 Vict. c. xliii.) which provided:

Sect. 66. The corporation [that is, the corporation of Bristol] may from time to time hereafter appoint and license any persons, duly qualified for that purpose, to be and officiate as pilots within the port of Bristol, and, at their discretion, suspend and discharge such persons from being pilots; and if any person, not being so appointed and licensed, shall take or hold the charge of or attempt to pilot any vessel within such port, unless such vessel be in distress, and there be no such pilot in sight, or shall otherwise act or attempt to act as such pilot within such port, and also if any person having the charge or pilotage of any vessel within such port, but not being such pilot, shall not, upon the approach of any such pilot, shorten sail for and take on board such pilot, and resign to him the charge or command of such vessel, every person shall for every such offence forfeit any sum not exceeding ten pounds.

Scrutton, K.C. (Clarell Salter with him) for the appellant.—The justices were wrong in refusing to convict the respondent. Sect. 9 of the Bristol Wharfrage Act 1807 requires that all vessels, except those which are there exempted, passing up or down the Bristol Channel shall be piloted by Bristol pilots duly licensed by the corporation; and sect. 66 of the Bristol Dock Act 1848 gives the corporation power to license duly qualified persons to act as pilots within the port of Bristol,

and that section imposes a penalty upon any person, not being a duly licensed Bristol pilot, who takes charge of or pilots any vessel within the port of Bristol when there is a Bristol pilot available. So that under those Acts pilotage by a Bristol pilot was compulsory for all vessels (except exempt ships) passing up or down the Bristol Channel, eastward of Lundy Island. Then came the Bristol Channel Pilotage Act 1861, which in sect. 4 exempts from the operation of sect. 9 of the Act of 1807 vessels passing up or down the Bristol Channel, bound to or from one of the three ports of Cardiff, Newport, or Gloucester, and the only effect of that section is to cut out from the previous compulsion, vessels bound to or from these three ports. Then came the Pilotage Order, &c., Act 1891, which in clause 3 of the order extended the exemption still further, and provided that vessels passing up or down the Bristol Channel to or from the port of Bristol should be exempted from all obligation to be piloted by Bristol pilots, "except when within the limits of that port." This exception is important as showing that, although vessels are exempted from taking Bristol pilots on board when going to or from the port of Bristol, they are not so exempt when within the limits of the port of Bristol. The limits of the port of Bristol are there defined, and it is not disputed that this vessel was within the port of Bristol. Upon the construction of these statutes it is clear that sect. 4 of the Act of 1861 does not apply to this case, and there is no exemption in this case from the operation of sect. 9 of the Act of 1807. The repeal of sect. 9 of the Act of 1807 by sect. 4 of the Act of 1861 is a repeal only in so far as it relates to vessels bound to or from the three specified ports, and does not in the least affect vessels bound to or from the port of Bristol. Here the vessel was not bound "from" Newport within the meaning of sect. 4; she was bound—at all events after entering the port of Bristol—"for" Bristol. The Legislature, in passing the Act of 1861, had not in their minds at all the port of Bristol, and were dealing with the ports of Cardiff, Newport, and Gloucester only, and that legislation leaves untouched the case of vessels going to or from the port of Bristol. Then the Act of 1891, while granting still further exemption from the obligation to have Bristol pilots on board under the Act of 1807, by exempting from that obligation vessels going to or from the port of Bristol, was careful to say "except when within the port of Bristol." The justices expressly find that this vessel when within the port of Bristol was not exempt from compulsory pilotage. Therefore this vessel was not a vessel bound "from" Newport within sect. 4, and, even if she were bound from Newport, at all events when she came within the port of Bristol she was bound to have a Bristol pilot. The decisions of the Court of Appeal in *The Charlton* (73 L. T. Rep. 49, affirming 72 L. T. Rep. 198) and of the Exchequer Chamber in *General Steam Navigation Company v. British Colonial Steam Navigation Company* (20 L. T. Rep. 581; L. Rep. 4 Ex. 238) show that a compulsory pilot was necessary in this case as soon as the vessel entered the port of Bristol, and that that pilot must be one licensed by the corporation of Bristol.

J. A. Hamilton, K.C. (Evans Austin with him) for the respondent.—The justices were right in

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dismissing the information. The Act of 1861 recites that owing to the great extension of trade in the ports of Cardiff, Newport, and Gloucester it was expedient to establish a separate system of pilotage for those ports, and the scheme of that Act was to create new pilotage areas or districts for those places. By sect. 4 of that Act the 9th section of the Act of 1807 is repealed as regards those vessels which were bound to or from those three ports. The vessel in the present case was at the time in question a vessel bound "from" Newport, and she was none the less bound from Newport because she happened to be going to Bristol. The object of sect. 4 of the Act of 1861 was to exempt a vessel from the obligation imposed by sect. 9 of the Act of 1807 to take a Bristol pilot on board when the vessel was bound to or from Cardiff, Newport, or Gloucester. The pilotage areas of some of these districts overlap, and that of Newport overlaps part of the port of Bristol. At the time when the respondent refused to give the charge of the vessel to the appellant, the vessel was still within the pilotage area or district of Newport, and therefore the Newport pilot was properly in charge as pilot. Sect. 29 of the Act of 1861 is important. This vessel was a vessel bound "from" Newport within the meaning of that section, and therefore the master could require—as he did—the assistance of a pilot licensed by the Newport Board, and, on being so required, the Newport pilot was bound to take upon himself the charge of the vessel, and to pilot the vessel for such distance within the pilotage district for which he might be licensed as the master of the vessel might require, and if the pilot refused to pilot the vessel to such distance, then he not only forfeited his right to any remuneration for his services, but he was also liable to be suspended or deprived of his licence. Therefore, in the first place, the provisions of sect. 9 of the Act of 1807 do not apply at all in this case by reason of the repealing provisions in sect. 4 of the Act of 1861, inasmuch as this vessel was a vessel bound from Newport; and in the next place, even if the pilotage was compulsory within the port of Bristol, it would not be so for that part of the port of Bristol which was overlapped by the pilotage area of Newport, and by sect. 29 the Newport pilot (the respondent) was entitled to pilot the ship to the furthest limit of the district for which he was licensed, and he was therefore entitled to remain in charge of the vessel, even after the vessel had entered the port of Bristol, so long as she was still within the Newport pilotage district. The refusal by the respondent to give up the charge of the vessel to the appellant took place within the Newport pilotage district, although it may have been within the port of Bristol, and therefore no offence was committed. He referred to *The Charlton* (*ubi sup.*), *The Rutland* (76 L. T. Rep. 662; (1897) A. C. 333), and to the Act of 1891.

Clavell Salter in reply.—Taking these Bristol Acts together, they create the offence charged in this case, and that offence was committed unless the vessel was exempt under the Act of 1861. The effect of the Acts is that if a vessel is going into the port of Bristol and is in this area which is common to the port of Bristol and to the pilotage district of Newport, she is not exempt from compulsory pilotage simply because she happens to have been also at Newport.

LORD ALVERSTONE, C.J.—This case presents to me very considerable difficulties, and, but for the assistance that I have received from the arguments, I think I should like to have taken time to go through the statutes referred to; but, after the best consideration I can give to the case, I think that this appeal must be allowed. The general purview of these statutes may, in my opinion, be stated with fair accuracy and conciseness without going through the whole of their enactments in detail. Originally, as appears from the history in the case of *The Charlton* (*ubi sup.*), and as I should gather from the statutes themselves, Bristol was, practically speaking, the only port of importance upon the Bristol Channel for this purpose, and according to the earlier statutes—and for this purpose I need only commence with the Bristol Wharfrage Act of 1807—the authority for licensing pilots on the Bristol Channel was the Bristol Corporation. The respondent was summoned for an offence against the statute 47 Geo. 3, sess. 2, c. xxxiii. (the Bristol Wharfrage Act 1807), in that he had continued to navigate this vessel within the port of Bristol when a Bristol pilot had offered his services. Therefore it seems to me that what we have really got to consider is the true state of the law at present as regards the area over which pilotage is compulsory in and out of Bristol, and as regards the vessels in respect of which pilotage is compulsory in and out of Bristol. I may say at once that we ought to deal with this case upon the theory that this vessel was bound "from" Newport. Upon the facts in this case it is not, in my opinion, open to the appellant to say that this vessel was not treated by the magistrates, who decided in favour of the respondent, as being bound from the port of Newport; but, on the other hand, it must be observed that it is admitted that the pilotage was compulsory within the port of Bristol. A paragraph of the case says this: "The steamship was not a coasting vessel or an Irish trader, and when within the port of Bristol was not exempt from compulsory pilotage." Therefore we must take it that the ship in respect of which this right to be navigated in the port of Bristol by a Newport pilot is claimed can only succeed if she is able to establish that, under the sections to which I am about to refer, pilotage was not compulsory within the port of Bristol in respect of that area which was common to the port of Bristol and to the ports or pilotage districts of Cardiff, of Newport, or of Gloucester. I was for a considerable time very much impressed with the argument of counsel for the respondent. It seemed to me that it was open to grave consideration, apart from the language of the sections to which I am about to refer, that the scheme of the Bristol Channel Pilotage Act 1861 was to create two or three other pilotage areas, the areas overlapping among themselves, as we are told that the pilotage areas of Newport and Cardiff do, and also overlapping that part of the Bristol Channel which is within the port of Bristol; and that it was intended to create certain authorities which should license pilots and should give to those pilots what I may call full rights within those geographical areas, even although the areas overlapped or were in certain parts in common. It seems to me that if we took that view, having regard to the fact that the pilotage was found to be compulsory in the

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Bristol district, we should be obliged to come to the conclusion that the Newport pilot would be a good compulsory pilot and would protect the ship, even although the Newport pilot was within the port of Bristol and had not, of course, *ex hypothesi* been licensed by the corporation of Bristol. That being so, we have to consider whether that is the effect of the Act of 1861. It may be said, no doubt, that the Act of 1861 does recite that the great extension of trade in the several ports of Cardiff, Newport, and Gloucester made it expedient "that a separate system of pilotage should be established in the Bristol Channel in connection with those respective ports, under the supervision of local boards for each of such ports," and that, therefore, there is no doubt that certain privileges and rights in connection with pilotage and pilots were intended to be created by the Act of 1861. Then comes the section—namely, sect. 4—to which so much argument has been addressed, and with which we have to deal in this case: "From and after" a certain date "so much of the ninth section of the said Act"—that is, the Act of 47 Geo. 3, the Act of 1807—"as relates to vessels navigating or passing up or down the Bristol Channel, bound to or from either of the said ports of Cardiff, Newport, or Gloucester, shall be and the same is hereby repealed." I was for some time impressed with the view that that did mean to exempt from the provisions of sect. 9 of the Bristol Wharfrage Act of 1807 a vessel coming from Newport, Cardiff, or Gloucester, even though it went into Bristol, and that, at any rate within the area which was common to the two ports, or I should rather say to the port of Bristol and to the pilotage district of Newport—taking Newport in this case—created by sect. 8 of the Act of 1861, pilotage was no longer compulsory. It is to be observed that sect. 9 of the Act of 1807 says that "all vessels sailing, navigating, or passing up, down, or upon the Bristol Channel to the eastward of Lundy Island . . . shall be conducted, piloted, and navigated by pilots duly authorised and licensed by the mayor, aldermen, and burgesses of Bristol"; and the subsequent section (sect. 11) prevents unauthorised persons—that is to say, persons not sanctioned and authorised and licensed by the mayor, aldermen, and burgesses of Bristol—from navigating these ships. It is with some doubt that I have come to the conclusion that it was not intended by the Legislature in sect. 4 of the Act of 1861 to include and deal with the case of vessels going into and out of the port of Bristol; that it was intended to deal with the case of vessels which were going to and from Cardiff, to and from Newport, and to and from Gloucester, by way of the Bristol Channel, and that the section did not purport to deal specifically with the case of vessels which were going into or out of Bristol at all. The concession was a very valuable one, as I pointed out in the course of the argument, because up to the passing of that Act in 1861, east of Lundy Island, all vessels, whether they went to Cardiff, Newport, or Gloucester, were bound to take Bristol pilots under the Bristol Wharfrage Act of 1807. The subsequent sections of the Act of 1861 also, I confess, for a time impressed me in the respondent's favour. The power to license in sect. 23, the compulsion in sect. 29 which compels a pilot to take a vessel to

the limit of the district for which he is licensed, and the power in sect. 26 to license the old existing port pilots of Cardiff, Newport, and Gloucester for the whole pilotage area of the new pilotage authority certainly do tend in favour of the view put forward on behalf of the respondent, that these persons were intended to have licences to navigate ships throughout their whole pilotage area. I cannot, however, help thinking that this is all subject to the general observation that the Legislature, in sect. 4 of the Act of 1861, were not thinking of or dealing with vessels that were going into or out of the port of Bristol at all. They were dealing with the case of the other ports there specified which were reached by the Bristol Channel; and therefore we must look at the other sections to see what are the provisions as to compulsory pilotage, and as to the persons who may be the compulsory pilots within the port of Bristol in the case of vessels going to and from the port of Bristol. In other words, to adopt the very comprehensive, accurate, and concise way in which counsel for the appellant put it in his reply, the effect of these statutes is not to exempt from compulsory pilotage vessels that are going into the port of Bristol, in this common area, simply because they happen to have been also at one of the ports which are mentioned in the Act of 1861. Therefore, though, as I have said, sect. 29 of the Act of 1861 and the other sections of that Act may afford arguments which have to be carefully considered, they are not, in my opinion, sufficient to support the argument of counsel for the respondent. I thought at first that possibly a distinction might be drawn between vessels bound from Cardiff, Newport, or Gloucester, and vessels bound to those ports. For this purpose, I doubt whether that distinction is sound. I think sect. 29 was passed for the purpose of compelling the Cardiff, Newport, or Gloucester pilot to take the vessel as far as his district would allow him, otherwise he was to forfeit certain rights which he enjoyed under the Act. I am supported in that view by the curious enactment in sect. 3 of the provisional order of the Act of 1891. I quite agree, and I think it is fairly put by both of the learned counsel, that the real enacting effect of this provisional order, which has the force of a statute, was only to alter the old geographical areas to which the Act of 1807 did apply, and it is quite possible, and I think it is true, that the new geographical area was subject to all the enactments both in the Act of 1807 and in the amending Act of 1861, and any other statute which has been mentioned. But I think that the language of sect. 3 does confirm the view that in dealing with the Act of 1807 and the other legislation with respect to the Act of 1807, particularly that in sect. 4 of the Act of 1861, they were not dealing with the case of vessels going into and out of the port of Bristol, because the provisional order does appear to recognise that vessels going to or from the port of Bristol shall be exempted from all obligations except when within the limits of that port. I therefore come to the conclusion, on a consideration of the statutes themselves, that this vessel was not an exempt ship; that she was bound, within the port of Bristol, going to Bristol, when she got within the area of the port of Bristol, to have a compulsory pilot, and that the man who was navigating her—namely, the respondent—who

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might well think that under sect. 29 of the Act of 1861 he had the right to take her, was not the compulsory pilot contemplated by the earlier Act. Then it is said that the case of *The Charlton* (*ubi sup.*) is an authority in favour of this view. I do not think it is an authority at all. In my opinion the court were there dealing with a different case, and had not really before them the difficulties with which we have to deal in this case. I very much doubt whether the point which we have had to consider in this case was very carefully considered by the learned judges in that case. It is certain that they had not got all the statutes before them, and I doubt whether the point was carefully considered. But it is very obvious that in that case the only important question was, Was the duty of the compulsory pilot as such ended at the time of the collision, because, although he had been taken on board as a compulsory pilot, the vessel at the place where the collision occurred was outside the district for which the pilotage was compulsory, though still within the district for which the pilot was licensed? And unless the ship was an exempt ship outside Kingroad, or at any rate at the place where the collision occurred, no argument could have been raised. The case of *General Steam Navigation Company v. British Colonial Steam Navigation Company* (*ubi sup.*) was referred to, and it was dealt with in the judgments in the case of *The Charlton* (*ubi sup.*), and, to put the matter shortly, as it was put by Kay, L.J. in *The Charlton* case, the pilot in that case came on board as a compulsory pilot, and he continued to be in the position of, though in fact he was not, a compulsory pilot at the time when the collision happened. There are certain expressions in those judgments which do support the view that their Lordships thought in that case that pilotage within the area of the port of Bristol was still compulsory. To that extent opinions were expressed in favour of the view which I have adopted after hearing the arguments for the appellant. But I do not want to base my judgment simply upon the authority of that case, because I do not think it is an authority in that sense. I come to the conclusion that the legislation upon which counsel for the respondent based his argument is not sufficient to exempt the ship, and does not remove the obligation to have a compulsory pilot on board when the vessel, bound to the port of Bristol, gets within the limits of that port; and in this case, inasmuch as the respondent, who was purporting to pilot the ship, was not licensed by the corporation of Bristol, but was only licensed to take vessels in and out of Newport, and, incidental thereto, to take them across this part of the area which was common to the various licensing districts when the vessel was leaving Newport, it does not enable the master to say that the statute was satisfied because he had got this pilot on board. I think, therefore, that the magistrates ought to have convicted in this case.

LAWRANCE, J.—I entirely agree, for the reasons given by my Lord.

KENNEDY, J.—I agree, and I only wish to add a very few words. One paragraph of this case states that this steamship, when within the port of Bristol, was not exempt from compulsory pilotage. If this is an area (the area ending with the point at Kingroad) within which she was not

an exempt ship—in other words, within which she still had an obligation to take on board a compulsory pilot—then there was no power, as it seems to me, in the Newport pilotage authorities to create a compulsory pilotage for the Bristol port. The pilot who was on board was a pilot licensed by the Newport authorities; and, while under sect. 29 of the Act of 1861 he might be required to take an outward-bound vessel from Newport to the utmost limit within the Newport pilotage district that the master of the vessel wished, he could not thereby become a pilot who would be able to assert a right to be taken on board for the port of Bristol as a compulsory pilot. I am dealing with this case upon the basis of a statement in the case itself that this vessel was not an exempt ship from compulsory pilotage coming into Bristol, and, if that be so, then it seems to me, for the reasons which my Lord has given, that the Act of 1861 did not get rid of the obligation of compulsory pilotage, and that the post of a compulsory pilot could not be held by a pilot who had started as a Newport pilot and not as a pilot of the port of Bristol.

Appeal allowed. Case remitted to the justices with a direction to convict.

Solicitors for the appellant, *Whites and Co.*, for *James Inskip and Co.*, Bristol.

Solicitors for the respondent, *Herbert Smith, Goss, King, and Gregory*, for *Lynne and Co.*, Newport, Monmouth.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, Jan. 28.

(Before Lord ALVERSTONE, C.J., COLLINS, M.R., and ROMER, L.J.)

LONDON TRANSPORT COMPANY LIMITED v. TRECHMANN BROTHERS. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Ship—Charter-party—Freight at per ton shipped payable on right delivery—Lump sum freight—Loss of part of cargo by jettison—Payment by consignees of bill of lading freight—Rights of charterers against shipowners.

By a charter party it was agreed that a ship was to load at Fiume a full and complete cargo of sugar in bags, and therewith proceed to Boston and there deliver the cargo agreeably to bills of lading, on being paid freight at the rate of 10s. 6d. per ton gross weight shipped, payable on right and true delivery of the cargo in cash; charterers' liability to cease when cargo was shipped and bills of lading signed, provided all the conditions called for in the charter had been fulfilled, but vessel to have a lien for freight, dead freight, and demurrage; the master to sign bills of lading at any rate of freight as presented, without prejudice or reference to the charter, any difference between the charter-party and the bills of lading freight to be settled at Fiume on clearance of vessel, if required by master.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

The charterers had previously agreed with an American company at Boston to ship by the vessel named in the charter-party, a cargo of sugar in bags from Fiume to Boston at 10s. per ton.

On the vessel being loaded, the difference between the charter-party and the bills of lading freight—i.e., 6d. per ton—was paid, and bills of lading were signed.

In the course of the voyage the vessel went aground and part of the cargo was jettisoned. On the arrival of the vessel the remainder of the cargo was delivered, and the consignees thereupon paid to the shipowners the bill of lading freight payable on the gross weight shipped.

In an action by the charterers against the shipowners to recover so much of the freight paid by the consignees to the ship owners as represented the freight upon the cargo which was not delivered.

Held (by Lord Alverstone, C.J. and Collins, M.R., Romer, L.J. dissenting), that the charterers were entitled to recover the sum claimed.

Judgment of Walton, J. affirmed.

APPEAL by the defendants from the judgment of Walton, J. at the trial of the action without a jury.

The action was brought by the charterers of the steamship *Wilster* against the owners to recover a sum of 545l. 8s. 3d., part of the freight paid by the consignees of the cargo under the bill of lading, which the charterers claimed had been collected by the shipowners for the charterers' use.

On the 11th Dec. 1901 the plaintiffs entered into a contract with the American Sugar Refining Company of New York, by which they undertook to ship from 3000 to 3150 tons of sugar in bags, quantity at steamer's option, by the steamship *Wilster*, "Fiume to Boston, at 10s. per. ton of 1000 kilogrammes gross weight shipped."

On the 16th Jan. 1902 an agreement for the chartering of the steamship *Wilster* was entered into between the plaintiffs as charterers and the defendants as owners.

A printed form of charter-party was made use of, some of the printed words being struck out, and other words being written in. In the following copy of the material parts of the charter-party, the words within brackets are the printed words that were struck out, and the words that are in italics are those that were put in in writing.

London, 16th Jan. 1902.—It is this day mutually agreed between Messrs. Trechmann Brothers, of the good steamship called the *Wilster* of the measurement of 1332 tons, net reg., classed 100 A1. and 30 min. 3150 *max.* tons deadweight cargo capacity guaranteed now Fiume discharging . . . that the said steamer . . . shall . . . sail and proceed to Fiume . . . and there load . . . a full and complete cargo of sugar in bags [lawful merchandise] in the customary manner [including the usual deck cargo] which the said charterers bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, fuel, and furniture [but charterers having the full reach of the holds and spare bunkers, the same as if the steamer was loading for owner's benefit], and being so loaded shall therewith proceed immediately to Boston . . . and there deliver the cargo agreeably to bills of lading on being paid freight in full of all port charges, wharfages, consular, pilotages, and other charges customarily

paid by steamers [for the full reaches and burden of the steamer's hold and every available space, the lump sum of or] at the rate of ten shillings and sixpence per ton of 20cwt. gross weight shipped [delivered], payable on right and true delivery of the cargo in cash at the current rate of exchange for sixty days' sight bills on London. [In the event of steamer not carrying the guaranteed dead weight as above, or owners failing to prove to the satisfaction of charterers that the steamer can carry same, owners to be responsible for the consequences thereof, and the above-mentioned lump sum to be reduced in proportion.] If required by master, one-third of freight payable here less 3 per cent. to cover interest and insurance. . . . The ship to be addressed at port of destination to charterers' agents on usual terms paying 2½ per cent. address commission on signing bills of lading. Charterers' liability to cease when cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled, but vessel to have a lien on the cargo for freight, dead freight, and demurrage. The master or person appointed by him shall sign bills of lading, at any rate of freight as presented without prejudice or reference to this charter; and, if required, he is to give charterers' agents in Fiume written authority to sign them for him in accordance with mate's receipts; any difference between this charter-party and bills of lading freight shall be settled at Fiume on clearance of vessel it required by master; if in charterers' favour by captain's draft payable three days after arrival at port of discharge, if in steamer's favour, in cash, less 3 per cent. for all charges. . . .

The bills of lading signed by the plaintiffs' agent contained the words "freight and other conditions as per agreement."

The agreement there referred to was the agreement of the 11th Dec. 1901 between the plaintiffs and the American Sugar Refining Company.

The vessel was loaded at Fiume with a cargo of 31,025 bags of sugar.

Bills of lading were signed, and the difference between the charter-party and the bills of lading freight—viz., 6d. per ton—was paid to the shipowners at or about the time when the vessel sailed from Fiume.

When close to Boston the vessel went aground, and there was very considerable difficulty in floating her.

Part of the cargo was jettisoned, and many of the bags of sugar were damaged by water, so that on the arrival of the ship at Boston only 27,743 bags out of the 31,025 that had been shipped were delivered to the consignees; and out of these 27,743 bags 7716 were empty.

The consignees of the sugar, the American Sugar Refining Company, paid to the defendants the whole of the bill of lading freight, that is to say, freight upon the whole cargo shipped at shipping weights, amounting to 1551l. 5s. 1d.

The plaintiffs alleged that under the charter-party they were not liable to pay full freight upon the whole cargo shipped at shipping weights, but were only liable to pay freight on the cargo actually delivered, and they brought this action to recover from the defendants the sum paid to the defendants by the consignees as freight in respect of the sugar which was not delivered, amounting to 545l. 8s. 3d.

At the trial of the action without a jury the following judgment was delivered:—

WALTON, J. (after stating the facts his Lordship continued:—) Now the question of the charterers' liability for freight must, of course,

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depend upon the terms of the charter-party. The shipowners say to the plaintiffs, the charterers: "We are entitled to the full freight which has been paid because we have just the same rights as you say you have under your bill of lading against the consignees." Under the charter-party the shipowners say: "We are entitled to recover the freight upon the total weight shipped, whether delivered or not, and therefore we are entitled to keep the 1551*l.* which we have in fact collected; it is not your freight, it is not a balance of freight over and above what we as shipowners are entitled to; we are entitled to the whole of it; we did not collect it for you the charterers." In support of that contention Mr. Carver referred to a number of cases, the last of which was the case of *Merchant Shipping Company v. Armitage* (29 L. T. Rep. 809; L. Rep. 9 Q. B. 99). The headnote in the Law Reports is this: "By charter-party a ship was to load at Colombo or Cochin from the charterers' agents a full and complete lading and proceed to London and discharge there, fire and other dangers of the sea excepted, a lump sum freight of 5000*l.* to be paid after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the Custom House. Part of the cargo loaded in accordance with the charter-party was lost by fire without any default of the master or crew and the remainder was delivered in London. Held, that the shipowner was entitled under the charter-party to the full sum of 5000*l.*" In that case the freight was a lump sum of 5000*l.*, indivisible. The cargo was shipped and the whole of it was not delivered. Part of it was lost by fire, and it was there contended that the shipowner was not entitled to the lump sum of 5000*l.*, but only to some part of it. It was held that he was entitled to the full freight. Lord Bramwell, then Baron Bramwell, in giving judgment, said this: "The claim is 'a lump sum freight of 5000*l.* to be paid after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the Custom House.' Now, Mr. Williams says that until the ship is discharged and there is a right delivery of the cargo the lump sum is not due. It may possibly be that verbally he is right. If so, what is the meaning of 'the cargo.' In my opinion it is the cargo which she has to deliver. It does not mean the cargo she has shipped but which she is not bound to deliver, which the shipowner is excused from delivering; it means the right delivery of the cargo which is to be delivered, not the right delivery of the cargo which was originally shipped on board of her. Now, there is a cogent argument in favour of this construction. Suppose that 5*l.* worth of these goods had been stolen by the crew, that would not be within the exceptions; then would it have been possible to have said that the whole lump sum was lost? Would not the common rule have applied? The defendants would have had to pay the freight and seek their remedy by a cross action. If that is so, is it not very odd that the shipowner is worse off, because he is not subject to an action than if he had been subject to an action—that is to say, he is worse off because fire has caused the loss than he would have been if it had been owing to a depredation of the crew? I venture to think

some interpretation must be put upon the clause to preclude the entire delivery of the whole cargo being a condition precedent." Therefore in that case the court felt that it would be so unreasonable to say the shipowner must lose the whole of his lump sum freight if he failed to deliver any part, however small, of the cargo, that they were driven to put the construction upon the contract that the entire delivery of the whole cargo was not, and could not have been intended to be, a condition precedent. No doubt, then, if this charter-party were a charter-party for a lump sum freight as in that case I should be governed of course by that case, and I have no desire to distinguish it in any way, and should simply follow it. The question really is whether this charter-party is a charter-party similar to that which the court had to construe in the case of *Merchant Shipping Company v. Armitage* (*ubi sup.*). It seems to me that the reasoning upon which that judgment was arrived at depended essentially upon the fact that the freight payable was a lump sum freight in this strict sense, that it was an indivisible freight. I am not at all certain that if in that case the freight had been, not an indivisible lump sum, but a sum to be arrived at at a rate per ton upon the cargo shipped—and the delivery of the cargo intended to be carried and intended to be delivered under the bill of lading was prevented by some of the excepted perils—that the judgment would have been the same, I doubt whether in such a case as that, even though the freight was to be a freight payable upon the weight shipped, and in that sense perhaps a lump sum freight, it would have been regarded as an indivisible freight, and whether the court would have felt itself constrained, as it did in that case, to treat the words which correspond to the words of this charter-party, "payable on right and true delivery of the cargo" as something not amounting to a condition precedent. However, it is necessary to look at the clauses of this particular charter-party and see what is a fair construction of them with regard to the freight payable. I do not know that there are any clauses other than what I have read which really help in coming to a conclusion upon this matter. There is this clause which I have referred to which provides that: "Any difference between this charter-party and bills of lading freight shall be settled at Fiume on clearance of vessel, if required by master." That does seem to contemplate an adjustment at Fiume. It seems to contemplate that the freight payable under the charter-party is such a freight that at Fiume it would be possible to compare it with the bills of lading freight, and to settle once for all whether there is any difference either one way or the other, and if there is any difference it seems to contemplate that that difference should be paid at Fiume, whether it is in favour of the shipowners or the charterers. That, no doubt, as far as it goes, is rather in favour of the view put forward on behalf of shipowners by Mr. Carver, because if you cannot tell until the cargo is delivered in a case of this kind what the freight payable is going to be, and assuming the bill of lading bears the construction which is put upon it by the charterers, then it would be impossible to adjust the difference of freight at Fiume. I think to that extent, and to that extent only, does that clause

throw any light on the matter. At the hearing I was rather inclined to think it might be carried further, but now I do not think it can. I think that the most that can be said about that clause is that it does appear to contemplate that any adjustment or difference of freight can be settled at Fiume. Of course it is to be observed that that clause is subject to this. The difference is to be settled at Fiume on the clearance of the vessel, "if required by master," and only if required by the master; so that it is not absolute, and one is really thrown back upon the very words of the clause which provided for the payment of freight. That clause provides that the vessel being loaded as required is to proceed to Boston "and there deliver the cargo agreeably to the bills of lading on being paid freight." I leave out some words, "at the rate of 10s. 6d. per ton of 20cwt. gross weight shipped payable on right and true delivery of the cargo in cash at the current rate of exchange." The cargo as provided in the charter-party is a "cargo of sugar in bags," and I have looked through the bills of lading and I find mentioned in each bill of lading the number and the weight of the bags for which that bill of lading is given. I have gone through them, and I find that the weight per bag in all the bills of lading, although the quantities differ, is uniform. Therefore, I come to the conclusion, that in the ordinary course of things at Fiume, when a shipment is made of sugar in bags and bills of lading are given in the way they were given in this case, the weight of each bag is approximately ascertainable. It is taken to be a uniform weight, and according to these bills of lading it is 100·8 kilogrammes. In some of the documents it is treated as 100; but at any rate, whatever it may be, it is uniform. Therefore we have this. It is a shipment of sugar in bags, the weight of the bags being ascertained by the bills of lading. So that you have the shipping weight of the parcels which are shipped. That is certain. That being so, what is the meaning of the clause saying that the cargo is to be delivered "on payment of freight at the rate of 10s. 6d. per ton of 20cwt. gross weight shipped payable on right and true delivery of the cargo." Does that mean that the freight is to be paid on the cargo which is rightly and truly delivered, or does it mean that freight is to be paid which shall be equal to 10s. 6d. per ton on the total weight shipped, and in that sense a lump sum not depending or referable in any way to the quantity of cargo delivered? I do not think that the cases which I have been referred to really help one very much. Those cases all proceed on the assumption, or rather upon the fact, that in those cases the freight was a lump sum freight. Is it a lump sum freight here? It is by reading the words as one must read words of the English language that one finds out the intention of the parties, unless there is some strict rule of construction which one must follow. Taking the words which make the cargo deliverable "on being paid freight at the rate of 10s. 6d. per ton of 20cwt. gross weight shipped payable on right and true delivery of the cargo," and reading those words in their natural sense, I cannot help thinking that the only proper meaning which can be given to them is that freight is to be paid upon the cargo which is delivered. I do not find much difficulty with regard to the words "per ton of 20cwt. gross weight shipped."

I think they are quite satisfied and quite naturally interpreted as meaning that there is to be no dispute about weight. The weight is to be the weight as shipped. There is no need to alter the words at all, merely to interpret them, and it seems to me that, although no doubt it is expressed briefly and not quite fully, the meaning is that the freight is to be paid at shipping weights upon the cargo which is delivered. There might be a difference in the weighing of the bags at Boston and Fiume. The bags might have become wet and the sugar might have drained away and disputes might have arisen one way or the other. I think this charter-party fixes the weight per bag, and that weight is to be the shipping weight, and is to be ascertained and can be ascertained from the bills of lading. Therefore I think with regard to this point that the contention of the charterers must be accepted. Now, so far I have gone upon the mere language of the charter-party as it stands; but I think that to some extent I am confirmed in that view by noticing this. The charter-party is a printed form which has been adapted by certain alterations to the particular case, and I observe that the printed form itself is so framed that the form can be used, by striking out various passages, either for a lump sum freight or for a freight which is not a lump sum freight. That appears, for instance, in the sentence which fixes the freight. The printed form runs thus: "And there deliver the cargo agreeably to bills of lading, on being paid freight in full of all port charges, wharfages, consulage, pilotages, and other charges customarily paid by steamers for the full reaches and burden of the steamer's hold, and every available space, the lump sum of or at the rate of per ton of 20cwt. gross weight delivered, payable on right and true delivery of the cargo." So that the printed form may be adapted either to a lump sum freight, or to a freight which is at so much per ton on the cargo delivered, and here those parts of the form which are appropriated to a lump sum freight are struck out. For instance, the clause "but charterers having the full reach of the holds and spare bunkers, the same as if the steamer was loading for owner's benefit," is struck out. That is a clause which is put in to entitle a charterer, who pays a lump sum, to the full use of the ship, and is not appropriate in a case where a full cargo is to be shipped and to be paid for at so much per ton. Then in the clause which relates directly to the freight, the words "for the full reaches and burden of the steamer's hold and every available space, the lump sum of or" are struck out. So this printed form which can be adapted either to a lump sum charter-party or to a charter-party at so much per ton on the cargo delivered, is altered for the purposes of this case so as not to make it a lump sum charter, but a charter of a different kind. I do not say that is conclusive, because they might have made out a charter of a different kind, and yet such a charter that the freight would be payable on the whole quantity shipped, notwithstanding that some of it was lost, but it does point to this, that the parties did not intend it to be a lump-sum charter such as that which the court had to deal with in the case of *The Merchant Shipping Company v. Armitage* (*ubi sup.*). I only mention that as a matter confirming me in the view which I have arrived at on merely reading the words and

giving them what I believe to be their natural and proper sense. Therefore, I come to the conclusion that this sum of 545l. 8s. 3d. is a freight which the shipowners are not entitled to keep. It was freight which was not payable by the charterers to the shipowners under the charter-party. If that is so I do not see how I can hold, having regard to the way in which business is done under a charter-party like this, that it was not collected by the shipowners from the charterers. It was collected under and upon the bills of lading from the holders of the bills. I am assuming that the consignees under the bills of lading were bound to pay it. I am not deciding that; I am expressing no opinion about it. They did, in fact, pay it, and it was a sum which, if I am right in my view of this charter-party, was not payable by the charterers, although it was receivable by the charterers under their bills of lading. Therefore, if I am right in my construction of the charter-party, and, indeed, whether the consignees were or were not strictly bound to pay it, I think that it was a sum received by the defendants under the bills of lading. It was paid on the bills of lading, and it is not chartered freight, which I think the shipowners are entitled to retain, and I think they have collected for, and must account for it, to the charterers. The consignees do not appear to have intervened in any way or to have attempted to get this money back, and as, in the present case, I am not dealing with their rights, I do not say whether they are entitled to get it back. Whether the consignees were bound to pay or not I think the plaintiffs are entitled to recover the money from the defendants. I ought to have said a word about the empty bags, because Mr. Carver said as to those empty bags, on 7716 at any rate, the freight was payable, because, even although the bag was empty you must take it as weighing the shipping weight. I appreciate what there is to be said in favour of that, but I think the freight was to be payable on the sugar in bags. No doubt the weight of the bag was to be included but where there was no sugar in the bags I do not think that any sugar was delivered, and therefore the freight is not payable on the empty bags.

Judgment for the plaintiffs.

From this judgment the defendants appealed.

Carver, K.C. (Leck with him) for the defendants.—This case turns on the question whether upon the true construction of the charter-party the freight payable is a lump sum freight, or whether it is to be paid upon the delivery of the cargo at the rate of the amount of sugar shipped. I submit that the freight is a lump sum freight, and if so the shipowners are entitled to retain all the freight which they collected from the consignees under the bills of lading. The charter-party freight is not payable with reference to the number of bags, but with reference to the number of tons shipped. The freight was therefore fixed as soon as the cargo was put on board, and it was in fact, according to the true construction of the charter-party, a lump sum freight. This view is supported by the provision that any difference between the chartered freight and the bills of lading freight was to be settled at Fiume. The governing case here is the decision of the Exchequer Chamber in

Merchant Shipping Company v. Armitage, 29 L. T. Rep. 809; L. Rep. 9 Q. B. 99.

In that case Bramwell, B. said: "What is the meaning of 'the cargo'? In my opinion it is the cargo which she has to deliver. It does not mean the cargo she has shipped, but which she is not bound to deliver, which the shipowner is excused from delivering; it means the right delivery of the cargo which is to be delivered, not the right delivery of the cargo which was originally shipped on board of her." In that case the court approved of the decision in

The Norway, 13 L. T. Rep. 50; 3 Moo. P. C. N. S. 245;

Robinson v. Knights, 28 L. T. Rep. 820; L. Rep. 8 C. P. 465.

He referred also to

Blanchet v. Powell's Llantwit Collieries Company, 30 L. T. Rep. 28; L. Rep. 9 Ex. 74;

Hansen v. Harrold Brothers, 70 L. T. Rep. 475; (1894) 1 Q. B. 612.

J. A. Hamilton, K.C. and A. M. Talbot for the plaintiff.—The cases cited are cases of lump sum freight. But the question here is whether under this charter-party the freight is a lump sum freight. It is to be observed that the parts of the printed form which are specially applicable to a case of a lump sum freight have been struck out. Freight is *prima facie* a sum which is not earned until the cargo for which it is demanded has been delivered. That is well established:

Dakin v. Oxley, 10 L. T. Rep. 268; 15 C. B. N. S. 646.

That *prima facie* rule, that freight is only payable on delivery of the cargo, may be altered by the parties by some special agreement, but the burden of showing that the general rule is not applicable in any particular case lies on the person who contends that the rule does not apply. There are difficulties in the construction of this charter-party, but that is not enough to take the case out of the rule of *Dakin v. Oxley*. In the case of lump sum freight there is no relation between the freight paid and the nature of the cargo delivered. The clause here "at the rate of," &c., is irreconcilable with the freight being a lump sum freight. In the court below a case which turned on the words in a charter-party, "freight payable on deals and sawn lumber on the intake measure of quantity delivered," was cited for the defendants:

Spaight v. Farnworth, 42 L. T. Rep. 296; 5 Q. B. Div. 115.

But I submit that the decision of Bowen, J. is really in favour of the plaintiffs.

Carver, K.C. in reply.

Lord ALVERSTONE, C.J.—This case is one, to my mind, of very great interest, and at the same time presents very great difficulty; but after the interesting and able arguments we have heard I have come to the conclusion that the judgment of my brother Walton is right. Now the terms of the contract must be carefully looked at, in order to ascertain what are the real rights of the parties in this case. I say, carefully looked at, because, it seems to me, that the real point in this case depends upon whether the contract in the case can be treated as a lump sum contract—that is to say, a contract for the use of the ship, and whether the argument as to a full cargo for a lump sum applies to this contract or not. Now, I think it is convenient that I should, in the first place, construe the contract and then

see within which category it falls. It is a contract that the charterers are to load a full and complete cargo of sugar in bags which the charterers bind themselves to ship, and the ship being so loaded shall proceed to Boston and there "deliver the cargo agreeably to bills of lading on being paid freight in full of all port charges"—so far it is a contract which contemplates the payment of the freight on delivery of the cargo—"at the rate of 10s. 6d. per ton of 20cwt. gross weight shipped, payable on right and true delivery of the cargo in cash at the current rate of exchange for sixty days' sight bills on London." I pause there, for the purpose of pointing out that the words "deliver the cargo on being paid freight in full of all port charges," "at the rate of," and the words "payable on right and true delivery of the cargo in cash," all indicate an ordinary contract for payment of freight upon delivery of the cargo. The difficulty arises because after the words "at the rate of" you have "at the rate of 10s. 6d. per ton of 20cwt. gross weight shipped. Now, the real question we have to consider is this: Does the fact that the rate of freight is to be fixed solely with reference to the gross weight of the cargo shipped justify the defendants in turning this into, or in saying that this is, a contract which is subject to the incidents of a contract for a lump sum freight? It seems to me that there is another class of contract from which we must distinguish it, having regard to the principle we have to apply, before we can say it must be a lump sum contract, and that class of contract is one of which *Spaight v. Farnworth* (*ubi sup.*) is an instance, where the freight is said to be freight payable on delivery and freight payable on right and true delivery, but at a rate to be fixed according to the weight of cargo shipped. As in the timber case, there was a contract to pay freight on delivery at the rate of the weight or quantity of the timber shipped, so it seems to me quite possible that in a sugar case, as this is, you may have a contract to pay freight on delivery at the rate of the weight of cargo shipped, and the real difficulty in this case is within which class of contract this contract falls. Does it fall within the class of contract which is subject to the conditions which attach to a lump sum contract, or does it fall within that class of contract where the freight is payable upon delivery, but at a rate to be fixed on the weight shipped? The only two other clauses that have any bearing are these ordinary clauses: "Charterers' liability to cease when cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled, but vessel to have a lien on the cargo for freight, dead freight, and demurrage." Then the other clause is: "Any difference between this charter-party and bills of lading freight shall be settled at Fiume," that is the port of loading. "on clearance of vessel if required by master; if in charterers' favour by captain's draft, payable three days after arrival at port of discharge, if in steamer's favour in cash, less 3 per cent. for all charges." At first I thought that was a very strong argument in favour of Mr. Carver's view, because it seemed to contemplate the ascertainment of the actual payment due from the one party to the other in respect of the cargo of the ship at the time that the vessel was loaded and left, but I think that I have attached too

much importance to that, and for these reasons: It is quite plain that might apply to either class of contract, because it is merely for the purpose of adjusting the rights of the parties at the time, *ex hypothesi* there is a difference between the bill of lading freight and the charter-party freight, either in favour of one side or the other, which has to be adjusted, but when it has to be adjusted the only matter to be dealt with will be the balance between the two parties. The rest will remain at the same risk as before; in other words, the shipowner, though he has received the extra 6d., will still have to insure, and may be liable to lose his freight if he does not fulfil the conditions of the contract; and on the other side it is a clause which must be, or which may be, made use of in favour of the charterer, who will have got the bill of lading from the captain, and still the shipper will have to look for delivery of his cargo to get back that money, part of which he has already paid, and part of which he expects to repay himself when he has delivered the cargo. I therefore come to the conclusion, in accordance with the view of the learned judge, that it is open on this contract to say it is a contract whereby the cargo is to be delivered on being paid freight; or, in other words, the time of payment of freight is to be when the cargo is delivered, and it is to be paid on right and true delivery of the cargo at the rate of the sugar when it is put on board. I am fully alive to the difficulties in actually ascertaining what is to be paid when a cargo arrives short in quantity; but I cannot help thinking that these were the very difficulties which were pointed out by Bowen, J., and for the reasons which I will give in a moment, I do not think that the difficulty in the application of the contract justifies us in bringing it within the category of those contracts which are for lump sums. Now, why do I say that I think, at any rate in this court, we ought to hold that this language is not sufficient to turn this into or make it equivalent to a contract for a lump sum? I do not refer again to the provisions beyond saying that they are the ordinary provisions for payment on the chartering of a ship—freight to be payable upon delivery—except the one condition that it is at the rate of 10s. 6d. per ton gross weight shipped. Ever since *Dakin v. Oxley* (*ubi sup.*), which was decided in 1864, I think that it has been recognised that Willes, J. laid down the law absolutely correctly when he said that "The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they be in a damaged state when they arrive. If the shipowner fails to carry the goods for the merchant to the destined port, the freight is not earned. If he carry part, but not the whole, no freight is payable in respect of the part not carried and freight is payable in respect of the part carried unless the charter-party make the carriage of the whole a condition precedent to the earning of any freight." Under what circumstances is that departed from? I believe it is accurate to state, as has been stated in the course of the arguments by both of the learned counsel, that, as far as authority goes, that rule has never been departed from, except in the case of lump freight, or, in other

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words, freight paid for the use of the ship, and which would be due however much cargo the charterers put on board the ship. It is quite true that in the *Merchant Shipping Company v. Armitage* (*ubi sup.*) you have the same words: "A lump sum freight of 5000*l.* to be paid after entire discharge and right delivery of cargo," and it was held that that 5000*l.* was due because it was a lump sum, and that the right delivery of the whole cargo could not defeat or could not prevent the shipowner being entitled to receive that lump sum. That was following the cases of *The Norway* (*ubi sup.*) and *Knights v. Robinson* (*ubi sup.*), and therefore if, as I have said, the only reasonable construction to put on this charter-party is that it is to be a charter-party for a lump sum, which lump sum is to be ascertained by paying 10*s.* 6*d.* per ton upon every ton shipped—if that is the true construction of this charter-party, of course the principle of the *Merchant Shipping Company v. Armitage* (*ubi sup.*) would apply. But I think it does require special words in order to deprive the word "freight" of the meaning which has been attached to it by the law of England for so many years, and I think that the mere fact that there would be difficulties in ascertaining what is due, because when the cargo arrives it has to be measured by the weight at shipment, is not sufficient, but only brings the case within that category of contract where freight in the ordinary sense of the word has to be measured, not by the weight of the goods when they arrive, but by the weight of the goods when they are shipped. I fully recognise the difficulties there are in working out the contract, but those are difficulties in application, and must not be allowed to prevent us applying the rules of law; and I think, although the case does present very considerable difficulties, this contract is in its terms an ordinary contract for payment of freight at a rate to be so ascertained, and is not a contract which has the incidents of a lump sum freight. For that reason I think my brother Walton has come to the right conclusion on the construction of the contract. With regard to the other point, in my opinion it does not arise, because I think the charterers were, on the construction I put upon the charter-party, only liable to pay to the shipowner the rate of freight which Walton, J. has assessed. If the case could be argued on the basis that the other sum of money, the larger sum of money, was not due from the consignees to the charterers, different considerations might have arisen; but it seems to me, to the extent to which they received the money beyond that which was due from the charterers to them, they certainly did receive it by virtue of their position under the charter-party and as agents for the charterers. I therefore think this appeal must be dismissed.

COLLINS, M.R.—I am of the same opinion, and I have very little to add, because I not only agree with the judgment delivered by the Lord Chief Justice, but also with that of Walton, J. It seems to me that the basis of the whole question here is, what is the right of the shipowner to freight? It is perfectly clear law that *prima facie* freight is not payable except upon delivery of the cargo. You have to find some special provisions sufficiently clearly expressed in the contract between the parties to oust that *prima facie* presumption. Therefore, in approaching

this case, you must start with supposing that where freight is stipulated for, it is a condition precedent to the earning of that freight that the goods should be carried to their destination. Now, what do I find here on the face of this charter-party? To begin with, it is not a contract written out *de novo* between the parties, but it is a contract based upon a printed form, some parts of which are allowed to stand, and some parts of which are excluded, and on the face of this printed form there is a provision for agreeing distinctly for what is called a lump sum freight and there is also a provision for the ordinary agreement of ordinary freight, i.e., freight to the earning of which delivery is a condition precedent. The contract is to load a full and complete cargo and deliver it at a certain place agreeably to bills of lading, on being paid freight in full, and then, "At the rate of 10*s.* 6*d.* per ton of 20*cwt.* gross weight shipped, payable on right and true delivery of the cargo in cash, at the current rate of exchange for sixty days' sight bills on London?" Is there anything in those terms incompatible with the *prima facie* obligation to deliver the cargo before you can earn your freight? The only thing that can be suggested as incompatible with it is that the rate at which the freight is to be paid is the rate per ton of the gross weight shipped. What is there inconsistent with that in the obligation to deliver the cargo before you have earned your freight? It seems to me nothing. It is a convenient way of measuring that which is to be paid for—the freight—and it is convenient in this way, that for many causes the weight may be altered during the course of transit without any fault on the part of the shipowners, and therefore it is thought a fair provision that they should have a perfectly indisputable weight, the weight when the cargo is shipped, as the basis on which the freight was to be paid; and if it should happen that that weight is diminished by causes outside the shipowners' responsibility, they are not to suffer in that respect, but are to be paid on the weight of the cargo shipped, not on the weight of the cargo delivered, which may be less. That is a very intelligible provision, and one which the parties might perfectly well have in mind when they made the stipulation, without any intention whatever to qualify the always underlying obligation to deliver your cargo before you earn your freight. Now, that being what I should myself treat as the *prima facie* inference from the word "freight," I find that it is considerably strengthened in the particular circumstances of this case. In the printed form used for this charter-party I find after the provision for the delivery of the cargo on payment of freight, a clause "for the full reaches and burden of the steamer's hold, and every available space, the lump sum of." That provision, which would have supported the contention of the shipowners that the contract was for a lump sum freight, was scratched out, and what is left in is the clause beginning "at the rate of," which is the other and alternative form, which indicates freight in the ordinary way. So it is not merely a case, as I have said already, of writing out the contract as if was written out on a new sheet of paper; but it was a deliberate deletion of that part of the printed contract which would have formed the obligation which the shipowner now sets up as

the one between him and the charterer. The Lord Chief Justice has gone through the rest of the charter-party and referred to the leading authorities on the matter, and I not think it is necessary to repeat anything that he has said. I agree in all he has said as to the right of the charterer to recover back from the shipowner the surplus which he has received over and above the freight to which he alone has any right—namely, the freight payable on the cargo actually delivered. I agree therefore with the learned judge, and I think that this appeal fails.

ROMER, L.J.—I am extremely sorry that I feel obliged to form an opinion which differs from that of my Lords and from that of Walton, J. Inasmuch as the question involved in this appeal is one concerning charter-parties, I need scarcely say that I differ with the greatest diffidence, for I have no doubt that in all human probability my opinion is wrong. At the same time, I have formed that opinion, and my duty is, sitting here, when I have formed an opinion to express it. I have come to the conclusion, stating the matter somewhat briefly, that the case before us cannot be distinguished in principle from that which was decided in the case of *Merchant Shipping Company Limited v. Armitage* (*ubi sup.*), and the cases there cited. To my mind, when this charter-party is looked at it will be found in effect that the cargo which is the subject of it is treated as one cargo, not as something broken up into portions, and that in substance the amount that is to be payable for freight is in effect a lump sum though it is not called so. The cargo which is to be loaded under this charter-party, is a full and complete cargo; and the tonnage of the ship and its carrying capacity is stated. That cargo, of course, might vary by a few tons either way, according to the minimum or maximum capacity of the ship, but it was to be a full and complete cargo; and then you find that the freight was to be estimated with regard to that cargo at so much per ton. That appears to me to have been a short way of arriving at the amount of the freight directly the cargo was shipped and the ship was ready to depart. The method of ascertaining the sum that had to be paid for freight was, of course, fixed by reference to tonnage, because, as I have pointed out, the exact amount of the tonnage contained in the full and complete cargo could not be ascertained until the whole cargo was on board. Then when I come to the part of the charter-party which states as to when the freight is payable, how do I find the question of payment is dealt with with reference to the cargo? Is it dealt with with reference to tonnage, or anything of that sort; or is it dealt with with reference to the cargo as a whole? It is clearly dealt with with reference to the cargo as a whole. It is payable on the right and true delivery of the cargo in cash. Then it is stated that in substance this is to be treated as a provision for payment of the freight according to the tonnage of the cargo, or according to the bags in which that cargo was packed at the moment of delivery, so that you can only ascertain the freightage payable by seeing what tonnage is delivered or how many bags are handed over. Now let me first consider the question of tonnage. Is it a natural inference or a proper inference from this charter-party

that it was contemplated that the freight would be payable according to the tonnage of the goods as delivered? In what shape was this sugar to be shipped? On the face of the charter-party, it was to be shipped in bags. Those bags, on the face of the charter-party, might be of any size; they might be of any weight. I find, nevertheless, that the freight is to be ascertained with reference to the gross weight of the cargo shipped, which would include the weight of the bags. You could not ascertain, then, with regard to this cargo, except by weighing it as a whole, what portion of it would be delivered on arrival of the ship, if any portion of it was lost. If the freight was payable according to tonnage on delivery (which is one of the views put forward by the respondents on this appeal) let me see what would have to be done. Could it be contemplated by this charter-party that there would have to be a re-weighing of the cargo on delivery? How could you properly re-weigh it if the whole cargo did not arrive—properly weigh it when it has been delivered in such bags as I have indicated? You could not possibly do it, nor do I think it could have been contemplated that the weight on arrival was supposed to be a matter on which the payment of freight depended; and, when you bear in mind that sugar must of necessity change in weight, it seems to me almost inconceivable that they could have supposed that the amount of freight payable on this charter-party had to be considered with reference to the weight of the sugar on arrival, especially, as I have said, when you bear in mind that it would be impossible to tell from the cargo, when it arrived, if the whole did not arrive, how much had been wasted, or what was the tonnage of the cargo that arrived when it was shipped. Of course, if I had come to a conclusion in other respects as to the true meaning of this charter-party, and thought that it did not come within the principle laid down in *Merchant Shipping Company Limited v. Armitage* (*ubi sup.*), I should not be deterred by difficulties of that sort from trying to do what was right between the parties, but I do point out the difficulties as showing that it could not have been contemplated in this case, as it appears to me, that there should have been any sort of re-assessment of this cargo with reference to tonnage in order to ascertain the freight which is payable. Then I come to the next suggestion, which, I think, really was the main suggestion of the respondents on this appeal, namely, that a charter-party has to be construed as if it were a provision for payment of freight according to delivery of the bags in which the sugar was. I have already pointed out that there is nothing in this charter-party which says anything about the size or weight of the bags, and, except in saying that the cargo is to come in bags, there is nothing in this charter-party to show that the bags had anything whatever to do with the freight, and if it had been contemplated that the payment of the freight would have depended on the number of bags that arrived more or less filled with sugar, nothing could have been more easy than to have said so in this charter-party. If the freight was to depend upon the number of bags which were delivered it appears to me difficult to see why the charter-party, in dealing with the question of freight, referred at all to the gross weight of the cargo

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as it was shipped. It appears to me, therefore, that to hold that this charter-party means that the freight is payable only on the cargo in bags as per bag when delivered, is to do violence to this charter-party, and to put upon it a construction which it really will not bear. Then I may point, as supporting the view that I am taking, to one of the later clauses in this charter-party. I refer to the clause about what is to happen when the master signs the bill of lading, and the rate of freight in the bills of lading differs from that in the charter-party. That provision, to my mind, points to this: that it is contemplated that the freight which is payable under this charter-party is a sum then ascertainable and which can be finally adjusted, if there is a difference between the bill of lading and the charter-party, by a sum in cash then ascertainable. It appears to me, therefore, that this charter-party, when looked at as a whole, is, in substance, a charter-party for a cargo as a whole, not split up into items which can be separately identified, and in respect of which you can fairly put on them a separate rate of freight. It is, therefore, as I have said, as it appears to me, within the principle of the cases I have referred to. Now, I will only say with reference to *Spaight v. Farnworth* (*ubi sup.*) that that really is no authority whatever in the present case, nor has it, to my mind, any material bearing upon it. There there was no question of the construction of a charter-party. There it was admitted that the freight was payable according to the timber delivered, and the only question was with reference to a provision as to the measurement of the timber, with reference to the kind of measurement adopted at the port of shipment. If that case is looked at, as I have said, it is no authority at all on the present question. Given the respondents in this case were right in the construction of the charter-party, I should not hesitate to carry out that construction merely because it occasioned difficulties, but I do think, apart from all other considerations, the construction contended for by the respondents in this case does lead to almost incredible results—at any rate, to me, incredible. It would really appear from their contention, if they are right as to the bags, that in a case of jettison, if the parties had only jettisoned portions of the sugar—three parts of the sugar out of every bag—they would be able to say that the whole freight was payable, but that if they jettisoned the whole of the sugar out of a certain number of bags, then they could be entitled to say the freight was only payable in respect of the remaining bags which contained the sugar. At any rate, that does not seem to be a result that could be desirable, nor does it appear to me to be a result which ought to follow from the charter-party. I have expressed my opinion, as I have said, and I do so with very considerable diffidence.

Carver, K.C.—Your Lordship has not dealt with the point of the 7716 bags which were empty. The learned judge has taken the bags delivered as that on which the freight has to be paid. I have submitted, but your Lordships have not dealt with the matter, that the freight ought to be paid on those as well as on the others.

Lord ALVERSTONE, C.J.—A point arises, as I understand it, on this passage at the end of the

judgment of Walton, J.: "I ought to have said a word about the empty bags, because Mr. Carver said as to those empty bags, on 7716 at any rate, the freight was payable, because even although the bag was empty you must take it as weighing the shipping weight. I appreciate what there is to be said in favour of that, but I think the freight was to be payable on the sugar in bags. No doubt the weight of the bag was to be included, but where there was no sugar in the bags I do not think that any sugar was delivered, and therefore the freight is not payable on the empty bags." Your claim is in respect of the bags being taken to be empty for this purpose?

Carver, K.C.—Yes.

Lord ALVERSTONE, C.J.—We need not trouble you, Mr. Hamilton, I am sorry I did not notice the point yesterday; I ought to have done so, especially after it was clearly mentioned by Mr. Carver. We must take it for this purpose that the bags were empty. On the view that the Master of the Rolls and I take of this agreement, confirming Walton, J., Walton, J. had to find how much sugar in bags was delivered at the weight which that sugar in bags was shipped; and he has gone through some calculation and arrived at that. It is said that ought to be increased, because in addition to what he has found for that, 7716 empty bags were also delivered. I think that was not sugar in bags, and, therefore, on the principle on which we have decided this case, whether we are right or wrong, Walton, J. was right in excluding those.

Carver, K.C.—Might I state that the learned judge did not make any calculation?

Lord ALVERSTONE, C.J.—We have had no argument on the question whether he arrived at the right figure or not. We are here to discuss the important question of law.

Appeal dismissed.

Solicitors for the plaintiffs, Woodhouse, Davidson and Co.

Solicitors for the defendants, W. A. Crump and Son, agents for Turnbull, Tilley, and Co., West Hartlepool.

Tuesday, Feb. 9.

(Before COLLINS, M.R., ROMER, and MATHEW, L.JJ.)

LUMBY v. FAUPEL. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Landlord and tenant—Lease—Covenant to pay all assessments "which now are or during the term shall be imposed or assessed"—Paving expenses under Public Health Act 1875—Works completed before lease—Apportionment after lease—liability of lessee.

A covenant by a lessee that he will pay "all rates, taxes, and assessments whatsoever which now are or during the said term shall be imposed or assessed upon the said premises or on the landlord or tenant in respect thereof by authority of Parliament or otherwise" does not apply to paving expenses which have become a charge upon the premises under the Public Health Act 1875 upon the completion of the

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

works before the date of the lease, although such expenses do not become payable until after that date.

Surtees v. Woodhouse (88 L. T. Rep. 407; (1903) 1 K. B. 396) followed.

APPEAL by the plaintiff from the judgment of the Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.) reversing the decision of the judge of the Kingston-on-Thames County Court.

The action was brought to recover the sum of 25l. 18s. 11d. which the plaintiff had been compelled to pay to the Wimbledon Urban District Council, being the proportionate amount of the paving expenses incurred by the council in carrying out certain improvements under sect. 150 of the Public Health Act 1875, apportioned in respect of certain premises belonging to the plaintiff, situate in Broadway, Wimbledon.

On the 7th Oct. 1879 the plaintiff had demised the premises in question to one Gordon.

On the 4th May 1893 Gordon assigned to the defendant.

On the 2nd Nov. 1899 the defendant surrendered the lease to the plaintiff, the deed of surrender containing an absolute release and discharge of the defendant by the plaintiff from all rents and covenants and conditions reserved by and contained in the indenture of lease of the 7th Oct. 1879, and from all actions, proceedings, claims, and demands in respect thereof.

On the same day—viz., 2nd Nov. 1899—the plaintiff granted to the defendant a new lease of the same premises for a term which was to commence on the preceding 29th Sept.

The new lease contained the following covenant:

That the lessee will pay the rent hereby reserved at the time and in manner aforesaid, and will pay all rates, taxes, and assessments whatsoever which now are or during the said term shall be imposed or assessed upon the said premises or on the landlord or tenant in respect thereof by authority of Parliament or otherwise.

Before the execution of this lease—i.e., in Jan. 1898—the Wimbledon Urban District Council had finally completed the improvements under sect. 150 of the Public Health Act, but the expenses of the works were not apportioned under that section among the frontagers till Dec. 1900.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 257. Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act . . . such expenses may be recovered . . . from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred.

The County Court judge held that under the above-mentioned covenant, in the lease of the 2nd Nov. 1899 the defendant was bound to repay to the plaintiff the amount which the plaintiff had been compelled to pay to the Wimbledon Urban District Council.

The Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.) reversed the decision of the County Court judge upon the ground that the words in the covenant, "rates, taxes, and assessments," were not wide enough to cover the apportioned expenses of paving a street under

sect. 150 of the Public Health Act 1875, and they therefore gave judgment for the defendant.

The case is reported 88 L. T. Rep. 562.

The plaintiff appealed.

W. O. Hodges for the plaintiff. (a)—The defendant's covenant is that he will pay all assessments which now are "or during the said term shall be" imposed or assessed. The charge on the property may have existed before the execution of the lease to the defendant, but the assessment was not made till after the date of the lease. Reliance is placed by the defendant on a recent decision of the Court of Appeal:

Surtees v. Woodhouse, 88 L. T. Rep. 407; (1903) 1 K. B. 396.

But in that case the important words of the covenant were, as Stirling, L.J. observed near the end of his judgment, "outgoings charged," not "outgoings payable." There the defendant was not liable, because the charge on the land was not made during the term. The defendant's covenant also contains the words "which now are" imposed or assessed. That means which have been imposed or assessed before the commencement of the term. The lease was intended to be retrospective. The term was to begin before the date of the indenture.

Dankwerts, K.C. and *S. Green* for the defendant.—Under sect. 257 of the Public Health Act 1875 the charge was imposed on the premises on the completion of the works, and therefore the defendant is not liable under his covenant to reimburse the plaintiff. The point is settled by *Surtees v. Woodhouse* (*ubi sup.*), which followed *Stock v. Meakin* (82 L. T. Rep. 248; (1900) 1 Ch. 683). The liability is created by the charge. The subsequent assessment is merely a matter of calculation as to the exact figures. The duty of paying is on the landlord, and if he does his duty there would be no charge or assessment, and he clearly could not recover anything from his tenant. It is only when the landlord makes default that the local authority steps in, does the work, and assesses on the frontagers the proportions of the expenses they must pay. A landlord cannot, by making default in his duty, bring his case within the words of such a covenant as this, so as to impose a liability on his tenant.

Hodges in reply.

COLLINS, M.R.—I am of opinion that this appeal fails, and I decide the case, not on the point that has been mainly argued, but upon the last point, which is a very short one, and upon which it appears to me the authorities are conclusive. The headnote to *Surtees v. Woodhouse* (*ubi sup.*) in the Law Reports is this: "Where by a covenant in a lease the lessee covenanted that he would during the term pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the demised premises or the owner or occupier in respect thereof: Held, that the covenant did not apply to expenses of private street works, which under the Private Street Works Act 1892 had become a charge upon the premises on the completion of the works before the date of the commencement of the term

(a) So much of the argument as had reference to the point upon which the decision of the Divisional Court was based is not here set out, because that point is not considered in the judgment of the Court of Appeal.

granted by the lease, though not payable until after that date." Now, in the present case paying expenses had been incurred in respect of these premises before the date of lease to the defendant, and though the amount payable in respect of them had not been assessed at the date of the lease, still the charge, according to this authority, had become a charge upon the premises—i.e., the liability had been incurred. The defendant had surrendered the lease, which he had held at the time when these expenses became a charge on the premises, and he had received a complete release from all his obligations towards the lessor in respect of these premises. After that he took the existing lease, and the covenant that we have to construe appears to me for all purposes of this discussion to be on all fours and identical with the covenant in *Surtees v. Woodhouse*. The covenant here is this "And the lessee hereby covenants with the lessor in manner following—that is to say, that the lessee will pay the rent, hereby reserved at the time and in manner aforesaid, and will also pay all rates, taxes and assessments whatsoever, which now are, or during the said term shall be imposed or assessed upon the said premises, or on the landlord or tenant in respect thereof by authority of Parliament or otherwise." It seems to me that that covenant is identical for all purposes of this discussion with the covenant in *Surtees v. Woodhouse*, and, just as there, it was held that the fact that the expenses had ripened into a charge before the commencement of the new lease was a complete answer to any claim made upon the new lease, so, it seems to me, it is a complete answer here. I have listened to the argument of Mr. Hodges, and I am really unable to follow the distinctions which he seeks to make between the obligations arising on the two covenants, and, therefore, I do not propose to attempt to go through them. It appears to me that the grounds of the decision of *Surtees v. Woodhouse* apply just as much whether the words are "outgoings," or whether, as they are here, "assessments," because the basis of the decision was that the charge had accrued before the assessment was made, and the fact that the charge subsisted was not affected, nor was any fresh liability imposed by virtue of the fact that assessment came after. The charge was for an amount which was afterwards assessed and although the assessment did not take place until after the currency of the new lease, nevertheless it gave no new right at all in respect of a right which had accrued, and which in this case was satisfied before the new lease arose. In *Surtees v. Woodhouse* (*ubi sup.*) Williams, L.J. after reading from the words of the covenant in question, said: "In my judgment these words would not cover a rate or charge which had become effective before the date of the lease, by reason merely of the completion of the works," and then, lower down, he said: "Apart from the words 'present and future' the covenant is to my mind perfectly plain, and does not impose upon the tenant the obligation to pay charges to which the property had been assessed for private street works, but which had not become payable. For these reasons I am of opinion that the judgment of Walton, J. must be reversed." And Stirling, L.J. said in a written judgment, after referring to sect. 257 of the Public Health Act 1875: "It appears to me that, by the combined

effect of this last section and sect. 112 of the Private Street Works Act 1892, the apportioned amount became charged on the owner at the time of completion of the works as from that date." That is to say, although the apportionment did not take place till afterwards, nevertheless the apportioned amount had become charged. My brother Mathew gave judgment to the same effect. For these reasons I think that on this point this appeal must be dismissed.

ROMER, L.J.—I agree.

MATHEW, L.J.—I am of the same opinion, and for the same reasons as those given by my Lord.

Appeal dismissed.

Solicitors for the plaintiff, *Ashley, Lumby, and Cooper.*

Solicitors for the defendant, *Gregson, Wareham, Waugh, and Gregson.*

Jan. 12 and Feb. 16.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.J.J.)

GRIFFIN v. HOULDER LINE LIMITED. (a)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—"Factory"—Ship in a dock—"Workman"—Seaman—Factory and Workshop Act 1901 (1 Edw. 7, c. 22), s. 104—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), s. 7.

A ship moored to buoys in a dock preparatory to proceeding to sea occupies part of a factory within sect. 104 of the Factory and Workshop Act 1901.

An able seaman employed in the ordinary duties of a seaman on such a ship is a "workman" within sect. 7 of the Workmen's Compensation Act 1897 and, subject to the provisions of that Act, is entitled to be compensated by the ship-owners for personal injury by accident arising out of and in the course of such employment.

So held by Collins, M.R. and Cozens-Hardy, L.J., Mathew, L.J. dissenting.

APPEAL by the plaintiff from the decision of the judge of the City of London Court that she was not entitled, under the Workmen's Compensation Act 1897, to any compensation for the death of her husband, who had been killed by an accident arising out of and in the course of his employment by the defendants.

The agreed facts of the case were as follows:—

The applicant, Elizabeth Ann Griffin, is the widow and administratrix of Edward Latimer Griffin, deceased.

The deceased was an able seaman, and on the 21st Nov. 1902 he signed articles at Liverpool to serve on board the respondents' steamship *Royston Grange* as an able seaman, upon a voyage from Liverpool, where the ship was then lying, to the River Plate and back to this country.

The deceased duly joined the ship pursuant to the articles on or about the 22nd Nov. 1902, and sailed in her from Liverpool to Newport, Monmouthshire, at which port the vessel called to take in her bunker coal for the voyage.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

The vessel arrived in the Alexandra Dock, Newport, on the 24th Nov. 1902, and at midnight on the 28th Nov. she had finished receiving her bunker coals, and was moved out to the buoys in the dock preparatory to proceeding to sea on the following morning.

Whilst engaged clearing up the No. 5 hold on the 29th Nov. 1902 a dunnage wood, known as a "tom," and used for the purpose of supporting a deck beam when heavy weights were stowed above, was knocked down by a fellow servant of the deceased, and fell across his ankle and instep, which necessitated an operation. The accident and the operation resulted in the death of the deceased.

At the hearing before the judge of the City of London Court the judge held that the Workmen's Compensation Act 1897 was not intended to include the case of a sailor working as a sailor, and as the deceased was working as a sailor, and nothing else, at the time when the accident happened, his case was not within the Act, and therefore the plaintiff was not entitled to any compensation under the Act.

The plaintiff appealed.

Jan. 12.—*Robson, K.C.* and *G. A. Scott* for the plaintiff.—The Workmen's Compensation Act 1897 does not apply to defined classes of workmen, but to employments in certain specified places. The first question here, therefore, putting aside for the moment the nature of the employment of the deceased, is whether or not the place in which he was employed at the moment when he met with the accident, was a "factory" within the Act. He was in a ship which was in a dock, and it must now be taken to be well settled law that a ship in a dock is a "factory" within sect. 104 of the Factory and Workshop Act 1901 (1 Edw. 7, c. 22) and is therefore also within sect. 7 of the Workmen's Compensation Act 1897:

Raine v. Jobson and Co., 85 L. T. Rep. 141; (1901) A. C. 404;

Cattermole v. Atlantic Transport Company, 85 L. T. Rep. 513; (1902) 1 K. B. 204;

Bartell v. Gray, 85 L. T. Rep. 658; (1902) 1 K. B. 225.

It is true that here the vessel was moored to a buoy and not occupying a berth at the side of the dock, but that can not make any real difference between this case and the three just cited. It is enough that she was lying in a dock and was therefore in a "factory." The defendants are the "undertakers" of the factory:

Merrill v. Wilson, 83 L. T. Rep. 490; (1901) 1 K. B. 35.

The only real question in this case is whether the deceased, although employed in a factory, is deprived of the benefits of the Workmen's Compensation Act 1897 by reason of the fact that he was employed as a seaman. Seamen are not expressly excluded from the benefits of the Act, as they are from the benefits of the Employers' Liability Act 1880 (43 & 44 Vict. c. 42) in consequence of the saving clause, sect. 13, of the Employers and Workmen Act 1875 (33 & 39 Vict. c. 90). A stevedore's labourer would be entitled to compensation if he met with the same accident that the deceased met with, and there is no reason why the plaintiff here should not be entitled to compensation. The remarks of the Lord Chancellor *Raine v. Jobson and Co.* (*ubi sup.*) as to the

exclusion of seamen from the Act only had reference to accidents taking place on a ship when at sea.

Carver, K.C. and *Dawson Miller* for the defendants.—The deceased was engaged at the time of the accident in ordinary seaman's work, unconnected with loading or unloading. That was not the class of work contemplated by the Act. His employment was not connected with a "factory." The ship was not in the dock for the purpose of work connected with the dock. She was in transit from her berth to the open sea. She was merely passing through the dock. She was not in occupation of any definite part of the dock. The kind of occupation necessary to satisfy the Act is an occupation of a place for the purpose of doing work there:

Wrigley v. Whittaker, 86 L. T. Rep. 775; (1903) A. C. 299.

In that case the House of Lords approved the decision of the Court of Appeal in

Francis v. Turner Brothers, 81 L. T. Rep. 770; (1900) 1 Q. B. 478.

Robson, K.C., in reply.—The two cases just cited were decided on sect. 7 of the Workmen's Compensation Act 1897, and it was held that "employment in a factory" meant employment by the undertakers in their own factory. Those cases refer to the "use" of a factory and have nothing to do with the present case, which depends on sect. 104 of the Factory and Workshop Act 1901.

Cur. adv. vult.

Feb. 16.—*COLLINS, M.R.* read the following judgment: I agree with the judgment about to be read with *Cozens-Hardy, L.J.*, but, as there is a difference of opinion among us, I will state my opinion in my own words. The question is whether a sailor who met with an accident while engaged in clearing out the hold preparatory to receiving cargo in a ship which was lying at anchor in a dock can take proceedings against the owners of the ship under the Workmen's Compensation Act. The County Court judge has decided that he cannot, on the broad ground that the Act does not apply to sailors. It is not contended that there is any provision expressly excluding sailors from the Act. The question, therefore, must be, Do they come within the class of persons to whom the Act gives a remedy? Sect. 1 of the Act provides as follows: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." Therefore the applicant must be a workman, and the employment must be one to which the Act applies. By sect. 7, sub-sect. 2, "workman" is defined as including "every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing." By sub-sect. 1 of sect. 7 "this Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a . . . factory." And by sub-sect. 3 "undertaker" in the case of a factory

means the occupier thereof within the meaning of the Factory and Workshop Act; and by the Factory and Workshop Act 1901, s. 104, "the person having the actual use or occupation of a dock . . . or of any premises within the same or forming part thereof . . . shall be deemed to be the occupier of a factory." It was once thought that, as the Act does not in terms constitute a ship a factory, employment in a ship in a dock was not employment in a factory, and the inference was also drawn that, as ships were not made factories, the Act was not intended to include sailors. The House of Lords, however, held in *Raine v. Jobson* (*ubi sup.*) that a workman employed in a ship which was in a dock was employed in a factory. The fact that he was employed in a ship did not negative his being employed in a factory. Therefore, if the exclusion of sailors from the Act is rested on the fact that employment in a ship cannot be employment in a factory, the foundation for such contention is destroyed by that case. This court has applied the principle of *Raine v. Jobson* to more than one case where workmen sent by their employers to do painter's or joiner's work in a ship in a dock have been held to be within the Act and to be entitled to compensation against their employers as the undertakers—i.e., the users or occupiers of a dock within the above definition. Unless, therefore, there be some special exclusion of sailors from the Act, a sailor clearing out a hold in a ship in dock is precisely in the same position to claim compensation against his employer as he would be if instead of being a sailor he had been a coal heaver in a coal bunker and his master had been a coal merchant instead of the owner of the ship. But there is no such exclusion to be found in the Act. The foundation for such suggestion, as I have pointed out, fails: and a sailor when employed as a workman in a ship in a dock is just as much drawn within the Act as any hand craftsman under the same circumstances. His position, of course, while at sea is quite different; he must get himself physically into a factory before he can get the benefit of the Act. The difference of his position at sea is pointed out by Lord Halsbury and Lord Shand in the case cited. It seems to me, therefore, that the authority of *Raine v. Jobson* concludes this case, and that the appeal must be allowed.

MATHEW, L.J. read the following judgment:—I regret to be unable to deal with this appeal from the point of view of my learned colleagues. I think Judge Rentoul was right in his decision that the appellant was not entitled to compensation under the Workmen's Compensation Act for the loss of her husband, Edward Latimer Griffin. The material facts are these. The deceased man had joined the defendants' ship, the *Royston Grange*, at Liverpool under signed orders which bound him to serve the defendants as an able seaman on a round voyage to the River Plate and back to a home port. The vessel went from Liverpool to the Alexandra Dock, Newport, to take in her bunker coal, and, when the coaling was completed, she was moved out to buoys in the dock preparatory to proceeding to sea. While there the deceased man was employed in what was admitted to be the ordinary duty of a seaman—viz., in clearing up No. 3 hold for the reception of cargo. The accident to which his

death was due occurred while he was so engaged. The learned County Court judge came to the conclusion that Griffin was not protected by the Act, and that the claim of his widow for compensation failed. Upon the argument of the appeal it was not disputed that, if the accident had occurred while the ship was at sea, the widow could not have maintained her right to compensation. But it was argued that the legislation embodied in the Factory and Workshop Act 1901 had altered the status of seamen on board when the vessel was not at sea and was lying in dock. The ship, it was said, while in dock was occupying part of a factory, and the sailors therefore were employed in a factory, and were protected by the Workmen's Compensation Act. In support of this contention reliance was placed on the provisions of the Factory and Workshop Act 1901 and the judgment of the House of Lords in *Raine v. Jobson*. But I am unable to discover either in the statute or in the decision of the House of Lords any indication of an intention to extend the Workmen's Compensation Act to a class which had not previously been included in that statute. Full effect may be given to the Factory and Workshop Act and the decision, if both are treated as applicable to the class of workmen with which the Workmen's Compensation Act was clearly intended to deal—viz., workmen as distinguished from seamen. The argument for the appellant would lead to this extraordinary and, as it seems to me, unreasonable result—that a seaman while at sea would be outside the operation of the Act, but would become entitled to protection when in a position of comparative safety. I can see no reason for thinking that such a result could have been intended as the consequence of the application of the provisions of the Act of 1901 to the Workmen's Compensation Act. Further, I consider it unlikely that any change would have been made in the law which would affect existing as well as future contracts with seamen without a clear intimation to shipowners of their altered position. I am of opinion that the appeal should be dismissed.

COZENS-HARDY, L.J. read the following judgment:—The applicant is the administratrix of Edward Latimer Griffin, an able seaman on board the respondents' steamship *Royston Grange*. On her voyage from Liverpool to the River Plate the vessel proceeded to Newport to take in bunker coal. She arrived in the Alexandra Dock on the 24th Nov., and at midnight on the 28th Nov. she had finished receiving her bunker coal, and was moved out to the buoys in the dock preparatory to proceeding to sea on the following morning. While there, in the discharge of his duties as a seaman, Griffin met with an accident which resulted in his death. His Honour Judge Rentoul has held that as the deceased was a sailor, working as a sailor, he is not within the Act. By sect. 7 of the Act the term "workman" includes every person who is engaged in the employments to which this Act applies, whether by way of manual labour or otherwise. The Act applies only to employment by undertakers as defined in the Act, including (*inter alia*) employment in, on, or about a factory, and "factory" includes a dock, and the undertaker of a factory is the occupier thereof. Now, it is clear that a ship, as such, is not a factory within the meaning of the Act, but I think it must be admitted, since

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the decision of the House of Lords of *Raine v. Jobson* (*ubi sup.*) and the decision in this court of *Bartell v. Gray and Co.* (*ubi sup.*), that a ship occupying a berth in a dock occupies part of a factory, with the result that the vessel in question was within the operation of the Act, and the shipowners were undertakers within the Act at the time when the accident happened. Unless, therefore, there are some words to be found expressly excluding seamen as such from the benefit of the Act, I think that the applicant must succeed. I can find nothing to put seamen in a worse position than would be any carpenter, painter, or other mechanic on board a ship while in dock. The observations of Lord Halsbury and of Lord Shand in *Raine v. Jobson*, to the effect that it was not within the contemplation of the statute to deal with the relations between shipowners and sailors when engaged in their occupation of sailing upon the seas, do not seem to apply where the vessel is not at sea, but where, within the meaning of the statute, it is lying in and occupying part of a factory. In my opinion, this appeal must be allowed.

Appeal allowed.

Solicitors for the plaintiff, *Burn and Berridge*.
Solicitors for the defendants, *W. A. Crump and Son*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Feb. 10 and 11.

(Before KEKEWICH, J.)

Re EDUCATION ACT 1902; *Re* HEBBURN URBAN DISTRICT COUNCIL AND HEDWORTH, MONKTON, AND JARROW UNITED DISTRICT SCHOOL BOARD'S ARBITRATION. (a).

Education — United district school board — Transfer to educational authorities — Different "appointed days" — Adjustment of liabilities — Immediate or postponed arbitration — Education Act 1902 (2 Edw. 7, c. 42), s. 27, sub-s. 2, sched. 2, clauses (1) (8) (22) — Local Government Act 1894 (56 & 57 Vict. c. 73), s. 68 — Arbitration Act 1889 (52 & 53 Vict. c. 49), s. 2.

The H. Urban District Council is the local education authority for the H. Urban District. The 1st June 1903 was the "appointed day" for the coming into operation of the Education Act 1902 within the district. The corporation of J. and the county council of D. are respectively the local education authorities for the borough of J. and the rural district of M. At the passing of the Education Act 1902 the H., M., and J. United District School Board was the school board for the urban district of H., the rural district of M., and the borough of J. The 1st April 1904 was the appointed day for the coming into operation of that Act within the county of D. and the borough of J. Matters having arisen requiring adjustment between the council and the united district school board, and clause 1 of the second schedule to the Act providing that the rights and liabilities "of any school board" existing at the appointed day should be transferred to the council exercising the powers of the school board:

Held, that an arbitrator should be at once appointed to adjust such matters, and that the appointment should not be delayed until the appointed day for the remainder of the united district school board.

ADJOURNED summons raising the question whether the rights and liabilities *inter se* of a local education authority and a united district school board, part of which it has taken over, should be adjusted by arbitration forthwith, or await the transfer of the remaining parts of such school board to other education authorities.

The Hebburn Urban District Council is the local education authority under the Education Act 1902 for the urban district of Hebburn, an urban district with a population of over 20,000. The Board of Education had fixed the 1st June 1903 as the appointed day for the coming into operation of the Act within that district.

The corporation of Jarrow and the county council of Durham are respectively the local education authorities for the borough of Jarrow and the rural district of Monkton. At the time of the passing of the Education Act 1902 the Hedworth, Monkton, and Jarrow United District School Board was the school board for the borough of Jarrow, the urban district of Hebburn, and the rural district of Monkton.

The Board of Education fixed the 1st April 1904 for the coming into operation of that Act within the borough of Jarrow and the county of Durham.

Matters having arisen requiring adjustment between the Hebburn Urban District Council and the Hedworth, Monkton, and Jarrow United District School Board, on the 24th Oct. 1903 the Hedworth, Monkton, and Jarrow United District School Board were, at the instance of the Hebburn Urban District Council, served with a notice to concur with the board in the appointment of Mr. W. B. Keen, of London, accountant, as a single arbitrator, but would not agree.

By the Education Act 1902, s. 27, sub-s. 2:

This Act shall, except as expressly provided, come into operation on the appointed day, and the appointed day shall be the 26th day of March 1903, or such other day, not being more than eighteen months later, as the Board of Education may appoint, and different days may be appointed for different purposes and for different provisions of this Act and for different councils.

By the second schedule to the Act, clause 1 provides that

The property, powers, rights, and liabilities (including any property, powers, rights, and liabilities vested, conferred, or arising under any local Act or any trust deed) of any school board or school attendance committee existing at the appointed day, shall be transferred to the council exercising the powers of the school board.

By clause 8:

Sects. 85 to 88 of the Local Government Act 1894 [which contain transitory provisions] shall apply with respect to any transfer mentioned in this schedule, subject as follows: (a) References to "the appointed day" and to "the passing of this Act" shall be construed, as respects a case of relinquishment of powers and duties, as references to the date on which the relinquishment takes effect; and (b) the powers and duties of a school board, or school attendance committee, which is abolished, or a council which ceases under the provisions of this Act to exercise powers and duties, shall be deemed to be powers and duties transferred under

(a) Reported by W. P. PAIN, Esq., Barrister-at-Law.
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this Act; and (c) sub-sects. 4 and 5 of sect. 85 shall not apply.

And by clause 22:

Sect. 68 of the Local Government Act 1894 (which relates to the adjustment of property and liabilities) shall apply with respect to any adjustment required for the purposes of this Act.

The Arbitration Act 1889 provides in the first schedule that

If no other mode of reference is provided, the reference shall be to a single arbitrator.

P. Ogden Lawrence, K.C. and *W. M. Cann* for the applicants.—The application is one under the recent Education Act 1902, incorporating the Local Government Act 1894, s. 68, by reference. The Hedworth, Monkton, and Jarrow United District School Board became severed under the Act, and vests in three different education authorities:

2 Edw. 7, c. 42, ss. 1, 27 (2).

The local education authority have throughout their area all the powers and duties of a school board: (sect. 5). We ask for an arbitrator to adjust the difficulties which almost daily arise, and we are told that we must wait until the appointed day for the other two districts. We are entitled to an immediate appointment clear of the county and borough councils. If they step into the place of the school board, they would have to adopt any proceedings which have taken place. We are the education authority for every purpose except higher education. We submit that the property, powers, and rights mentioned in clause 1 of the second schedule mean such part of the powers, authorities, and duties as are attributable to the school board under the Act. This adjustment is required for the purposes of this Act.

Sched. 2, clauses (8) (22):

56 & 57 Vict. c. 73, ss. 68, 85-88;

52 & 53 Vict. c. 49, s. 5;

Annual Practice 1904, vol. 2, pp. 554, 555;

33 & 34 Vict. c. 75, s. 40;

Julius v. Bishop of Oxford, 42 L. T. Rep. 546;

L. Rep. 5 App. Cas. 214,

were also referred to.

Warrington, K.C. and *Gatey* for the united district school board.—The Act did not contemplate a piecemeal transfer, but a transfer as a whole. The only difference between a school board and a united school board is that the voters come from different districts. The school board is not the educational authority under the Act. The united district school board continues in existence as the body intrusted with education under the old Acts. It is impossible to give effect to the provisions of clause 16 of the second schedule, providing that officers of the authority transferred shall become officers of the transferee council, until the united board ceases to exist. They referred to sect. 27 sub-sect. 2, and sched. 2, clause 1.

KEKEWICH, J.—Those who followed the wearisome history of the Education Act 1902 might be surprised to hear that there was some point which had escaped observation, but so it was. I can find nothing in the Act which points to the conclusion that the existence of a united school board was present to the minds of those who framed this Act. If it had occurred to the framers of the Act, there would probably have been some

express reference providing for the case. It does not follow that the Act will not fit it, and I am bound to construe this Act as meaning that all school boards, with their property, rights, and liabilities, shall be transferred to these new education authorities. But it was said that, admitting that the Act must apply in some way to united school boards, the transfer must not take place piecemeal, but must be done once for all—*uno actu*, so to speak. Undoubtedly there was much to be said in favour of that view. Clause 1 of the second schedule did contemplate one transfer, and one only. The result was that, if that clause was construed literally, according to the grammatical meaning of the words, there must be a single transfer, not a piecemeal transfer. But a difficulty arose when one had to deal with the transfer of a united school board and a transfer possibly to several educational authorities, as was the case here. Starting with the hypothesis that there was to be a transfer, sooner or later, it becomes necessary so to mould the meaning of the clause as to make it apply to the case of a united school board, where one transfer was not sufficient. I agree with the suggestion that this was an automatic transfer. It took effect by force of the Act of Parliament, so that there was in one sense one transfer; but when the transfer was to several authorities, that was equivalent to so many transfers by deed. That must be the meaning of the Act if it was to have the effect of transferring the whole of a united school board to more than one authority. The language of this second schedule has been criticised, and it was said that it was difficult to make it fit the possibility of more than one transfer. But the difficulty was not all on one side. According to the Act, there might be more than one appointed day for its coming into operation. There might be a transfer of a part of the school board to one educational authority, of another part to another educational authority, and the Board of Education might appoint one day for one authority and another day for the other; and, further, the Act enabled the Board of Education to appoint different days, not only for different councils, but for different purposes. Therefore it was quite competent for the Board of Education to say that, even as regarded Hebburn, the transfer should not be all at one time; and so with regard to Jarrow and Durham. If the clause was to be dealt with strictly and confined to a single transfer, one was met with this great difficulty—that the value of the Act was destroyed. The Act plainly contemplated more than one appointed day. It could only mean that the transfer should take place as often as was necessary, and that the transfer should extend on each appointed day so far as it ought to extend on that particular day. If that was so, there was no difficulty at all in construing the other clauses of the schedule. They all fell into line when once the difficulty of construing the first clause was got over. Then arose the question what was likely to require adjustment. The Legislature was silent as to that, and for a good reason. It contemplated that all sorts of questions might arise for adjustment, and it left that point entirely open. Practically any question of finance or anything else might be adjusted—for example, the question who was to pay a particular

officer. But then it was objected that there could not be a complete adjustment because there were questions which would arise between the united school board and the two other educational authorities, which had not yet come into existence because the other appointed day had not arrived. But the answer to that was that the Hebburn authority was not concerned with those questions. Supposing the arbitration was concluded before the 1st April, the Hebburn authority would be out of it. All the questions between the Hebburn authority and the united school board were to be settled under the present arbitration. That arbitration would settle, for example, how much a particular officer was to be paid by the Hebburn authority. It was true that this arbitration might not be concluded on the 1st April. The result of that would be that the Jarrow and Durham authorities would step into the shoes of the united school board, and no serious difficulty would arise. In my opinion, whether the question is looked at as a matter of convenience or as a matter of strict construction of the Act of Parliament, there ought to be an arbitration at once. With regard to the question who is to be appointed arbitrator, I agree with the respondents that it is more convenient to appoint a local arbitrator. With regard to the costs, the summons raised a question of construction which could not have been settled without the assistance of the court, and under the circumstances I think that there should be no costs.

Solicitors: *Baker, Lees, and Co.*, agents for *A. Robson*, Hebburn; *J. E. and H. Scott*, agents for *W. S. Daglish and Mulcaster*, Newcastle-upon-Tyne.

Friday, Jan. 29.

(Before FARWELL, J.)

RIDOUT v. FOWLER (a).

Vendor and purchaser—Sale of land—Purchaser's interest before completion—Judgment creditor of purchaser—Receiver by way of equitable execution—Notice to vendor—Personal estate—Date of appointment—Effect of appointment.

The appointment of a receiver upon giving security does not, as regards personal property, become effectual until security is actually given, and does not refer back to the date of the original order.

Ex parte Evans; Re Watkins (41 L. T. Rep. 565; 13 Ch. Div. 252) distinguished.

*G. contracted to purchase land from the defendant, paid a deposit of 300*l.*, and received immediate possession. The plaintiff subsequently became a judgment creditor of G. and obtained a receiver in respect of G.'s interest in the land. Notice of the receivership was given to the defendant.*

*G. failed to pay the purchase money, and the defendant gave notice of rescission to G., who thereupon commenced an action for the return of the deposit. That action was settled at a date subsequent to the order appointing the receiver, but anterior to security being given. By the terms of the consent order the defendant paid G. 110*l.*, and G. agreed to give up possession.*

*Held, that G. never acquired the ownership in equity of the land, and that consequently the receivership did not create a charge or lien. With regard to the 110*l.* paid by the defendant to G., the receiver, not having given security at the date of the payment, had not been effectually appointed, and therefore had no claim to be paid that money. Further, even if the receivership had been in force, the order appointing a receiver having failed to constitute a charge or lien, notice of the appointment did not do so; and the defendant incurred no liability by paying the money to G. direct.*

In June 1901 the defendant, who had been for some time past the owner of Oakleigh Lodge, Sunbury, Middlesex, and the land and cottages adjoining (hereafter called the premises), agreed to sell the premises to Albert Edward Green, who paid a deposit of 300*l.*, and was thereupon allowed by the defendant to at once go into possession.

The plaintiff was a creditor of Green, and in 1901 had commenced an action against Green to recover certain moneys due to him. On the 1st July 1902 judgment was given in that action that the plaintiff should recover the sum of 55*l.* and costs, which subsequently on taxation were found to amount to 100*l.* 7*s.*; and on the 18th Aug. 1902 an order was made in the same action that Edmund Frank Ridout be appointed receiver (upon first giving security) to receive the rents, profits, and moneys receivable in respect of the said Albert Edward Green's interest in the premises and pay the balances on his accounts in or towards satisfaction of what should for the time being be due in respect of the above-mentioned judgment debt and costs.

Edmund Frank Ridout did not give security until the 29th May 1903. Notice of the receivership order was given on the 9th Aug. 1902 to the present defendant, and the order was on the 12th Aug. 1902 registered under the Land Charges Registration and Searches Act 1888 and the Land Charges Act 1900.

Meanwhile the defendant had given formal notice to Green on the 8th March 1902 rescinding the agreement for sale of the premises. On the 29th May 1902 Green commenced an action in the Chancery Division against the defendant claiming the return of the deposit of 300*l.* In this action the defendant counter-claimed for specific performance.

Finally, on the 16th June 1903 an order was made by consent in the action. This order directed Green to deliver up possession of the premises to the defendant, and ordered the defendant to pay to Green 110*l.* The contract for sale of the premises was rescinded, and all further proceedings in the action and counter-claim were stayed.

A question was raised whether the 110*l.* paid to Green by the defendant was paid as a part return of the deposit; the defendant, in announcing the terms of settlement to the present plaintiff by letter, had taken the view that it was a return of deposit.

On the 30th May 1903 the plaintiff in the present action commenced proceedings asking for a declaration that the plaintiff was entitled to a charge or lien upon the premises for securing the sum of 155*l.* 7*s.* (due from Green in respect of the above-mentioned judgment debt and costs),

(a) Reported by H. C. GARCIA, Esq., Barrister-at-Law.

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together with interest thereon; and for payment of the same by the defendant.

Bramwell Davis, K.C. and T. K. Crossfield for the plaintiff.—We submit that the receivership constituted a charge on Green's interest in Oakleigh Lodge on the ground that Green's interest was an equitable ownership of the property subject to payment of the purchase money, and therefore real property. If it were personalty, we agree there would not be a lien; but the receivership was really in respect of realty, and therefore constituted a charge under 1 & 2 Vict. c. 110:

Ex parte Evans; Re Watkins, 41 L. T. Rep. 565; 13 Ch. Div. 252.

This case also decides that the appointment of a receiver relates back to the date of the order appointing him, whenever the order is perfected by the giving of security. If Green's interest were held to be personalty, we certainly could not allege that the receivership constituted a charge on it:

Re Marquis of Anglesey; Countess de Gaires v. Gardner, 89 L. T. Rep. 534; (1903) 2 Ch. 727.

See also on the same point:

Levasseur v. Mason and Barry Limited, 64 L. T. Rep. 761; (1891) 2 Q. B. 73.

But we submit that, notice of the receiver having been given to the defendant, he was prevented from dealing direct with Green and ignoring our claim, and that we ought to have received the portion of the deposit returned. There are analogous cases relating to solicitors' liens:

Price v. Crouch, 60 L. J. 767, Q. B.

Ross v. Buxton, 60 L. T. Rep. 630; 42 Ch. Div. 190.

[*FARWELL, J.*—From the case of *Shaw v. Foster* (27 L. T. Rep. 281; L. Rep. 5 H. L. 321) it is clear that mere notice could not put such a burden on the defendant as your argument suggests.] That case turned on the question of the sufficiency of the notice. There is no question of the sort here.

Webster for the defendant.—Green's interest was never an interest in realty. This is clearly shown by James, L.J.'s dictum in *Rayner v. Preston* (43 L. T. Rep. 18; 18 Ch. Div. 1, at p. 13): "I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract, while the contract is *in fieri*, the relation of trustee and *cestui que trust*." As to the position of the receiver with regard to personalty, *Re Potts*; *Ex parte Taylor* (69 L. T. Rep. 74; (1893) 1 Q. B. 648) is clear.

FARWELL, J.—The plaintiff in this case seeks to enforce a claim under the appointment of a receiver by way of equitable execution which he has obtained. [His Lordship here stated the facts, and continued:] The plaintiff has commenced these proceedings for the purpose of enforcing against the vendor, Fowler, some claim or charge against, first of all, the land contracted to be sold by the defendant to Green, and, secondly, the 110*l.* which was paid by the defendant to Green under the compromise of the 16th Jan. 1903. In my opinion both claims fail. As regards the land, it entirely depends on the nature of the interest which the purchaser Green acquired under the contract. A person who gets equitable execution can only acquire interest in property that his debtor himself possesses. Now, the right of a vendor

and purchaser has been explained so often it is perhaps hardly worth while to go through it again. It is sufficient to refer to what Lord Hatherley says in *Shaw v. Foster* (27 L. T. Rep. 281; L. Rep. 5 H. L. 321, at p. 356), where he quotes his own words in a previous case: "It is quite true that authorities may be cited as establishing the proposition that the relation of trustee and *cestui que trust* does, in a certain sense, exist between vendor and purchaser; that is to say, when a man agrees to sell his estate he is trustee of the legal estate for the person who has purchased it as soon as the contract is completed, but not before." Then he cites the expression used by Sir Thomas Plumer in *Wall v. Bright* (1 Jac. & W. 503): "The vendor, therefore, is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey." James, L.J. puts it perhaps even more clearly in *Rayner v. Preston* (43 L. T. Rep. 18; 18 Ch. Div. 1, at p. 13) in the passage that has already been read: "I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract, while the contract is *in fieri*, the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate." Now, here it is quite clear that the relationship never was completed by the completion of the contract, and therefore there was no estate in land, in the events that have happened, on which this order by way of equitable execution could have operated. If it had operated, it would have created a charge upon the land, and different considerations would have arisen. That disposes of any question of a charge upon the real estate, because, by reason of the events that have happened and which the plaintiff in the present action could not interfere with or prevent, no actual estate in the land has ever belonged to the debtor at all. Now comes the question of personal estate. It is conceded, and rightly conceded, that no charge is created on personal estate. That is put very clearly in the case of *Re Potts*; *Ex parte Taylor* (69 L. T. Rep. 74; (1893) 1 Q. B. 648), in the judgment of Lindley, L.J., who sums up the state of the law on p. 661 as follows: "The order not constituting a charge or lien, notice of it did not make it so." In this case, however, there is to my mind a fatal preliminary objection. When the compromise took place on the 16th Jan. 1903, there was no receiver appointed who was in a position to come and say, "Pay me the money." For security was not given till the 29th May 1903. It is true that in *Ex parte Evans* (41 L. T. Rep. 365; 13 Ch. Div. 252) the Court of Appeal, in a decision which binds me, decided that the form of order appoint-

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ing a receiver upon giving security did not delay the date of delivery in execution as regards real estate; but, security being afterwards given, the appointment related back, so that the charge crystallised as at the date of the original order. Still, I am of opinion that it is settled, as regards personalty, that, when the order is of the form mentioned above, the appointment does not become effectual till security is in fact given; it is a conditional appointment, and the condition is a condition precedent. The practice where such an order has been made is this: when the order is taken to be drawn up, the registrar requires the parties to go before the master to settle the security; he does not pass or enter the order till he is satisfied by proper evidence that the security is given, and then, and then only, does he pass and enter the order. Now the receiver, unless he had an office copy of the order with him, could not go and claim any money to which as receiver he might be entitled. His title would not be complete, and he could not give a receipt or obtain the money. How, therefore, does any question arise as to the payment of the 110*l.*? That appears to me to be a fatal objection. Further, as I have already said, there is no charge on the personal estate; and, that being so, I cannot see on what possible ground it can be alleged that a person who merely gives notice of the receivership and does no more thereby creates any charge in his own favour. If there were any question as to this, the judgment of Lindley, L.J., to which I have already referred, fully disposes of it. That really settles the matter; but in fact and in truth I do not think the question arises, because there is nothing whatever, except a statement in a letter, which in my view is in no way conclusive, to show that the 110*l.* was in fact part of the deposit. To decide this, however, it is necessary to consider the purchaser's rights in respect of the deposit which he has paid. He has a right to a lien and to have the deposit repaid to him; and according to *Rose v. Watson* (10 L. T. Rep. 106; 10 H. L. C. 672), which I recently followed in *Whitbread and Co. v. Watt* (84 L. T. Rep. 419; 86 L. T. Rep. 395; (1901) 1 Ch. 911; (1902) 1 Ch. 835), this right attaches from the moment of payment, subject to the condition that the purchase does not go off through the purchaser's own fault. He has no absolute right to this lien or to repayment of the deposit at all—it is conditional on his not being in default; if he is in default, his right ceases to exist. I can see in the present case that there was every appearance of the purchaser Green being in default, and, however that may be, on the face of the order—which is, after all, the conclusive matter, and shows what the agreement was—no deposit was in fact returned; but the vendor, being in the unfortunate position of having a man who was unable or unwilling to pay a debt of 55*l.* in occupation of his lands without having paid the balance (amounting to 2850*l.*) of the purchase money, saw no chance of getting it, and gave him 110*l.* to go out of possession. I can only say it would be most unfortunate if a decision of this court was to prevent an arrangement of this sort being given effect to when no offer has ever been made by the present plaintiff to step into the shoes of the defaulting purchaser and pay the purchase money. The plaintiff has tried to get as near as he can to the position of a mortgagee,

but the mortgagee in a similar case would be bound in some way or other to undertake the liabilities of his mortgagor. The truth is that a man in the position of the plaintiff cannot, by giving a mere notice, put a burden upon a creditor of his debtor. The order operates, no doubt, as an injunction against his own debtor to restrain that debtor from receiving the money, but it does not in any way affect the person who is going to pay the money under circumstances such as the present. The result is that the action fails and is dismissed with costs.

Solicitor for the plaintiff, *Alexander Pope*.

Solicitors for the defendant, *Smith, Fawdon, and Low*, for *Bone*, Bournemouth.

Jan. 23, 25, and Feb. 1.

(Before FARWELL, J.)

BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE FLOUR AND PROVISION SOCIETY LIMITED v. BUTTERWORTH COLLIERY COMPANY LIMITED. (a)

Mines and minerals—Right to let down surface—Inclosure Act—Award—Manorial rights.

By an *Inclosure Act* and award certain waste land was allotted amongst commoners. The Act provided that nothing therein contained should be construed to diminish the rights of the lord of the manor in respect to his seignory and royalties except in respect of his ownership of the soil to be enclosed. And the Act further provided that the lord and his successors should hold and enjoy all mines and quarries under the waste together with liberty of searching for, winning and working the same, as fully and freely as if that Act had not been passed, and that without making or paying any satisfaction for so doing. And the Act further provided a summary means by which any person injured through the lord's working of the mines should be compensated by the occupiers of allotments in the same township.

Held, in action brought by surface owners against an assign of the lord to restrain by injunction any injury to the surface by mining operations, that there was nothing in the *Inclosure Act* to deprive a surface owner of his common law right of support (the clause as to compensation in the Act relating to surface user only), and that consequently the plaintiffs were entitled to an injunction.

By a private Act passed in the reign of George II (31 Geo. 2, c. 1.) a large common or moor situate within the townships of Hamaterly, South Bedburn, Lynesack, and Softley, in the manor of Wolsingham and chapelry of Hamaterly, in the county of Durham, containing about 7000 acres, was inclosed. The Act recited that the Bishop of Durham was lord of the manor of Wolsingham in right of his church and see and entitled to the soil of the common, and provided in the usual manner for the division, apportionment, and allotment of the moor among the several persons having an interest as freehold or copyhold tenants in the same as in the Act provided. The Act further (pp. 11 and 12 thereof) provided that nothing therein contained should be construed to defeat,

(a) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

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lessen, or prejudice the right, title, and interest of the lord of the manor of, in, and to the seignory and royalties incident to and belonging to the manor; but that every such lord should for ever thereafter hold and enjoy all rents, services, courts, perquisites, and profits of court and all royalties and seignories whatsoever to such manor or to the lord thereof for the time being incident, belonging, or appertaining other than and except such common right as could or might be claimed by him or them respectively as owner or owners of the soil and inheritance of the moors or commons or otherwise in or upon the moors or commons or otherwise in or upon the commons so to be inclosed as aforesaid in as full, ample, and beneficial a manner to all intents and purposes as they or any of them might have held and enjoyed the same, in case that Act had not been made; and also that the Lord Bishop of Durham, his successors and assigns, should and might from time to time and at all times thereafter have, hold, and enjoy all mines and quarries of what kind and nature soever lying and being in and under the moors and commons so to be divided and inclosed as aforesaid (other than and except such quarries of stone as were thereafter mentioned), together with all convenient and necessary ways and wayleaves, and liability of laying and repairing waggon ways and other ways in, over, and along the same and any part thereof, and of searching for, winning, and working the mines and quarries and leading and carrying away the coals, lead, mines, and minerals, stones, and other things to be gotten thereout, and making drifts, levels, watercourses, and erecting and using fire-engines and other engines, pit-rooms, and other usual liberties as fully and freely as he or they could have had or might have enjoyed the same in case that Act had not been made, and that without making or paying any satisfaction for so doing.

The Act provided:

And whereas great inconveniences may happen, and damage be done to particular persons by the reason of the searching for winning and working the mines and quarries within and under their respective allotments by the said Lord Bishop of Durham, his successors and assigns, without making or paying any satisfaction for so doing. For remedy thereof be it hereby enacted, by the authority aforesaid, that when and so often as any person or persons shall suffer or sustain any loss or damage in his, her, or their respective allotments by the searching for winning and working of the mines and quarries therein, or the laying and repairing waggon ways and other ways, or by the loading and carrying away the coals, lead, minerals, stones, or other things to be gotten thereout, or making drifts, levels, and water courses, or erecting or using fire engines or other engines, pit room, or other the liberties and powers hereby given and reserved to the said Lord Bishop of Durham, his successors or assigns, upon complaint thereof, and by such person or persons so damaged as aforesaid to one or more justice or justices of the peace in and for the said county of Durham (notice of such intended complaint having been first given by such person or persons in the chapel or hamlet aforesaid on some Sunday morning preceeding such complaint), such justice or justices is and are hereby empowered and required to examine and inquire into such complaint or complaints in a summary way either by the examination of witnesses on oath, or being of the people called Quakers upon their solemn affirmation [&c.] or by such

other evidence or proof, ways or means as to them or him shall seem requisite or expedient in that behalf; and finally to assess, settle, and determine the damages sustained by such persons or person as aforesaid, which damages shall be paid and borne by the occupiers of the several other allotments lying and being in such and the same township in which the allotment or allotments in which such damages shall be committed shall lie according to the respective yearly values or rents of such allotments in such proportion and shares as the said justice or justices shall direct or appoint. And in case any person or persons chargeable with or contributable to such damage as aforesaid shall neglect to pay his, her, or their said proportions thereof within a time to be limited by the said justice or justices to the said person so injured as aforesaid, then and in such case the said justice or justices by warrant under his or their hand and seal hands and seals shall and they are hereby required to cause the same to be levied by distress and sale of the goods and chattels of such persons or person so neglecting or refusing to pay the same as aforesaid, rendering the overplus (if any be), after deducting the reasonable charges of such distress and sale, to the owner or owners of such goods and chattels upon demand.

Certain of the commons named in the award were, as is more fully explained in the judgment, persons of great territorial influence in the county of Durham.

The rights of the Bishops of Durham, as lords of the manor, subsequently became vested in the Ecclesiastical Commissioners, and by them a mining lease of mines under a portion of the inclosed common had been granted to the Butterknowle Colliery Company Limited. The Bishop Auckland Industrial Co-operative Flour and Provision Society Limited were the surface owners of four acres which prior to the inclosure Act were part of the waste, and which were allotted under the Act.

The action was brought by the Bishop Auckland Industrial Co-operative Flour and Provision Society Limited against the Butterknowle Colliery Company Limited, claiming a declaration that the defendants were not entitled as against the plaintiffs as surface owners to lower and depress the surface of their lands and for an injunction.

Upjohn, K.C. and Leigh Clare for the plaintiffs. —The defendants claim through the Bishop of Durham as lord of the manor. Consequently, their rights are simply those of an ordinary lord of a manor. The lord is no doubt entitled to the soil of the waste; but he must exercise his rights in such a way as to leave sufficient pasturage for the commoners. Under the award the soil is granted to the plaintiffs, and they are entitled to the support of the surface. To disprove this, the defendants must show that on the construction of the inclosure Act the plaintiffs are deprived of this *prima facie* right. If the surface is sold and the minerals reserved, the owner of the minerals has not a right to let down the surface:

Bell v. Love, 48 L. T. Rep. 592; 10 Q. B. Div. 547;
Hert v. Gill, 27 L. T. Rep. 291; L. Rep. 7 Ch. 699.

[*FARWELL, J.*—The decision in *Hert v. Gill* has been stated by the Lord Chancellor, in *Re Todd, Birleston, and Co. v. North-Eastern Railway Company* (88 L. T. Rep. 366; (1903) 1 K. B. 603, at p. 607) to be inconsistent with his observations in *Lord Provost of Glasgow v. Fairie* (60 L. T. Rep. 274; 13 App. Cas. 657), and that he intended them

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to be so taken.] Every inclosure Act must be construed by itself. The fact that in this Act the minerals are reserved to the lord, and that he is given liberty to work them will not justify him in destroying the surface. Nor will a compensation clause of itself be sufficient to deprive the surface owner of his right to support:

New Sharlston Collieries Company v. Earl of Westmorland, 82 L. T. Rep. 725.

The provision for compensation in the present Act is inadequate.

Danckwerts, K.C. and *MacSwinney* for the defendants.—The Act shows that the lord is entitled to destroy the surface for the purpose of working. It must be noted that he is entitled to quarry as well as to work mines:

Duke of Buccleuch v. Wakefield, 23 L. T. Rep. 102;

L. Rep. 4 H. L. 377;

Bell v. Earl of Dudley, 72 L. T. Rep. 14; (1895) 1 Ch. 102.

The Bishop of Durham was a prince bishop of a county palatine, and he had greater rights than an ordinary manorial lord. The fact that compensation is to be paid tends to show that the commoners have not the right of support:

Conselt Waterworks Company v. Ritson, 60 L. T. Rep. 360.

[This case was not reported on appeal. But the transcript of the shorthand-writer's notes were produced in court.] The present Act was considered by the court in *Gill v. Dickinson* (42 L. T. Rep. 510; 5 Q. B. Div. 159), and it was held that the lord of manor had the right to let down the surface by mining without making compensation.

Upjohn, K.C. in reply.—It is possible to satisfy every part of the Act without interfering with the right of support. The surface may be supported by artificial means.

Cur. adv. vult.

FARWELL, J.—The question in this case turns on the construction of an inclosure Act (31 Geo. 2, c. 1). The plaintiffs are surface owners and the defendants are lessees of minerals claiming under the Ecclesiastical Commissioners (who derive their title from the Bishop of Durham), and the short point is whether the defendants, working in the ordinary manner, and not negligently, are entitled to let down and destroy the surface of the lands in question. The lands contain four acres, and are situate within the parish of Hamsterly, in the manor of Wolsingham, and were, prior to the inclosure Act, part of the waste of the manor. The lord of the manor was seised of the soil of the manor, and entitled to the mines and minerals thereunder in fee simple, subject only to the ordinary rights of pasturage in the commoners. This right involved some restriction on the lord's right of working and getting in the minerals—viz., that he must leave a sufficiency of pasturage for the commoners. The commons and wastes of the manor were duly inclosed and divided by an award under the said Act of George II. Questions of the construction of inclosure Acts have frequently been before the courts, and although each of course depends on the working of the particular Act, there is sufficient similarity between them to warrant the deduction of some general principles applicable to all such Acts, and, indeed, those principles have been settled

by numerous decisions, many of them in the House of Lords, and may be stated as follows: The surface owner has by common law the right to have proper support for his surface, so as to prevent its subsidence. If the mineral owner contests this right, the burden is on him to displace it; the right can only be displaced by express words, or by necessary implication from the words used in the Act—words, however large, applicable to the right of working and privileges connected with it and important for the exercise of such rights and privileges, are not enough, at any rate, if the words used are fairly applicable to the ordinary entering on and working the mine: (see Lord Selborne's judgment in *Love v. Bell*, 51 L. T. Rep. 1; 9 App. Cas. 289, 290, 291). The absence of any provision for compensation is strong evidence in favour of the continuance of the right to support; so also is the presence of a compensation clause limited to injuries arising from ordinary surface use, or obviously inadequate to any greater injury; but a compensation clause providing expressly for injuries to buildings, or other injury resulting from subsidence is in favour of the destruction of the right. But this is a question of construction, as stated by Lord Davey in *New Sharlston Collieries Company v. Earl of Westmorland* (82 L. T. Rep. 725, at p. 726), the existence of an express provision for compensation and for letting down the surface does not necessarily authorise the mineowner to let it down. The question is one of construction in each case, and the principles are the same, whether the document be a grant or lease or inclosure Act. The latter is nothing but a statutory agreement between the parties, or, as Lord Selborne puts it (9 App. Cas. 290), it is a case of mutual considerations resulting in the apportionment of land to which the parties have agreed or have had determined by the party making the award. It is important to ascertain whether the rights of the owners of the minerals are merely reserved or whether they are newly created by grant. In the latter case there is more ground than in the former for an argument that the ordinary common law right of support has been displaced: (*Duke of Buccleuch v. Wakefield*, 23 L. T. Rep. 102; 4 H. L. 377; *Love v. Bell*, 51 L. T. Rep. 1; 9 App. Cas. 291, 292). The reservation of the lord's right to be enjoyed in as full and ample a manner as if the Act had not been passed, is not equivalent to a reservation, free from the common law liability to leave support, merely because the only liability before the Act was to leave sufficient pasture, but is to be read as subject to the ordinary maxim, *Sic utere tuo, ut alienum non ledas*, so that, *mutatis mutandis*, it becomes subject to the substituted ownership right of support in lieu of the extinguished commoners right of pasturage (9 App. Cas. 292), and, accordingly, if there were no such commonable rights no substituted right of support can be maintained: (*Gill v. Dickinson*, 42 L. T. Rep. 510; 5 Q. B. Div. 159). In the case before me the lands inclosed were about 7000 acres, and provision is made in the usual way for their allotment amongst the several persons having a right of common therein in certain proportions, as freehold or copyhold, as the case might be (in the case before me the allotment to the plaintiff's predecessors in title was freehold)

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and then at pp. 12 and 13 come the clauses on which the question chiefly turns. I will not pause to read them through; but, bearing in mind the principles to which I have already referred, I remark (1) that, in my opinion, the mines and minerals are reserved and not granted; and (2) that they are granted subject to the principle *Sic utere tuo, &c.* As to (1) the fee simple was vested in the lord at the passing of the Act, and there is nothing in the Act to take it away from him until the award is made, and which is necessarily in *futuro*. The provision at p. 6 is "all such lands as shall . . . be allotted to any person, shall be vested and held by such person. . . . The words at p. 13 are words operating *de presenti* and take effect by way of reservation, of the existing estate. Nor, are there any such unusual powers or provisions therein contained, as would not follow from or be incident to a mere reservation. On (2) I observe that the words "as fully and freely as he or they might or could have had and enjoyed the same in case this Act had not been made or in immediate collocation with and precede the words "and that without making or paying any satisfaction for so doing." These latter words excluding compensation afford, in my opinion, very strong grounds for limiting the reservation to the ordinary rights of ownership; if it is not so the inference to antecedent title is meaningless; but the emphasis on the nonpayment of compensation ("and that too," &c.) follow immediately on the words referring to the antecedent title, and are to be read with them, and when so read amount to the reasonable and intelligent provision, that so long as the mineral owners work in exercise of their usual common law rights they are to pay no compensation to anyone. I further observe on this clause that the reserved liberties may all be satisfied by the exercise of surface rights; but that even if and so far as they may extend to the injury of the surface by working, it is to be remembered that the reservation in this case extends to quarries as well as to mines, and that the usual mode of working a quarry necessarily destroys the surface. If, then, any words are found in the next clause, which appear to point to the destruction of the surface by working, they may well be satisfied by applying them to the quarries and stone reserved *reddendo singula singulis* so as not unnecessarily to destroy the subject-matter of the property allotted to the commoners. Further, I can find in the next clause providing for compensation, no such wide phrases or rights as influenced Lord Lindley's judgment in the *Consett Waterworks Company v. Ritson* case; all appears to be quite consistent with the working of mines and quarries in the ordinary way and subject to the ordinary rights of the surface owners. Further, the fact that the compensation is to be paid by the occupiers of the other allotments and not by the owner confirms me in my view; the amount of compensation payable for the usual surface user could not well be large—that for letting down the surface with buildings thereon might be enormous; but the people to pay are not the owners in fee, but the occupiers, and only such occupiers as occupy allotments in the same township. If the Legislature really contemplated the payment of substantial compensation to occupiers—probably for the most part, shepherds, hinds, and gamekeepers

—who knew nothing of the existence of any such liability, and might find all their property sold under a distraint without its sufficing to discharge a hundredth part of the amount of damage done. If consideration of justice to the party liable to pay and of sufficiency of satisfaction to the person entitled to receive are of any weight, they appear to me to be strongly in favour of the preservation of the right to support. If the defendants are right the occupation as a yearly tenant of a small house in the district might entail ruin on the occupier. Further, the persons liable to pay in respect of damage to the allotment injured are the occupiers of other allotments within that township. It appears from page 1 that there are four townships comprised in the Act. Suppose them to be of equal extent, so that each contains 1725 acres. This is not a large area, and may quite possibly be in the occupation of two farmers in farms of practically equal amount and value. If farmer A. is injured by his surface being let down, his neighbour B. must pay him compensation for it. If B. is injured A. must pay him. If the injury be for the ordinary surface user, it is practically certain that they will not suffer alike, and the amounts payable would be small. But assume that both farmhouses are let down, as might well happen, the idea that each compensates the other appears to me too ludicrous to be adopted unless it is unavoidable. Again, suppose the size of the four townships to be unequal so that there is one containing as little as 500 or 600 acres. This may well be the farm of one man. Is he to pay himself if his farmhouse is let down, or is he to distraint upon such of his labourers and carters as happen to occupy cottages in the township? The ordinary surface user by roads and the like would avoid buildings, so that the question would not arise, but underground workings are more likely to cause subsidence where there is the additional weight of buildings superimposed than where the surface is unbuilt upon. In my opinion the mode of obtaining compensation provided by the Act is quite inadequate to provide a sufficient amount, and might well have the effect of depopulating the area subject to such a liability, and so become more and more inadequate. Is there, then, any authority which prevents me from deciding in accordance with my own opinion? There is one reported case on this very Act, *Gill v. Dickinson* (42 L. T. Rep. 510; 5 Q. B. Div. 159), for I cannot pay any regard to a case merely noted in the Weekly Notes, but the reasoning on which that case proceeded is quite consistent with my view. The case was heard on demurrer; and it was admitted, and the judgment of the court turned on the admission, that before the Act the lord worked as he pleased without paying any satisfaction, and the decision was that the Act preserved the *status quo ante*. Here the admissions are that the commoners had the usual right of common of pasturage which involves the limitations of the right of working that I have above stated. *Bell v. Lord Dudley* (72 L. T. Rep. 14; (1895) 1 Ch. 182) is also distinguishable, for there was there an adequate compensation clause. But the case most relied on by Mr. Danckwerts was the *Consett Waterworks Company v. Ritson* (60 L. T. Rep. 380, reversed in the Court of Appeal), with the shorthand notes of the judgments in which I have been supplied. In my opinion that case

is also distinguishable. Lord Esher's first point was that the Act was to be construed having regard to the position of the parties affected, and that the Bishop of Durham was one of the most powerful landowners, and had "immense powers," and that the humbler commoners were glad to take such crumbs as he deigned to give them. But in the case before me the two first-named commoners are Lord Darlington and his son, William Lord Vane; and I venture to think that the owners of Raby Castle and the enormous estates attached to it stood on equal terms even with the Prince Bishop of Durham, and, in addition to this, their political influence is a matter of history. Lord Darlington married a sister of Sir James Lowther, afterwards Lord Lonsdale, whose political influence as the owner of nine pocket boroughs is notorious, and Lord Vane owed his subsequent advancement to a marquise and dukedom to the possession of six pocket boroughs. If the position of the parties be a legitimate consideration I cannot think that the bishop had in this case any such commanding advantage as Lord Esher found that he possessed in the *Consett* case. The next point was the compensation clause. But in that case it was adequate. An estate was allotted to create a fund, and the owners as well as the occupiers of 30,000, and not as here of a few hundred, acres were made to contribute; and further, there were large powers referred to by Lord Lindley which are not to be found in the present case. Not only can I find nothing in any of the cases which compels me to decide contrary to my own opinion, but I have great doubt whether the *Consett* case or *Bell v. Lord Dudley* can stand with the subsequent decision of the House of Lords in *New Sharlston Collieries Company v. Lord Westmorland* (82 L. T. Rep. 725). The only question raised in this action is with respect to mines, and I make the declaration and grant the injunction as asked, and direct an inquiry as to damages. The defendants must pay the costs of the action; the costs of the inquiry will be reserved.

Solicitors: Meredith, Roberts, and Mills, for G. W. Jennings and Co., Bishop Auckland; Miller, Jennings, White, and Foster, for W. J. and H. C. Watson, Barnard Castle.

Feb. 3, 4, 5, and 8.

(Before JOYCE, J.)

COLWELL AND OTHERS v. ST. PANCRAS BOROUGH COUNCIL (a).

Nuisance—Electric lighting works—Vibration and noise—Borough council—Injunction.

Under a provisional order confirmed by Act of Parliament, the St. P. Borough Council supplied electricity in the borough, and for this purpose had an electric generating station about 50ft. from the nearest point of a row of houses. The provisional order provided that nothing contained in it should exonerate the council from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them.

In May 1903 the council began to run new and

enlarged works and machinery at the generating station, including two engines each of about 750 horse-power. The lessees and occupiers of the row of houses complained that the new machinery increased an already existing nuisance by vibration and noise so as to interfere with their comfort and enjoyment, cause injury to health, and diminish the value of their interests in their houses; and they brought an action against the council claiming an injunction restraining them from causing nuisance to the plaintiffs and damaging their interests in their houses by vibration and noise from the electric generating station, and damages. The defendants contended that the vibration and noise were due to certain defects in the balance of the engines which they were endeavouring to remedy, and which they ought to be allowed time to remedy completely.

Held, on the evidence, that the vibration and noise were productive of an amount of annoyance against which the plaintiffs were entitled to be protected on the principle laid down in *Broder v. Saillard* (2 Ch. Div. 692) and *Bamford v. Turnley* (6 L. T. Rep. 721; 3 B. & S. 62); that the annoyance was not merely temporary and occasional, but calculated to work material injury to the plaintiffs' property; that the defendants were not entitled to carry on their works unless they could do so without occasioning a nuisance; and that an injunction must be granted, with an inquiry as to damages.

TRIAL OF ACTION.

By the St. Pancras (Middlesex) Electric Lighting Order 1883, confirmed by the Electric Lighting Orders Confirmation (No. 7) Act 1883 (45 & 47 Vict. c. cccix.), the Vestry of St. Pancras were authorised to supply electricity within the parish of St. Pancras, and for that purpose to acquire lands and construct works. The order provided (by sect. 71) that nothing contained in it should exonerate the vestry from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them. Subsequently to 1883 the vestry constructed an electric generating station at a distance of about 50ft. from the nearest point of certain houses, numbered 108 to 116 (even numbers), in Great College-street, St. Pancras. From time to time complaints had been made by the occupiers of these houses and other persons in the vicinity regarding the vibration and noise caused by the generating station, and the consequent discomfort and injury to their property; and legal proceedings were at one time instituted, but were compromised. Under the provisions of the London Government Act 1899 (62 & 63 Vict. c. 14) the parish of St. Pancras became a metropolitan borough, and the powers and duties and property of the vestry were, by sect. 4, transferred to the borough council. In 1902 the borough council determined to enlarge the generating station and to erect new machinery there. The lessees and occupiers of the houses in Great College-street sent to the council a notice that they protested against this proposed increase in the plant and machinery; but the council nevertheless adhered to their intention, and the new machinery was completed and began to work in May 1903. It included two engines each of about 750 horse-power.

(a) Reported by H. W. LAW, Esq., Barrister-at-Law.

CHAN. DIV.]

COLWELL AND OTHERS v. ST. PANCRAZ BOROUGH COUNCIL.

[CHAN. DIV.]

The lessees and occupiers complained that the nuisance and annoyance arising from the generating station were greatly increased by the new machinery; their comfort and enjoyment of their houses were interfered with by the vibration and noise; injury to health was alleged in some cases, and the value of their interests in their houses was diminished, particularly in the case of one occupier who let lodgings. They accordingly on the 30th Nov. 1903 commenced this action against the borough council, claiming an injunction restraining the defendants from causing nuisance to the plaintiffs and damaging the value of their interests in their houses by vibration and noise from the electric generating station, and damages. Relief was also claimed in respect of an alleged nuisance from dust, noisome fumes, and smells arising from the defendants' dust destructor, which was situated close to the generating station and worked in connection with it; but on this part of the case the parties came to terms during the hearing. The defendants did not admit that there was nuisance, and contended that, if there was any vibration and noise of which the plaintiffs had cause to complain, it was due to the fact that the engines were at present defective in balance; that this would take time to remedy, but that they were endeavouring to remedy it, and had already effected an improvement, and would in time be able to remove it completely. Evidence was given as to the nuisance complained of and the nature and causes of the defect in the working of the engines.

Hughes, K.C. and E. Beaumont for the plaintiffs.—If, as we contend, what the defendants are doing amounts to a nuisance, they are not entitled to demand an unlimited time to remedy it. Where, as here, a prescriptive right has not been acquired, a nuisance like this cannot be committed:

St. Helen's Smelting Company v. Tipping, 12 L. T. Rep. 776; 11 H. L. C. 642;

Sturges v. Bridgman, 41 L. T. Rep. 219; 11 Ch. Div. 852.

Even if there was a nuisance of which we might have complained before the new engines were erected, we are entitled to be protected against the increase of it which has been caused by them:

Heather v. Pardon, 37 L. T. Rep. 393.

Our evidence establishes a serious and continuing nuisance, and we are entitled to an injunction:

Shelfer v. City of London Electric Lighting Company, 70 L. T. Rep. 762; and in the Court of Appeal, 72 L. T. Rep. 34; (1895) 1 Ch. 287.

Bousfield, K.C., Younger, K.C., and A. B. Marten for the defendants.—A statutory duty to construct and use these works has been thrown upon us, and therefore, if we use our best skill and diligence, we are not liable for consequential injury (*Sutton v. Clarke*, 6 Taunt. 29), except that sect. 71 of our provisional order precludes us from committing a permanent nuisance. But we are not liable for a temporary nuisance arising from the execution of our statutory duty:

Harrison v. Southwark and Vauxhall Water Company, 64 L. T. Rep. 864; (1891) 2 Ch. 409.

We are endeavouring to remedy the cause of complaint, and must be allowed time to do so.

Hughes, K.C. replied.

Cur. adv. vult.

Feb. 8.—JOYCE, J.—It has virtually been admitted, and, indeed, it can hardly be denied, that the plaintiffs have a right to complain by reason of the vibration caused by the defendants' works and machinery at various times and from time to time between May and Dec. 1903, unless the annoyance was a merely temporary one. If it be continued, the defendants cannot deny the existence of a nuisance in law. In other words, it appears to me that the vibration caused by the defendants' works has been productive of so much annoyance to the plaintiffs as to justify this action, unless the defendants can excuse themselves by showing that the annoyance is merely a temporary one, or in the nature of that referred to by Williams, L.J. (then Williams, J.) in *Harrison v. Southwark and Vauxhall Water Company* (64 L. T. Rep. 864; (1891) 2 Ch. 409). I consider that the amount of annoyance caused to the plaintiffs has materially interfered with their comfort, and, as Sir G. Jessel, M.R. said in *Broder v. Saillard* (2 Ch. Div. 692, at p. 701): "The law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbour makes such a noise"—or causes such a vibration—"as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier is entitled to be protected from it." In my opinion there has been such an amount of annoyance here; but it is suggested that the defendants are entitled to be excused on the principle of *Harrison v. Southwark and Vauxhall Water Company* (*ubi sup.*) Is the annoyance caused by the defendants within the principle of law laid down in that case? In my opinion it is not. The law on the subject is correctly stated by Bramwell B. in *Bamford v. Turnley* (6 L. T. Rep. 721; 3 B. & S. 62, at p. 82), and in that case he deals also with the question whether the defendants ought to be excused on the ground that the annoyance is merely a temporary one. The annoyance caused by the defendants in the present case is in my opinion not merely temporary and occasional, but calculated to work material injury to the property of the plaintiffs and seriously to depreciate its value, though that, perhaps, is not a ground of action by itself. In the provisional order authorising their works there is a clause providing that nothing therein contained shall exonerate them from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them. But, in spite of this provision, it has been suggested that the defendants, for a period perhaps of years after the erection of their works, are entitled to make the neighbourhood uninhabitable and cause a serious nuisance until the time comes when they can carry on their works without producing these results. It has not been explained what is to happen if that turns out to be impossible. But the proposition appears to me an entirely strange one, and I cannot accede to it. It seems to me that the owners of such works are not entitled to carry them on unless they can do so without occasioning a nuisance. In the present case none of the machinery has been working long enough for a prescriptive right to occasion a nuisance to be acquired, and I must grant an injunction restraining the defendants from carrying on their works so as to cause nuisance or

injury to the plaintiffs during the continuance of their leases by vibration, noise, or otherwise, with an inquiry as to damages.

Younger, K.O. asked that the operation of the injunction might be suspended, and, after some discussion, his Lordship suspended it for a period of six months, on certain terms as to the hours of the night during which noise or vibration was not to be caused.

Solicitors for the plaintiffs, *Beaumont and Son*.
Solicitors for the defendants, *Cunliffes and Davenport*.

Jan. 21 and Feb. 2.

(Before EADY, J.)

BRIGHT'S TRUSTEE v. SELLAR. (a)

Costs—Taxation—Costs after threat of proceedings.

A letter threatening an action was written by the plaintiff's solicitors on the 3rd March 1903. The defendant on the 20th March 1903 obtained a transcript of the speeches, evidence, and judgment of actions against other defendants in which the fraud, to which it was alleged the defendant was a party, was disclosed. The writ was issued on the 16th April 1903. The action was dismissed for want of prosecution. The taxing master had allowed the costs of the transcript.

Held, that the matter must be referred back to the master, with a direction to allow only the costs of so much of the transcript of the evidence and judgment as related to the question whether the defendant was or was not party or privy to the fraud disclosed in the former actions.

SUMMONS by the plaintiff to review taxation. The main question raised was whether the costs of the transcript of the shorthand-writer's notes of the proceedings in an action brought by the same plaintiff against a different defendant, amounting to the sum of 61l., ought to be allowed on taxation to the defendant in the present action under the circumstances stated in the judgment. The taxing master had allowed the costs, and the plaintiff now sought to have them disallowed.

Peterson for the plaintiff.—The taxing master has allowed the costs of shorthand notes of the two actions brought by the plaintiff against the South American Electric Company Limited and Bright's Light and Power Limited. These costs were incurred before the writ was issued, and ought to be disallowed. A great deal of the evidence had nothing to do with the present defendant.

Eve, K.C. and Van Neck for the defendant.—The costs were incurred after the plaintiff had threatened to take proceedings. It was absolutely necessary for the defendant to ascertain what had taken place in the former actions. Until he obtained a transcript of the whole proceedings it was impossible to ascertain what part was material.

EADY, J.—This is a summons by the plaintiff to review taxation. The items objected to are an allowance of 61l., paid for a transcript of the whole of the proceedings, including speeches of counsel, in another action, and certain conse-

quential allowances—namely, a fee of 14l. 15s. for the solicitor perusing the transcript and making notes of it for counsel, and a fee of five guineas to counsel for perusing it. The transcript is 1830 folios in length. The writ in the present action was issued on the 16th April 1903, statement of claim delivered on the 15th May 1903, and defence on the 15th June 1903. No further proceedings were taken in the action, and on the 9th Nov. 1903 an order was made dismissing the action for want of prosecution. The defendant's costs, as taxed, were allowed at 100l. 13s. 5d., including the items in dispute. Although the transcript is entered in the bill of costs as having been obtained in May 1903, it is not disputed that it was really bespoken on the 20th March 1903, and obtained on the 26th March, just three weeks before the issue of the writ in this action. It was, however, bespoken after a letter threatening this action had been received by the defendant on the 3rd March 1903. In the previous action—*Bright's Trustee v. South American Electric Company Limited and Bright's Light and Power Limited*, 1902, B., 2558—the plaintiff established that transfers of 21,800 out of 22,000 shares in Bright's Light and Power Limited were fraudulent and void under the statute 13 Eliz. c. 5, being made with intent to delay, hinder, or defraud the creditors of Charles Bright, the bankrupt. The defendant, Norrie Sellar, was not a party to that action, but 4000 of the shares in question were at one time standing in his name. The plaintiff in the present action sought to recover damages against Norrie Sellar for the loss sustained by the bankrupt's estate by reason of the fraudulent dealings with the shares, and alleged that the defendant was party or privy to the fraud of Charles Bright. The defendant in his defence did not admit that any fraud had been committed, and denied that he was party or privy to it, and said that with regard to the 4000 shares formerly standing in his name (part of the 21,800) he transferred them at the request of Charles Bright, but certainly without any intention to defeat Bright's creditors, and without knowledge of any such intention on the part of Charles Bright. It will thus be seen that the only case alleged against Norrie Sellar was being party or privy to a fraud by Bright. A letter threatening an action was written by the plaintiff's solicitors to the defendant on the 3rd March 1903. In this letter the plaintiff's solicitors state that they have been consulted "with reference to your conduct in fraudulently assisting the bankrupt to transfer and conceal the whole of his assets for the purpose of defeating his creditors." The defendant's contention is that it was in consequence of this letter that the transcript was bespoken, and preparations made for defending the action so threatened. The transcript is in four volumes and has been produced to me, and I have refreshed my recollection of the action, which was tried before me, by looking through it. Of vol. 1 ninety-two pages, of vol. 2 fifty-six pages, and of vol. 4 ninety-six pages consist of the speeches of counsel. The rest of vols. 1 and 2 and the whole of vol. 3 consist of evidence. The rest of vol. 4 consists of the judgment. Under these circumstances, and having regard to the nature and course of that action, it seemed to me that it was impossible to consider that the great

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

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Re PERROTT AND KING'S CONTRACT.

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expense incurred in obtaining this transcript and consequent thereon was "necessary or proper for the attainment of justice or for defending the rights of any party" in the present action. I thought that the master must have been under some misapprehension in allowing it, and accordingly I determined to see him upon the matter before disposing of this summons. An interview with the master has shown that this view was correct. He tells me that the transcript was not produced to him, and that no opportunity was afforded him of seeing the document, the costs of which he was allowing, and that if the matter is sent back to him he will only allow so much of the evidence and judgment as relates to the question whether the defendant was or was not party or privy to the fraud—that is, whether the defendant Sellar did or did not by any conduct of his assist the bankrupt to transfer or conceal any part of the assets for the purpose of defeating the bankrupt's creditors. In my judgment the defendant Sellar ought not to be allowed any greater amount than this, and accordingly I allow the summons and refer the matter back to the master with a direction to allow only the costs of so much of the transcript of the evidence and judgment as relates to the question whether the defendant Sellar was or was not party or privy to the fraud of Charles Bright—that is, whether the defendant Sellar did or did not by any conduct of his assist the bankrupt to transfer or conceal any part of the assets for the purpose of defeating the bankrupt's creditors. The two other items will be proportionately reduced. The defendant is to pay the costs of this application, and the costs will be taxed and set off against any sum payable by the plaintiff to defendant.

Solicitors: Wingfield and Blew; W. J. Hunter.

Thursday, Feb. 11.

(Before EADY, J.)

Re PERROTT AND KING'S CONTRACT. (a)

Vendor and purchaser—Power of sale—Will—Executor—Constructive trustees.

A testatrix by her will dated the 3rd March 1849 appointed R. J. and U. M. executors, and gave them powers to apply income in maintenance and to sell certain hereditaments after the death of the survivors of her daughters.

The testatrix died on the 25th Dec. 1850. R. J. alone proved the will and died, leaving J. W. and M. W. his executors.

In 1873 a petition was presented by all parties beneficially interested, and new trustees of the will were appointed under the Trustee Act 1850.

After the death of the survivor of the daughters the trustees contracted to sell the hereditaments. The purchaser required the concurrence of the beneficiaries.

Held, that the concurrence of the beneficiaries could not be required.

VENDOR and purchaser summons.

A testatrix by her will dated the 3rd March 1849 appointed R. Joyning and U. Macey executors, and empowered her said trustees with the consent in writing of her daughters during

their lives and afterwards at their discretion to demise hereditaments.

At the death of the survivor of her daughters she empowered her executors to sell the hereditaments.

The testatrix died on the 25th Dec. 1850. R. Joyning alone proved the will and died, having made a will, the executors of which were Jane Wood and Mary Wood.

In 1873 a petition was presented under the Trustee Act 1850 (13 & 14 Vict. c. 60) by all the persons beneficially entitled to the estate. The petition alleged that R. Joyning and U. Macey were constructive trustees, that Jane Wood and Mary Wood had never acted, and desired to be relieved of the trusts of the will.

On the 25th July 1873 Malins, V.C. made an order: "This court being of opinion that R. Joyning and U. Macey are trustees of the will of the testatrix within the meaning of the Trustee Act 1850, and that it is expedient to appoint new trustees of the will and impracticable so to do without the assistance of the court," and vested the hereditaments in new trustees thereby appointed.

After the death of the survivor of the daughters the trustees contracted to sell the hereditaments.

The purchaser objected that the power was given to the executors, and said that the trustees could not make a title without the concurrence of the beneficiaries.

Gatey for the vendors.—Malins, V.C. has declared that the executors are in fact trustees. Trustees appointed by the court have the same powers as the persons originally appointed by the will. The Conveyancing Act 1881 (44 & 45 Vict. c. 41), s. 70, prevents the purchaser from going behind the order.

Johnston for the purchaser.—The power was given to the executors, and can only be exercised by persons holding the office of executor:

Brown v. Burdett, 60 L. T. Rep. 520; 40 Ch. Div. 244;

Re Smith (1904) 1 Ch. 139.

It is for the vendor to show that the power is given to the trustees:

Re Willing, W. N. 1890, 1.

EADY, J. (after stating the facts) said:—Powers are given to persons named executors in the will to do certain things; for instance, to apply income in maintenance, to sell the hereditaments after the death of the two daughters, to execute a conveyance, &c. An attempt has been made to say that the true construction is that the executors were not trustees. I am of opinion that it is not open to me to depart from the order made thirty years ago that the executors were trustees. The appointment of new trustees following on a declaration that the persons originally named were trustees within the meaning of the Act ought now to be acted upon. The persons appointed have all the powers of the persons originally named, including the power of sale. It is not necessary to get the concurrence of the beneficiaries at whose instigation these trustees were appointed.

Solicitors: Langford and Fisher; A. Neale.

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

K.B. Div.]

HENNIKER v. HOWARD.

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KING'S BENCH DIVISION.

Wednesday, Jan. 13.

(Before Lord ALVERSTONE, C.J. and
KENNEDY, J.)

HENNIKER v. HOWARD. (a)

*Trespass—Ditch and fence—Presumption of ownership—Acts of ownership—Rebuttal of presumption.**The plaintiff and defendant were adjoining owners of land, the lands being bounded by a bank with a fence, with a ditch on the defendant's side.**For nearly fifty years the defendant had trimmed the fence, pollarded the trees, and cleaned the ditch, but there was no evidence of knowledge on the part of the plaintiff.**Held, that these acts of ownership did not rebut the presumption that the bank and fence were the property of the plaintiff.*

APPEAL from His Honour Judge Eardley Wilmot sitting at the Ipswich County Court.

The action was brought to recover damages, and for an injunction to restrain the defendant from cutting certain trees in a fence.

These trees and the fence stood on a bank, the ditch of which was on the defendant's side. The bank and fence stood next to the plaintiff's land, and therefore *prima facie* belonged to him.

For nearly fifty years the defendant had trimmed the fence and pollarded the trees and cleaned the ditch.

It was alleged, and there was some evidence, that in 1862, four years after the defendant entered into possession, that the plaintiff's tenant, pointing to an ash tree in the fence, said: "I should like to put an 'eye' through that ash tree."

The then agent to the plaintiff, it was alleged, was called in consultation on the dispute, and agreed that the defendant was right and that the fence was his, but the defendant admitted that, so far as he knew, the plaintiff knew nothing about this.

With regard to the cutting of trees there was no substantial evidence.

The County Court judge gave judgment for the defendant on the broad ground that he, for over half a century, exercised acts of ownership over the fence, acquiesced in and not interfered with, without placing much reliance on the defendant's evidence as to the conversation with the agent in 1862, which might not be evidence, or upon the evidence of the maps. He based his judgment on the broad acts of ownership, and stated that, as here there had been acts of ownership, he could not help if these acts had not been brought to the knowledge of the plaintiff. If the plaintiff's tenants thought that the defendant was wrong in doing what he did, they would have brought it to the notice of the plaintiffs. The evidence of the acts of ownership was to his mind sufficient to rebut the presumption that the fence and ditch went together.

The plaintiff appealed.

Stewart for the plaintiff.

North for the defendant.

Lord ALVERSTONE, C.J.—I have really felt great difficulty in this case, and, but for the decision in *Earl of Craven v. Pridmore* (18 Times L. Rep.

282), I should have thought we were not entitled to interfere with the finding of the County Court judge, because it must be remembered that in this court, dealing with County Court appeals, we have not got the power of the Court of Appeal dealing with the case of a judge sitting alone in the High Court, as we often have to point out. We have no right to review findings of fact, and, if there was any evidence on which the learned judge could come to the conclusion which could in any way support his finding of fact, we may not overrule him. If the decision in *Earl of Craven v. Pridmore* (*sup.*) had been a decision by the Court of Appeal that on the weight of evidence—as a rehearing—they thought Ridley, J. (17 Times L. Rep. 399) had come to a wrong conclusion, it would not have been an authority to the extent to which I think it is. But I certainly read the judgment of the Master of the Rolls, concurred in by Romer and Mathew, L.JJ., as holding that the evidence therein referred to was of such a shadowy and neutral character as not sufficient to displace the presumption, meaning that it ought not to be regarded by a lawyer as being evidence of a character which would displace the presumption, and, further, that the alleged acts of ownership were easily explicable without the necessity for drawing the inference that the property in the fences was in the defendants or their lessor. In that case there had been evidence of the clipping of the hedge and of the lopping of trees for a much longer period, and of some other acts which were not in this case. Therefore I think I had better state what I understand the sum and substance of the evidence is apart from this question of the map, which I think when examined has very little to do with the case. I gather that the real evidence is that which Mr. North very frankly and fairly stated. The real evidence is continuous or almost continuous—I will say constant—clipping of the hedge and pollarding of some of the trees for many years. With regard to the cutting down of the trees, there does not seem to be any substantial evidence or any evidence of cutting down trees in the ordinary sense of the word. There is some evidence of one tree being cut forty years before, and then evidence of two trees being cut which gave rise to this dispute. Therefore there is only evidence of one tree being cut which could be fairly treated as being evidence of an act of ownership acquiesced in by anybody. With the observations which have been made by my brother I entirely concur, in that many of these acts may be done, or allowed to be done, without any admission, and that applies very strongly to a clipping of hedges or pollarding pollard trees in a hedge. It must be remembered that there certainly is no evidence here of knowledge by Lord Henniker or his agents of what the defendant was doing, and if it be true, as Mr. North says, that this is an outlying part of Lord Henniker's estate, and that it is not one which has been brought before his notice, or much before that of his agents, that observation would, of course, be strengthened. I therefore come to the conclusion that the Court of Appeal in *Earl of Craven v. Pridmore* (*sup.*) have said that where you have got the original strong presumption of a ditch made, the earth thrown back, and a hedge placed upon the side of the ditch next to the man's land who has made the ditch, with these acts of

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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clipping the hedges and dealing with the cutting and lopping of the trees not brought to the knowledge of the owner, those acts of ownership are not that class of evidence which can be held to be properly admissible for rebutting the presumption. They are, as the Master of the Rolls calls it, evidence of a shadowy and neutral character, and not sufficient to displace the presumption. I think we should not be doing our duty in following the Court of Appeal, as we are bound to do in such cases, if we were to draw the distinction in this case that there was some evidence to go to the learned County Court judge on which he could come to the conclusion which he did. I would only say one word with regard to the map. It is obvious it cannot be used a document in favour of the defendant as against Lord Henniker, because it is not the defendant's own deed, but it might possibly have been of some service if it had been connected with some definite act of Lord Henniker or his agents, and thereby brought within the rule about the declaration of servants or agents in the course of their duty. I do not think it is so. In the first place, with regard to part of the *locus in quo*, it distinctly says the hedge is not the defendant's. I think the County Court judge was right in disregarding—as an important factor in this case—both the deed and Preston's statement, and in holding that there was not enough in the evidence proved with regard to the document or the conversation to make them admissible. With regard to the other point, I think he was bound and we are bound by the decision in *Earl of Craven v. Pridmore*, and he ought to have held that there was no evidence on which he could properly come to the conclusion that the presumption was rebutted. I think the appeal should be allowed.

KENNEDY, J.—I have come to the same conclusion, and I feel the difficulty which my Lord has indicated as to the exact ground to be taken in a case of this kind in dealing with the case for the purpose of seeing whether—although there are some facts—a lawyer, who has to look at the matter from a legal point of view, is justified in giving that evidence any weight as against an established or admitted state of things creating the presumption which is admitted in this case. As I read the report which has been before me of the judgment of the Court of Appeal in *Earl of Craven v. Pridmore*, which is binding upon us, in substance it is a decision, not that there was no evidence of acts of ownership, but that, as the Master of the Rolls says, there was evidence, but that it “seemed to him to be of a very shadowy and neutral character, and not sufficient to displace the presumption.” There is no doubt there were certain facts there proved which were the evidence referred to by his Lordship the Master of the Rolls, and I think, when he said that they were not sufficient to displace the presumption, he was not merely meaning that on the balance of evidence they came to the conclusion that there was such an overwhelming weight of evidence on one side that the learned judge below, whom they were entitled to overrule on that ground, had gone wrong and had taken a view which had some evidence to support it, but so little that his judgment was against the weight of evidence, but I think they are saying: “Here you have a recognised legal presumption; before that pre-

sumption can, as a matter of law, be properly overruled in a court of this country, there must be more evidence than is afforded by acts of the character and nature that are proved before us in this case.” Now, what were the acts in that case, and what was their character? There was very strong evidence, indeed, in a sense—when I say strong, I mean evidence which, according to the report, seems to have been unshaken—both of the lopping and the cutting and laying of fences and the repairs of fences whenever needed since the year 1856 in regard to one portion of the land, and 1875 as regards another portion. Not only so, but it was proved that the defendant had, in that case, cut trees in the fence as far back as thirty-one years ago and sold them; that in 1887 another tree was cut in the same fence; and in 1895, when a tree was blown down in the fence and actually lay on the plaintiff's land for two years, Pridmore, the defendant, sold the tree, and the timber merchants removed it from the plaintiff's own land. I confess that if the view which I hope we are both right in taking of the judgment of the Court of Appeal is right, they were taking that view on evidence which I confess, speaking for myself, as far as regards acts of ownership, is much stronger than any evidence in this case, because what happened here was merely a repairing of the fence, which in certain cases may not be jealously watched. On the other hand, it must largely depend upon the character of the adjoining tenant and his relations with his neighbour and whether the neighbour is going to found a right on his being allowed to lop. It must depend on circumstances, but it is quite explicable. But if as is said on behalf of the person who is pleading against the presumption, “Do you think that unless I believed it to be mine I should go to the expense of lopping it and trimming it?” On the other side it may be said: “Very well, if that is a substantial matter, is not it the very thing which in many cases, at any rate, the adjoining tenant would be only too glad to see done at the expense of his neighbour rather than his own?” Besides that which my Lord has referred to, there is in this case, I might also call it so isolated as to be shadowy, evidence of cutting trees, and a statement as to a dispute which is only valuable in so far as it is sought to bring in by it an admission of an agent of Lord Henniker. I do not, speaking for myself, think that it ought to be treated as an admission, technically, but I certainly should attach no value to it. What happened is that a person who was the agent, when two neighbours are disputing, no doubt, as to the right to interfere with the tree in the fence, is said to have given his opinion one way. I do not think that ought to constitute an admission. At the most the value of that admission could only be got at by ascertaining to what extent the dispute was gone into on the merits, and was not treated as a friendly settlement. I am afraid of admissions always, and certainly when they are made by persons who are not those immediately concerned, but their servants or agents. When you have said that, the only thing left is the map. As regards maps, I think it may be fairly said that at most they cut both ways. If the map upon which stress is laid shows in one portion of it something that favours the defendant, on the other hand it shows something which favours the

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plaintiff. I think it is better to leave the map out altogether, but certainly it does not materially, as it appears to me, improve the case as regards the whole of this line of fence for the defendant; it would only improve it as regards part, if at all. Then, if used at all in regard to the whole of the contention, it seems to me it cannot be treated except as being certainly neutral evidence, to borrow one word in the judgment of the Master of the Rolls. In my opinion, following loyally, as one is bound to do, that decision, we have no alternative but to allow this appeal.

Appeal allowed.

Solicitors: *White, Borrett, and Co., for Westhorpe, Cobbold, and Ward, Ipswich; Tarry, Sherlock, and King, for Turner and Turner, Ipswich.*

Friday, Jan. 22.

(Before WILLS and KENNEDY, JJ.)

CHAPMAN v. WINSON. (a)

Principal and agent—Commission—"When and if the purchase is completed by private treaty."

The defendant agreed to pay the plaintiff commission on the sale of an hotel "when and if the purchase is completed by private treaty."

The plaintiff introduced a purchaser, who signed a contract to purchase with the defendant, and paid a deposit.

The purchaser was unable to carry out the contract, and the defendant agreed to release her and he was to retain the deposit.

Held, that the plaintiff was entitled to his commission.

APPEAL from His Honour Judge Austin sitting at the Bristol County Court.

In June 1902 the defendant had on his hands the Full Moon Hotel for sale.

He gave particulars to the plaintiff, who knew of a likely purchaser and communicated with her.

On the 8th Sept. the defendant gave the following commission note to the plaintiff:

If your friend is named and introduced within one week and becomes the purchaser of the above hotel, you shall be paid as and by way of commission a sum of 50*l.* when and if the purchase is completed by private treaty.

The plaintiff then introduced the lady to the defendant, and on the 11th Sept. she signed a contract with the defendant agreeing to purchase the hotel for 2000*l.*, and she paid to the defendant 200*l.* as deposit.

She was unable to carry out the contract, and it was agreed between her and the defendant that he should retain the 200*l.* deposit and should release her from the contract, and this was accordingly done.

Thereupon the plaintiff brought the present action to recover his commission.

The learned County Court judge was of opinion that, in construing the commission note of the 8th Sept. 1902, he was bound to give some effect to the words, "when and if the purchase is completed by private treaty," and that, inasmuch as the purchase never was completed in the ordinary meaning of the word and inasmuch as the pur-

chase went off through no default of the vendor, the plaintiff was not entitled to his commission.

The plaintiff appealed.

J. A. Hawke for the plaintiff.—The learned County Court judge was wrong in his construction of the commission note. What it means is that if the plaintiff finds a purchaser by private treaty and the negotiation results in a contract, then the plaintiff is to be paid his commission. The word "completion" is not used in its technical sense of handing over the money and signing the deeds, but completion so far as the plaintiff is concerned means finding a purchaser who is ready and willing to contract and does in fact contract and who is accepted by the vendor. All these conditions were fulfilled by the plaintiff, who obtained a contract for the vendor, and the vendor in fact received the deposit. It can make no difference to the right of the plaintiff to recover commission that the vendor has let the purchaser off her contract. He referred to

Grogan v. Smith, 6 Times L. Rep. 427; 7 Times L. Rep. 132;

Passingham v. King, 14 Times L. Rep. 39, 392.

Brooke Little for the defendant.—Some meaning must be attached to the words "when and if the purchase is completed by private treaty," and the only meaning to be applied is that the purchase must be completed in the ordinary legal meaning of those words by paying over the money and signing the deeds or documents. Here the purchaser found by the plaintiff was unable to complete, and the learned County Court judge was right in holding that the plaintiff had not earned his commission.

WILLS, J.—The point here is a short one, but one of some difficulty, because the words are not as clear as they might be, and I can quite conceive two persons coming to opposite conclusions as to their meaning. But I think when they are carefully considered their real meaning is tolerably obvious, and it is not the meaning attached to them by the learned County Court judge. It is a good general rule that, unless you are driven to a contrary conclusion, you should construe words according to their grammatical meaning. Now, the words "private treaty" attach to the word "completed," and the plaintiff is to be entitled to his commission when the purchase is completed in a particular way, and that particular way is by private treaty. If "completion" means completion in the ordinary legal sense—that is, by the execution of the conveyance and the paying over of the balance of the purchase money—then there is no meaning in the words "private treaty" as attached to the word "completed." I think the words "by private treaty" are meant to exclude by auction. Mr. Brooke Little's contention requires more violence of construction than the one which I have adopted. I think the word "completed" is used in its grammatical meaning and not in its technical meaning, and I think the parties in using the word "completion" did not mean it in this latter sense. I think the purchase was completed and effected by private treaty, for if the vendor by the contract is bound to sell, and the purchaser is bound to buy and the purchaser is accepted by the vendor, then the purchase is effected and completed so far as the agent is concerned. That construction does less violence to the use of the language than that suggested by the defendant.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

K.B. Div.] LEWIN AND OTHERS v. NEWNES LIMITED; SAME v. WARNE AND CO. [K.B. Div.]

KENNEDY, J.—I agree. I do not see any answer to the reasonable meaning placed on these words by my brother Wills. I do not think it is fair to take the words out of their order and to read them as "when and if the purchase by private treaty is completed." It would have been so easy to have said that if the parties had intended it. The purchase was effectually completed by private treaty when a valid legal contract was obtained.

Appeal allowed.

Solicitors: *William J. Card, for E. Woodhouse Veale, Bristol; Darley and Cunningham, for F. J. Farr and Son, Bristol.*

Jan. 13 and Feb. 1.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

LEWIN AND OTHERS v. NEWNES LIMITED;
SAME v. WARNE AND CO. (a)

Rating — House — Occupation — Caretaker — 51 Geo. 3, c. 150.

By 51 Geo. 3, c. 150, after reciting an Act of 12 Car. 2, c. 37, whereby a yearly sum of 250l. was charged upon the houses of the inhabitants of the parish of St. Paul, Covent Garden, for the support and benefit of the rector, curate, clerk, and sextons for the time being of that parish, that charge of 250l. was repealed, and in lieu thereof a yearly sum of 520l. was charged upon all houses within the said parish to be assessed by the churchwardens and paid by the occupiers of such houses respectively.

Held, that houses consisting of the offices, warehouses, store-rooms, and counting-houses of publishers, some rooms in which were occupied by caretakers and their families, such caretakers having internal access to the whole of the premises, were chargeable under this statute.

Surman v. Darley (14 M. & W. 181) considered.

APPEALS from His Honour Judge Woodfall sitting at the Westminster County Court.

Two actions were brought by the churchwardens of the parish of St. Paul, Covent Garden, to recover rates alleged to be due to them under 51 Geo. 3, c. 150.

The premises upon which the rates were sought to be levied were, in the case of Newnes Limited, premises Nos. 8 to 11, Southampton-street, occupied by them, and the bulk of those premises, some forty rooms, were used for the purposes of their business as publishers for their offices and their warehouse.

These defendants set apart three rooms, and in those three rooms lived their caretaker and his wife.

In the case of Warne and Co. they occupied premises at No. 15, Bedford-street, and Nos. 2, 3, and 4, Bedford-court.

Those buildings were connected by iron doors, and the learned judge found, for the purposes of the action, that structurally they were one building, and the rooms consisted of store-rooms, offices, and counting-house.

All the premises were connected internally, and the caretakers had access to the whole of the buildings by means of internal communications.

The learned County Court judge, after stating the facts, delivered the following judgment:

The defence is that the house must be a dwelling-house, and the only definition of the houses which are actually subject to this rate is to be found in the case of *Surman v. Darley* (14 M. & W. 181). It is to be observed that in that case the question is whether a building in the nature of a theatre could be made subject to a rate under this Act. It was decided that it could not, and, in so deciding the case, the court gave a definition of what buildings were liable to rates under this Act, and it is upon that definition that the defendants rely. Pollock, C.B. said: "It seems to me that this Act was intended to apply only to dwelling-houses occupied by individuals as such, and that such buildings as warehouses and counting-houses were not included in it." The other judgments are to the same effect, and that judgment is prayed in aid by both the defendants. In my opinion those decisions will not help the defendants. All the judges there say is—Alderson, B. in particular—that the houses liable to the rate are "dwelling-houses, or, at all events, those which are capable of being occupied as such." These houses are occupied as such. It is quite true that it is only a small portion of them which is set aside as the dwelling-place of these people; but they are occupied as dwelling-houses, and it seems to me that is the answer. Is the house capable of being occupied as a dwelling-house? The answer is that it is occupied as a dwelling-house. It seems to me that it is impossible to say that these premises of both of these defendants are not capable of being occupied as dwelling-houses, because in fact they are so occupied. The second defence upon which the defendants rely is a judgment of Lord Herschell, delivered in the case of *Russell v. Town and County Bank* (59 L. T. Rep. 481; 13 App. Cas. 418). That was a judgment dealing entirely with what building was entitled to exemption under the Income Tax Act. Mr. Mears referred me to a dictum of Lord Herschell's, reported at p. 427, in which the noble and learned Lord says: "I do not think the word 'dwelling-house' is here used in any such sense, and that a bank or a manufactory or a warehouse becomes a dwelling-house because some servant of the trader resides in that building for the purposes of the trade." Mr. Mears asks me to read that proposition from the words "and that a bank or manufactory or warehouse becomes a dwelling-house because some servant of the trader resides in the building for the purposes of the trade." Of course, if Lord Herschell was there going to lay down a definition of a dwelling-house which was to be applied under any circumstances, to lay it down as an authoritative proposition with all the authority of the House of Lords, that is a conclusion of this case; but I do not think his Lordship meant that at all. I think that his whole sentence must be read. He says: "I do not think the word 'dwelling-house' is here used," and I think that what he said there must be taken to apply only to the point which he was then deciding, and that it would be putting a very much more extended meaning on his words to hold that that is a definition under all circumstances and under any act of what shall or shall not constitute a dwelling-house. The defendants rely again on the fact that these premises are exempted from payment of the inhabited house duty; but there again, in considering a case under this Act of 51 Geo. 3, I think that a different reasoning applies to the case of *Russell v. Town and County Bank* (sup.) and to the considerations which exempt a building from the inhabited house duty. Different considerations apply. Fiscal and other considerations arise in determining what is the liability under the Revenue Act. I think that when one looks at what is the intention of this Act of 51 Geo. 3 (which extended the Act of Charles II.), one sees at once that an entirely different train of thought arises, and entirely different

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considerations apply. The intention of these Acts was to provide spiritual benefit for the persons who dwell in the parish. As Alderson, B. said in the case of *Surman v. Darley* (sup.), the first Act is a key to the second, and shows that the parties who were to be liable to the rate were those who would derive benefit from the services of the rector, curate, clerk, and sexton. Who are these people? The caretakers and their families. That is to say, the servants of the defendants. The defendants occupy these premises as dwelling-houses for their servants. Mr. Mears took a further point. He said that if that is so, then it is the servants who are liable to the rate, and not the persons who do not in fact dwell in the parish; but there again I do not think that the argument can be maintained, because, if one looks at sect. 9 of the Act of George III., it clearly contemplated that someone who does not himself live in the parish, but who lives outside, may still be liable to the rate, because his house is occupied as a dwelling-house. It is his house, and he himself occupies it as a dwelling-house, although he does not himself actually live there. It seems to me that that really exhausts the subject, and I can only find that the defendants by their servants occupy these houses as dwelling-houses, and consequently they are liable to pay this rate.

The defendants appealed.

It was provided by 51 Geo. 3, c. 150:

Whereas an Act was passed in the twelfth year of the reign of His late Majesty King Charles II., intituled "An Act for making the Precinct of Covent Garden parochial," whereby it was, amongst other things, enacted that the yearly sum of 250*l.* should from thenceforth be and the same was thereby charged upon the houses of the inhabitants of the parish of St. Paul, Covent Garden, in the county of Middlesex (except the house then commonly called Bedford House, with the appurtenances), for the support and benefit of the rector, curate, clerk, and sextons for the time being of the said parish: And whereas from the very great advance in price of the articles of necessary consumption, it is expedient that the said sum of 250*l.* should be increased: May it therefore please your Majesty that it may be enacted and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act the said charge of 250*l.* shall cease and determine, and that all and every the clauses, powers, and provisions in the said Act contained so far as the same respect the assessing and compelling payment of the said sum of 250*l.* (except as to any arrears of the same sum which shall at or before the passing of this Act have become due and payable) shall and the same are hereby repealed and declared to be null and void to all intents and purposes whatsoever.

II. And be it further enacted that in lieu of the said sum of 250*l.* the yearly sum of 520*l.* shall from the 25th March next before the passing of this Act be and the same is hereby charged upon all houses within the said parish of St. Paul, Covent Garden, and shall within fourteen days next after the passing of this Act and for ever after yearly, on the 25th March or within thirty-one days after in every year, be assessed and rated by the churchwardens of the said parish or any two of them after a pound rate, according to the fair yearly rent or improved value of such a house respectively; and every such rate or assessment shall be confirmed and allowed by and under the hands and seals of two of His Majesty's justices of the peace for the county of Middlesex or city of Westminster; and all such rates and assessments shall be borne and paid by the respective occupiers of such houses respectively and shall be paid to and be collected by such person or persons as they the said churchwardens or any two of them shall from time to time appoint

by quarterly payments on the 24th June, the 29th day of Sept., the 25th of Dec., and the 25th March in each and every year; all which moneys to be collected by such rates and assessments so to be made as aforesaid shall and are hereby declared to be vested in the said churchwardens in trust to be applied by them for the purposes of this Act, and the said rates and assessments shall commence and take place from the said 25th day of March last. Provided always that it shall be lawful for the said churchwardens or any two of them and they are hereby required from time to time in making any rate or assessment by virtue of this Act to assess and raise in addition to and in the same manner in every respect as the said sum of 520*l.* as much money as may be necessary for defraying the reasonable expenses of making and collecting every such rate or assessment and for making good any loss or deficiency which shall then have arisen from the insolvency of any collector or collectors of the said rates or otherwise: Provided also and be it further enacted that it shall be lawful for the said churchwardens and they are hereby required in making out any rate or assessment by virtue of this Act to exclude out of the same such house as at the time of making such rate or assessment shall be actually occupied by the rector of the said parish for the time being.

Grimwood Mears for the appellants. — These premises are not liable to be rated. It was held in *Surman v. Darley* (14 M. & W. 181) that the word "houses" in this statute meant houses intended for human habitation, and Pollock, C.B. says: "We all think that the word 'house' *prima facie* means a dwelling-house." Rolfe, B. says the same. He referred to

12 Car. 2, "An Act for making the Precinct of Covent Garden parochial," ss. 2, 3;

51 Geo. 3, c. 150, ss. 1, 2.

This last Act, which repealed the former one, does not include in the word "houses" strictly business premises which have a caretaker on them. The fact of dwelling is purely personal, and only the persons who dwell within the parish and so enjoy the benefits of the rector, curate, clerk, and sextons are made liable to this rate by the statute. *Surman v. Darley* (sup.) shows that the statute was only intended to apply to individuals occupying a dwelling-house as such. He referred to

Customs and Inland Revenue Act 1878 (41 & 42 Vict. c. 15, s. 13;

London and Westminster Bank v. Smith, 85 L. T. Rep. 747; 87 L. T. Rep. 244;

Grant v. Langston, 82 L. T. Rep. 629; (1900) A. C. 389.

Clarke Hall (Ernest H. Pooley with him) for the respondents. — If these premises would be liable to inhabited house duty apart from the exemption in sect. 13 (2) of the Customs and Inland Revenue Act 1879, they would certainly be liable to this rate. If they had not been considered liable before 1879, there would have been no necessity for inserting the exemption. These premises are used as dwelling-houses and are capable of being used as such, which is very different from the case of a theatre as in *Surman v. Darley* (sup.). *London and Westminster Bank v. Smith* (sup.) turned on the point that the bank manager was not a caretaker, and so the case was not within the exemption of sect. 13 of the Act of 1879. The intercommunication makes the whole of the premises one occupation, and the whole premises are liable.

Mears in reply.

Cur. adv. vult.

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Feb. 1.—KENNEDY, J. read the following written judgment of the court:—This is an appeal from the judgment of the learned judge of the Westminster County Court in the case of *Lewin and others v. Newnes Limited*. He held that the appellants, who occupy Nos. 8, 9, 10, and 11, Southampton-street, Covent Garden, are liable to the rector's rate in respect of those premises under the statute 12 Car. 2 and the amending statute 51 Geo. 3, c. 150. The premises comprise altogether forty rooms, and are used by the appellants chiefly as a store and counting-house in their business as publishers. They are connected internally. Three rooms are used for the residence by day and night of a servant of the defendants and his wife, who act as caretakers and who have access to the whole building by means of internal communication. The statute 12 Car. 2, c. 10, s. 3, directs the rate to be assessed upon the inhabitants of the parish according to the improved value of the yearly rent of the respective houses of such inhabitants. Sect. 2 of the amending Act says that the sum charged (520l.) is thereby charged upon all houses within the parish, and all the rates and assessments "shall be borne and paid by the occupiers of such houses." There is no doubt that the appellants are the occupiers of these premises; the principal ground of this appeal is that the premises do not constitute a "house" within the meaning of the statutes. In *Surman v. Darley* (14 M. & W. 181) the judges of the Court of Exchequer, in the year 1845, had to deal with a similar question under the same statutes. They had to decide whether or not the proprietors in possession of the Covent Garden Theatre were liable to the rector's rate. Obviously the theatre was not designed or built for inhabitancy or for the purposes of a dwelling-house. No person slept or resided in it. The court held that it was not liable to assessment. The judges (Pollock, C.B., Alderson, Rolfe, and Platt, BB.) were all of opinion that the term "house" *prima facie* means a dwelling-house; and the effect of the judgment is that, according to the true meaning of these enactments, the rector's rate is imposed only upon houses occupied as dwelling-houses, or, at all events, on those houses which are capable of being occupied as dwelling-houses. The Covent Garden Theatre plainly did not satisfy this test of rateability; but, in our opinion, as in that of the learned County Court judge, the premises in question do. They were built as dwelling-houses. They are capable, so far as structure is concerned, of being inhabited or occupied as dwelling-houses, and they are dwelt in night and day by the respondents' servant and his wife, who have access to every part of the building, which is internally connected throughout and must be treated as one. We are of opinion that our decision does not in any way conflict with any of the judgments cited from cases which have been decided under the provisions of the statutes relating to the duties on inhabited houses. In *Grant v. Langston* (82 L. T. Rep. 629; (1900) A. C. 389), a case under the Customs and Inland Revenue Act 1878 (41 & 42 Vict. c. 15), the decision hinged upon the conclusion of the House of Lords on the facts of the particular case, that the ground floor of a house of two stories was so completely divided and separated from the upper floor, which was used as a dwelling, as to consti-

tute in itself a house or tenement which was occupied solely for the purposes of a trade or business, and therefore was exempt from duty under sect. 13 (2) of that statute. In the present case no question of the division of the building into separate houses or tenements by structural severance arises. The learned counsel for the appellants referred also to a sentence in the judgment of Lord Macnaghten in *London and Westminster Bank v. Smith* (87 L. T. Rep. 244, at p. 245). This, too, was a case under the Customs and Inland Revenue Act 1878 (41 & 42 Vict. c. 15). There the House of Lords, affirming the decision of the Divisional Court and the Court of Appeal, held that the bank failed to bring itself within the exemption of sect. 13 (1). The third and fourth floors of a building were used as residences by the bank manager; and in the course of his judgment (p. 245) Lord Macnaghten said: "There is no ground that I can see on which the bank can claim exemption. The bank manager is not a caretaker. The case is the ordinary case of a person using part of his house as a residence and part as his place of business." The reasoning of this passage does not touch the present case. It is reasoning used to show that, inasmuch as the resident was a bank manager and not a caretaker, the bank was not in a position to rely upon the comparatively modern legislation in regard to inhabited house duties, which, in giving exemption to warehouse or office premises from assessment, has enacted expressly that the residence there of a mere caretaker shall not destroy the exemption. It is not reasoning which affects the value of the fact of the dwelling of a caretaker in premises, when the question is as to the propriety of treating those premises as a house within the meaning of the two statutes which govern the present case, as those statutes are, in respect of the word "house," interpreted by the Court of Exchequer in *Surman v. Darley* (sup.). It appears to us that a similar remark is applicable to the use which was sought to be made by the learned counsel for the appellants, both in the County Court and before us, of language which Lord Herschell is reported to have employed in the course of his judgment in *Russell v. Town and County Bank* (59 L. T. Rep. 481; 13 App. Cas. 418, at p. 427). We agree with the learned County Court judge when he points out that Lord Herschell was plainly expressing his opinion only as to the meaning of the term "dwelling-house" as used in the particular Act of Parliament—the Income Tax Act 1842 (5 & 6 Vict. c. 35, s. 100, sched. D). Lord Herschell is stating his dissent from the conclusion that, because the bank's business building contained living rooms for the bank manager, the deduction which the income tax allows for the rent or value of such parts of a dwelling-house as may be used for trade purposes could not be made in respect of any part of the building. We can see no authority in Lord Herschell's language for this court holding in the present case that, under statutes which are not passed for fiscal purposes, but are passed in order to make provision for the spiritual wants of the dwellers in a parish by a rate levied on the occupiers of all houses within the parish which are capable of being used as dwelling-houses, a building may not properly be treated as a dwelling-house, although the larger part of the building is used for the time being for the purposes of trade or

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business, if, in fact, the whole of the building is capable of being used as a dwelling-house and persons, whether caretakers or others, do, in fact, dwell in part of it. One other argument was addressed by the appellants to the County Court judge and also, though not with much insistence, to us. That was that, if any persons are to be rated, it should be the caretaker. We are clearly of opinion, that as the occupation of the caretaker is the occupation of a servant for and in the service of his employers, the appellants, it is they and not he who must, for rating purposes, be treated as occupiers. This appeal must be dismissed. It is agreed that there is no material distinction between the case of *Lewin and others v. Warne and Co.* and the preceding case, and therefore this appeal fails also. We do not think that it makes any difference that the rooms occupied by the caretaker and his wife are situated in the upper floor of one of several houses now internally connected and used as one.

Appeals dismissed.

Solicitors: *Bartlett and Large; Hoyle and Parry.*

Nov. 30, Dec. 1, 3, 4, 1903, and Feb. 6, 1904.

(Before KENNEDY, J.)

RUBEN AND LADENBURG v. GREAT FINGALL CONSOLIDATED LIMITED AND OTHERS. (a)

Company—Forged share certificate—Issue by secretary—Liability of company—Estoppel.

A certificate of shares in a limited company was delivered by the secretary of such company at their offices, such certificate in form being perfectly regular. In fact the certificate was a forgery, and was made and delivered by the secretary acting fraudulently and not for or on behalf of or for the benefit of the company, but solely for himself and for his own private purposes and advantage.

Held, that the company were estopped from denying the title of the transferees of the shares, and that they were liable in damages for refusing to place the names of the transferees on their list of shareholders.

Shaw v. Port Phillip and Colonial Gold Mining Company Limited (50 L. T. Rep. 685; 13 Q. B. Div. 103) considered and followed.

ACTION brought by the plaintiffs to recover 20,149l. 11s. 9d. damages from the defendants under the following circumstances.

The statement of facts is taken from the judgment of the learned judge.

One A. S. Rowe, then a partner in Bewick, Moreing, and Co., was in Dec. 1902 the secretary of the defendant company. He held the appointment under a written agreement of the 31st Dec. 1900 between the defendant company and Bewick, Moreing, and Co., whereby Bewick, Moreing, and Co. undertook to provide the defendant company with suitable offices and office accommodation, a suitable secretary, to be approved of by the company, and a sufficient clerical staff. The secretary was to be paid by Bewick, Moreing, and Co., but was to be deemed to be the secretary and officer of the defendant company, and subject to dismissal by the defendant company at any time. Bewick, Moreing, and Co. were to receive 500l. a

year from the defendant company, and also all transfer fees received by the defendant company.

The defendant company's registered office in Dec. 1902 was in the offices of Bewick, Moreing, and Co., No. 20, Copthall-avenue, E.C., and several other limited companies were housed and provided for by Bewick, Moreing, and Co. there under similar arrangements.

The plaintiffs are a firm of stockbrokers in the City, with whom Rowe had for some months before Dec. 1902 done business on his own private account in stocks and share transactions. They knew he was a partner in Bewick, Moreing, and Co. They did not know that he was secretary of the defendant company. They believed him to be a director of it. He had been introduced to the plaintiffs as a person in good credit, he kept his engagements, and they had every confidence in him.

With Mr. Lindo, one of the partners in the plaintiffs' firm, Rowe was on terms of social acquaintance.

In December Rowe saw Mr. Lindo and asked whether the plaintiffs could arrange a loan for him on 5000 shares in the defendant company. He said he had a joint account with a friend, who wished to sell, and he desired to take over the friend's interest, and so avoid a sale, because, on information which he had received, he believed the shares (which were then at a premium) would rise considerably in value. He wanted the loan for a short time only, and, as the 5000 shares afforded at the price of the day ample security for the 20,000l. which he wanted on loan, and he undertook, if there was any fall in price, to provide a 2l. per share margin, the plaintiffs agreed to try to meet his wishes.

On the 16th Dec. the plaintiffs arranged with Lazard Brothers and Co., bankers in the City, who have been made by the plaintiffs defendants in this action in order that all the parties might be before the court, for the advance of 20,000l. to themselves for a principal in the proposed security, and Mr. Lindo on the same day went to the offices of Bewick, Moreing, and Co., which were also the offices of the defendant company, and told Rowe that the money would be ready on the 18th Dec.

Rowe said that he would have the share transfer executed by the transferor on the following day. The shares, he said, were standing in the company's books in his friend's name, and not in his own.

On the 17th Dec. the transfer, with the names of the transferees, Rosenheim (a partner in the bank) and Alexandre, who appears as a formal defendant in this action, upon it, was taken by Lindo to Rowe, and later in the day it was returned by Rowe to Lindo, and purported to have been executed by "E. Storey" as transferor.

A shareholder of that name was called as a witness and deposed that he was interested at the time in 5000 shares in the company, but that he was the registered owner only of 2000.

In the corner of the document was the usual "certification."

Rowe, when he gave Lindo the transfer, said that his directors (that is, the directors of the defendant company) would be meeting the next day at 11 a.m., that he would explain everything to them, and have the share certificate made out

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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in the names of Rosenheim and Alexandre, and that it would be ready for Lindo if he called at 11.30 a.m.

The same afternoon Lindo brought back to Rowe the transfer executed by the transferees, paid to him the registration fee of 2s. 6d., and received a receipt in due form.

On the 18th Dec., at 11.30 a.m., at the office, Rowe delivered to Lindo the share certificate, and Lindo returned the receipt to Rowe.

The certificate thus issued was in form perfectly regular. It purported, in accordance with art. 12 of the articles of association of the defendant company, to bear the seal of the defendant company, to be signed by two of its directors, and to be countersigned by Rowe, as the defendant company's secretary. Lindo learnt from it for the first time that Rowe was the company's secretary.

The certificate was taken by Lindo to the plaintiffs' office, where it was examined by their clerk, and it was then taken by him to the office of Lazard Brothers and Co, where it was left after its examination by a clerk there, and their cheque for 20,000*l.* in favour of the plaintiffs was handed to Lindo.

This cheque was paid by the plaintiffs into their own banking account, and a cheque of the plaintiffs for the same amount, less stamp fee and commission, was handed over to Rowe the same day, and was subsequently cashed by him.

Within ten days Rowe absconded, and it was discovered that the certificate was a forgery. The only genuine part of it was Rowe's counter-signature as secretary. The signatures of the two directors, which it bore, were forged, and the seal of the company, which it also bore, had been fraudulently affixed to it by Rowe, who, as secretary, had access to it at all times, and practically the custody of it, in the safe of the defendant company.

Messrs. Lazard Brothers and Co., by their solicitors, applied to the defendant company for the registration of Rosenheim and Alexandre in the books of the defendant company as the owners of the shares.

The defendant company refused to accede to the application.

Then Lazard Brothers and Co. applied to the plaintiffs for other equivalent security or repayment of the loan of 20,000*l.*

The plaintiffs have paid Lazard Brothers and Co. the amount of the loan, with interest, and thereupon, as the defendant company refused to register the ownership of Rosenheim and Alexandre or recognise their title to the shares, they brought the present action, after obtaining from Lazard Brothers and Co. an assignment of that company's rights, if any, and giving written notice of such assignment to the defendant company.

In this action the plaintiffs claimed against the defendant company. They also claimed against Bewick, Moreing, and Co. as the partners of Rowe. Lazard Brothers and Co. and Rosenheim and Alexandre were defendants only in form.

The action came on for trial before the learned judge with a special jury.

Certain statements or admissions of material facts were agreed to by the counsel for the respective parties, which left, in the judgment of the

learned judge, no question which it was necessary or proper to leave to the jury.

These statements or admissions of fact were as follows:

Agreed—(1) That the alleged certificate is not a valid or genuine document, and that the signatures thereon, other than the signature of Rowe, are forgeries; (2) (a) that the bank (Lazard Brothers and Co.) and the parties respectively made the advances upon the faith of the genuineness and validity of the alleged certificate and of its being properly issued, and (b) the secretary was a proper person to deliver it; (3) that Rowe, in creating and delivering to Lindo the alleged certificate, acted fraudulently and not for or on behalf of or for the benefit of the defendant company, and solely for himself and for his own private purposes and advantage; (4) that the defendant company did not by its directors or otherwise authorise Rowe to make, seal, or issue the alleged document; (5) that during the month of Dec. 1902, at all events, Rowe was a partner in the firm of Bewick, Moreing, and Co.

Rufus Isaacs, K.C. and J. D. Crawford for the plaintiffs.—This case is covered by the decision of the Divisional Court in *Shaw v. Port Phillip and Colonial Gold Mining Company Limited* (50 L. T. Rep. 685; 13 Q. B. Div. 103), where it was held that the company were estopped by the certificate issued by their secretary in the usual and authorised form from disputing the plaintiff's title to the shares. There the secretary was acting within the scope of his employment. That decision is in no way affected by *British Mutual Banking Company Limited v. Charnwood Forest Railway Company* (57 L. T. Rep. 833; 18 Q. B. Div. 714), for there the secretary was acting outside the scope of his authority, and the company could not be liable for untrue and fraudulent answers made by such secretary for his own ends as to the validity of certain debenture stock. In this case the secretary was acting within the scope of his authority, and the facts here constitute an estoppel. They referred to

Balkis Consolidated Company v. Tomkinson, 69 L. T. Rep. 598; (1893) A. C. 396.

All the cases show that a company is bound by a certificate purporting to be issued in the usual and authorised form. It would be an impossibility to find out whether every signature and every act that had been done were in order. It is true that in *Buckley on the Companies Acts*, 8th edit., at p. 103, some doubt is thrown upon *Shaw v. Port Phillip and Colonial Gold Mining Company Limited* (sup.), but *Palmer* in his work on *Company Precedents*, 7th edit., at p. 17, thinks that the company would be liable where the seal was irregularly fixed, if the instrument appears to be in accordance with the regulations of the company. Where a company has registered a forged transfer or issued a false certificate the company are bound and are liable in damages to a person acting in good faith on the validity of the registration or the truth of the certificate and has thereby suffered damage. The present case is very different to *George Whitechurch Limited v. Cavanagh* (85 L. T. Rep. 349; (1902) A. C. 117), for the documents there were certifications of transfers of shares and clearly there was no estoppel, and to *Hambro v. Burnand* (89 L. T. Rep. 180; (1903) 2 K. B. 399). The facts admitted in this case show that the principles laid down in *Shaw v. Port Phillip and Colonial Gold Mining Company Limited* apply, and that

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case has not been overruled by any subsequent decision. They also referred to

County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Company, 72 L. T. Rep. 375; (1895) 1 Ch. 629.

Lawson Walton, K.C., Eldon Bankes, K.C., and Bremner for the defendants the Great Fingall Consolidated Limited.—A principal is not liable for the unauthorised or fraudulent act of a servant or agent committed not for the general or special benefit of the principal, but for the servant or agent's own private ends. They referred to

Barwick v. English Joint Stock Bank, 16 L. T. Rep. 461; L. Rep. 2 Ex. 259;

British Mutual Banking Company Limited v. Charnwood Forest Railway Company (sup.).

The certificate being a forged document the company cannot make any representation by means of it, and so they are not estopped. Rowe acted for his own purposes, and so the company cannot be liable. They referred to

Limpus v. London General Omnibus Company, 1 H. & C. 30.

The only representations made were made by Rowe, and not for or on behalf of the company, but for his own private gain. Both Buckley and Lindley think *Shaw v. Port Phillip and Colonial Gold Mining Company Limited (sup.)* is bad law, and in the face of subsequent decisions and on general principles it cannot be supported. The present plaintiffs cannot assert a right by estoppel. They referred to

Simm v. Anglo-American Telegraph Company, 42 L. T. Rep. 37; 5 Q. B. Div. 188.

The facts here do not create a right against the defendants by estoppel.

Rufus Isaacs, K.C. in reply.

Feb. 6.—KENNEDY, J. read the following written judgment:—The principal, although not the only, question in this action is whether the plaintiffs are or are not entitled to recover damages from the defendant company by reason of the company's refusal to place the names of Max Rosenheim and Edmonde Alexandre on the register of shareholders. The material facts are these. [His Lordship stated the facts set out above, and continued:] After I had heard evidence of witnesses called by the plaintiffs and the defendants, from which I have taken the history of the case set out above, and which, as there is really no conflict as to the facts, I see no use in stating more particularly, certain statements and admissions of facts were agreed. [His Lordship referred to these admitted facts set out above, and continued:] Mr. Rufus Isaacs, for the plaintiffs, submitted that there still was a question which ought to be left to the jury as to the liability of the defendants Bewick, Moreing and Co. under the Partnership Act 1890, s. 10. I ruled, however, that there was no case made out against Bewick, Moreing, and Co., and as the only questions of fact, which would otherwise have been questions for the jury, had been settled by the foregoing agreed statements and admissions, the jury was discharged, and the claim of the plaintiffs as against the defendant company was fully argued before me. The plaintiffs' case against the Great Fingall Consolidated Limited is based upon the assertion of a right of the plaintiffs to recover damages from that company

for its refusal to recognise the certificate, and register in its books the names of Rosenheim and Alexandre as the owners of the shares numbered in the certificate. It is unquestionably true that upon the faith of this certificate the plaintiffs incurred their liability to Lazard Brothers and Co., and advanced the 20,000*l.* (less stamp fee and commission) to Rowe. If the defendant company is estopped by the certificate from denying the title of Rosenheim and Alexandre, it has, in my view, been decided by the House of Lords that the plaintiffs are entitled to recover from the company the damages (not exceeding the value of such shares at the date of the company's refusal to register) which they have in fact sustained owing to the refusal of the company to register the purchaser: (*Balkis Consolidated Company v. Tomkinson*, 69 L. T. Rep. 598; (1893) A. C. 396). At p. 407 Lord Herschell disposes of an adverse argument which had appeared in the judgment of Bowen, L.J. in the case of *British Mutual Banking Company Limited v. Charnwood Forest Railway Company* (57 L. T. Rep. 833; 18 Q. B. Div. 714) and also in the judgment of Comstock, J., delivered in the Court of Appeals in the American case of *Mechanics' Bank v. New York and Newhaven Railway Company* (11 N. Y. (Sup. Ct.) Rep., at pp. 574-576), as to the transaction which it was sought to enforce against the company being *ultra vires* of the company, and therefore one as to which there would be no right to hold the company liable by estoppel. In the course of his remarks upon this point Lord Herschell said: "I do not think this argument is a sound one. A person to whom the company is liable by estoppel to pay damages for refusing to register his transfer does not by reason thereof become a shareholder. Indeed, the very title by estoppel implies that he is not one. It has never been laid down, and is manifestly not the law, that a company is not authorised to employ its funds in paying damages for a wrong done, and, if his right by estoppel is established, the company have as much committed a wrong by refusing to register as shareholder the person whose title they deny as if his title to be registered had in fact been a good one." A further and what I may call a subordinate point was raised by the defendants, that I ought to hold that no right by estoppel could be asserted by the present plaintiffs, because (it was said) the plaintiffs were in the same position as the parties who were held to have no such right in *Simm v. Anglo-American Telegraph Company* (42 L. T. Rep. 37; 5 Q. B. Div. 188), but it appears to me that the circumstances of the two cases are essentially different. The real question is, Do the facts of the present case create a right by estoppel? This was the question, or, at all events, the main question, which was fully and ably argued before me by the learned counsel who appeared for the defendant company. The argument for the plaintiffs, as I understand it, is substantially this. Instruments under seal have always been regarded by our law as instruments of especial solemnity. In old days, whilst it was a defence to an action in a contract under seal that the party's seal had been lost and had been affixed by a stranger without his knowledge, at least if the owner had given public notice of the loss, no such defence was open if the seal had been misapplied by a person in whose custody it was; for then, it was said,

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it was his own fault for not having it in better keeping: (see Pollock's Principles of Contract, 7th edit., p. 138, and note (n), where the authorities are cited). And in modern days, in regard to the certificates of shares in limited trading companies, the law recognises, for practical and business reasons, a high degree of responsibility resting on the companies whose seal they bear. Stress is laid upon this by the judgments of Cockburn, C.J. and Blackburn, J. in *Re Bahia and San Francisco Railway Company* (18 L. T. Rep. 467; L. Rep. 3 Q. B. 584): "It was the intention of the Legislature," said Blackburn, J. (at p. 590), "that these certificates should be documents on which buyers might safely act." It is unnecessary to quote at length the well-known passage in the judgment of Lord Cairns, L.C. in *Burkinshaw v. Nicolls* (39 L. T. Rep. 308; 3 App. Cas. 1004, at p. 1017). The 31st section of the Companies Act 1862 (25 & 26 Vict. c. 89) enacts that "a certificate under the common seal of the company, specifying any share or shares, or stock held by any member of a company, shall be *prima facie* evidence of the title of the member to the share or shares or stock therein specified." In the present case the certificate was on its face perfectly regular; it purported to be issued according to the formalities prescribed by the articles of the defendant company—i.e., to be signed by two directors and countersigned by the secretary, it was delivered at the company's office as the genuine certificate of the company by the secretary who had countersigned it and affixed to it the company's seal, to which the company permitted him to have access for the purpose of using it; it is admitted that he was a proper person to deliver such certificates. The certificate was a forged document, no doubt, but as it is apparently genuine and regular, and as it was received by the plaintiffs from a proper custodian and from the company's office, it is agreed by the parties that there was no legal duty on the plaintiffs, who received it, to ascertain, or try to ascertain, the genuineness of the directors' signatures, or to inquire whether the seal had been affixed by the authority of the directors. In Palmer's Company Precedents, 7th edit., p. 17, the learned author says: "Where the regulations contain special provisions as to the affixing of a seal—e.g., that the instrument must also be signed by two directors—those who deal with the company are bound to see that the deed on the face of it accords with the regulations. But, subject as aforesaid, it is to be presumed that where the common seal is affixed to an instrument, it has been duly fixed, and the burden of proving the contrary rests with those that allege it. . . . It by no means follows that, where the seal has been irregularly fixed, the instrument is ineffective: (see *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Company*, 72 L. T. Rep. 375; (1895) 1 Ch. 629); *Shaw v. Port Phillip and Colonial Gold Mining Company*, 50 L. T. Rep. 685; 13 Q. B. Div. 103). In both these cases the seal had been irregularly affixed, but the company was held bound by it, for the instrument appeared to be in accord with the regulations, and the irregularity was only in regard to the 'indoor' management, with which an outsider acting in good faith is not concerned." Finally the plaintiffs contend that this case is covered by direct authority which is binding upon

this court. They say that in *Shaw v. Port Phillip and Colonial Gold Mining Company* (50 L. T. Rep. 685; 13 Q. B. Div. 103) the facts, which were there stated in a special case, were practically identical with those with which I have to deal. The secretary of the defendant company in that case fraudulently forged the director's signature to a share certificate, affixed the company's seal without authority, and issued it to one Gledhill, who took it in good faith. Gledhill deposited the certificate with the plaintiff as security for advances, and executed a transfer of the shares to the plaintiff. The company refused to register the plaintiff as owner of the shares. The Divisional Court (Stephen and Mathew, JJ.) held the company liable for the agreed value of the shares, the question for the court being, as stated in the special case, whether the plaintiff had a good title to the shares as against the company. Stephen, J. bases his judgment on the ground of estoppel, as established by the case of *Re Bahia and San Francisco Railway Company* (*sup.*). He said: "It is said in answer that here the secretary carried out his fraud by means of forgery. It appears to me that this fact does not make any material difference. The defendants' counsel said it did make a difference on the ground, so far as I understand his argument, that nothing can give validity to a forged instrument as against anybody. That does not seem to me to be the case, and I think the authorities cited for the plaintiff are applicable. The company appear in this case to have prescribed certain formalities with regard to the use of the seal and the issue of certificates. The certificate is to be signed by a director and the secretary. In the present case it apparently does comply with those formalities. . . . A person can inform himself whether the certificate comes from the secretary, because he gets it from the secretary's office, but I do not see how, according to any practicable course of business, he can go behind the certificate and ascertain for himself such matters as whether the signature of the director is genuine. It appears to me, therefore, that the company have authorised the secretary and made it his official duty to act in such a way that his acts amount to a warranty by them of the genuineness of the certificate issued by him." Mathew, J. concurred upon the same grounds, and in the course of his judgment said: "It is obviously indispensable in the ordinary course of business that the secretary should perform these duties"—i.e., the execution of the certificate with the prescribed formalities and its issue—"and it never could have been contemplated that the purchaser of shares should himself ascertain that each of the prescribed formalities had in fact been complied with. . . . It was argued by the counsel for the defendants that the fact that the certificate was a forgery prevented their being liable for the act of their agent, but he failed, as it appeared to me, to establish any difference for this purpose between a fraud carried out by means of forgery and any other fraud." To these arguments of the plaintiffs the defendants oppose the doctrine which was enunciated by Willes, J. in his judgment in the Exchequer Chamber in *Barwick v. English Joint Stock Bank* (16 L. T. Rep. 461; L. Rep. 2 Ex. 259), and which, after being approved in the House of Lords and in the Privy Council, formed the basis of the decision of the

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Court of Appeal in 1887 in *British Mutual Banking Company v. Charnwood Forest Railway Company (sup.)*. That doctrine, as stated in the headnote of the last-mentioned case, is that a principal is not liable in an action of deceit for the unauthorised and fraudulent act of a servant or agent, committed, not for the general or special benefit of the principal, but for the servant's or agent's private ends. It is urged that this principle is applicable here, because, unquestionably, Rowe's acts in forging and issuing the certificate were done for his own personal advantage, and in no way for, or in the interest of, the company, and the company has received no benefit from them. It is, as the defendants urge, not the case of a document which has been issued irregularly, or without the proper formalities or authorisation according to the company's articles, as, for example, the mortgage in *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Company* (72 L. T. Rep. 375; (1895) 1 Ch. 629), which is referred to by Mr. Palmer in the passage from his book which I have quoted above, but it is the case of a certificate which was never "issued," in any proper sense of the term, by the company. It is the case of a mere forgery committed by a servant of the company by means of a dishonest and unauthorised use of the company's seal wholly for his own private ends. The defendants rely also on the case recently decided in the House of Lords, *George Whitechurch Limited v. Cavanagh* (85 L. T. Rep. 349; (1902) A. C. 117). In that case the House of Lords (Lord Robertson doubting) held, reversing the decision of Bigham, J. and of the Court of Appeal, that a limited company was not estopped by a fraudulent "certification" of their secretary that certificates for shares were in the company's office, from showing that the proposed transferor had no shares to transfer. There are, no doubt, in the judgments of the noble and learned Lords important observations upon the question of estoppel by representation which make for the defendants' contentions in the present case, but the decision of the House of Lords is as to the existence of an estoppel in the case of a certification—a very different class of document from a share certificate under seal—and both Lord Macnaghten and Lord Brampton refer to that difference. "There is a marked difference," said Lord Macnaghten (at p. 126), "between a certificate and a certification. A certificate is under the seal of the company. By the Companies Act 1862 a certificate is made *prima facie* evidence of title. If faith were not given to the solemn assertions of a company under its common seal, it would, as Lord Cairns observed in *Burkinshaw v. Nicolls*, paralyse the whole of the dealings with shares in public companies. A certification stands on a different footing altogether. Transfers are never certified under the company's seal. There is no obligation on a company to certify transfers at all. The certification is not passed by the directors or brought before the board." Lord Brampton said: "I take it to be common knowledge of all intelligent men of business that there is a wide and well-recognised difference between a certificate of shares under the seal of the company, which by sect. 31 of the Companies Act 1862 is made *prima facie* evidence of the title of the person named in it to the shares therein specified (see *Re Bahia and San Francisco Railway Company*), and a

transfer certification such as that which appears in the margin of the transfers in question." It appears to me that these pointed discriminations between share certificates and certifications are fairly relied upon by the plaintiffs' counsel as tending to support that part of his argument which rests on the special character of the document in the present case. It appears to me that my judgment properly depends upon the answers which ought to be given to three questions: (1) Is this case distinguishable, on the facts, from *Shaw v. Port Phillip and Colonial Gold Mining Company*? (2) If not, has that decision been overruled, or so treated in subsequent cases that it ought to be treated by me as overruled? (3) If it has been overruled, either expressly or by implication, then upon principle and authority, apart from that case, are the plaintiffs entitled to succeed in the present action? In regard to the first question, I have come to the conclusion that the two cases are in their material facts really indistinguishable. In each case the share certificate, on the faith of which the plaintiff has acted to his loss, was a forgery; in each case that forgery was the act of the secretary of the defendant company acting for his own purposes and profit, and not for or on behalf of or for the benefit of the company. The defendants' counsel in the present case suggested, but not, I think, strongly, that some difference might exist in the fact that Lindo, when he went to the defendant company's office and obtained the certificate, did not know that Rowe was the secretary, and believed him to be a director; and that the certificate was given by Rowe, not in the room marked "Transfer Office," or in a room in any way specially appropriated to the defendant company, but in one of the rooms in the office which might be the board-room of one of the other companies, which, like the defendant company, had their office in Bewick, Moreing, and Co.'s premises. I do not think that these circumstances can be held to make any real difference between the two cases. Lindo expressly deposed that he took the transfer to Rowe as an official of the defendant company, and I see no reason to doubt that he received the certificate also from him as an official of the defendant company. Before he acted on the certificate he knew that Rowe was the secretary. Rowe as secretary was superior to, and, as the defendants' head clerk stated, as secretary, responsible for, the clerks in the transfer department; and I fail to see how anything can turn upon the designation of the room in which the certificate was handed over to Lindo. This brings me to the second question, Has *Shaw v. Port Phillip and Colonial Gold Mining Company* been overruled or disapproved in any way which entitles me to disregard it as an authority of the Divisional Court of the Queen's Bench Division which binds me sitting at Nisi Prius? No judgment expressly overruling or disproving of the case was cited to me by counsel, and after careful search I have been unable to find any. In Lord Lindley's *Law of Companies* it is twice cited. At p. 82 (6th edit.) it is referred to with other cases and without comment in a note to the statement in the text that "the company cannot dispute the truth of the certificate as against the person to whom it is issued if he has suffered loss by acting or remaining inactive on the faith of it, or as against a

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person who has bought on the faith of it." At p. 668 it is referred to, and its effect and material facts are set out in the text itself, and a note is appended, "*Quere* whether in this case the secretary was acting for the company so as to bind it by his acts: (see *British Mutual Banking Company Limited v. Charnwood Forest Railway Company*, 57 L. T. Rep. 833; 18 Q. B. Div. 714). In Buckley, J.'s book on the Companies Acts (8th edit.) it is twice cited, not as being overruled by any later decision, but with the author's disapproval. At p. 103, after summarising the case, the author proceeds: "It is conceived that this case misapplied the principle of *Barwick v. English Joint Stock Bank*, for the secretary was clearly acting not for the benefit, i.e., for or on behalf of the company, but for his own interest, and in such case the company is not, in an action for deceit, liable for the fraud of its agent." At p. 117, after a reference to the law as laid down in *British Mutual Banking Company v. Charnwood Forest Railway Company*, the learned author says that the decision in *Shaw v. Port Phillip and Colonial Gold Mining Company* cannot, it is conceived, be reconciled with the principle as stated by the Court of Appeal in the former case. In Mr. Palmer's work on the law of companies the case is frequently cited, and nowhere with disapproval, or with any intimation that in the writer's opinion it can be treated as overruled. Now, although I myself might not have so decided, I should not be justified as a judge sitting at *Nisi Prius* in not conforming to a judgment of the Divisional Court which has not been expressly overruled or judicially disapproved, unless it was absolutely and unquestionably clear that it was inconsistent and could not be reconciled with later decisions of higher authority. I cannot say this in the present case. The guarded form in which such eminent authorities as Lord Lindley and Buckley, J. express their doubts of the correctness, in view of later cases, of the judgment of Mathew, L.J. and Stephen, J. in *Shaw v. Port Phillip and Colonial Gold Mining Company* affords in itself strong reason for my conclusion on this point. And, further, the thought which I have given to the matter since the trial has suggested to me two considerations which it might be argued at all events should be held to enable the law as laid down in *Shaw v. Port Phillip and Colonial Gold Mining Company* to be upheld without encroachment upon the principle of law enunciated by Willes, J. in *Barwick v. English Joint Stock Bank* and enforced by the Court of Appeal in *British Mutual Banking Company v. Charnwood Forest Railway Company*. The first of these considerations is that the doctrine as enunciated by Willes, J., and as approved and applied in the last-named case, is expressly in reference to an action of deceit. The right claimed by the plaintiffs in the case before Mathew, L.J. and Stephen, J., like the right claimed by the plaintiffs in the present case, to use the language of Bramwell, L.J. in *Simm v. Anglo-American Telegraph Company* (42 L. T. Rep. 377; 5 Q. B. Div. 188, at p. 202), is a right by estoppel. The nature of the claims in such an action and in an action of deceit are not identical, and the measure of the damages is not, I think, necessarily the same, though it may be so in some cases. The claim in *Shaw v. Port Phillip and Colonial Gold Mining Company* was for compen-

sation limited to the value of the shares, the plaintiff's title to which by estoppel the court held to have been wrongly denied by the defendant company. In an action of deceit the defendant, if held liable, is liable to a judgment for all the pecuniary loss of the plaintiff which has flowed naturally from the deceit. The second consideration is that which arises from the fact that in *Shaw v. Port Phillip and Colonial Gold Mining Company*, as in the present case, the case depended upon the liability of the company sued, not in respect of oral representations of a secretary as in *British Mutual Banking Company v. Charnwood Forest Railway Company*, nor in respect of a fraudulent "certification," which formed one of the two bases of claim in *George Whitechurch Limited v. Cavanagh*, but in respect of a share certificate under a company's seal, apparently genuine, created in the company's office by the company's servant, and issued to the recipient by a proper officer of the company; a document of a class to which, in the eye of the law of England, solemnity has always attached, and to which, in the case of trading companies, the Legislature intended, and, as Lord Cairns, Lord Blackburn, Lord Esher, and Lord Macnaghten have from time to time emphatically pointed out, the interests of mercantile business require that a large extent of faith should be given. After giving, however, full weight to these considerations, not only as tending to reconcile *Shaw v. Port Phillip and Colonial Gold Mining Company* with such cases as *British Mutual Banking Company v. Charnwood Forest Railway Company*, but also to support the plaintiffs' contention in the present case; after giving also, I hope, full weight to the arguments so ably put before me by the plaintiffs' counsel, I still feel myself bound to say that I decide this case, as I do, in the plaintiffs' favour simply because I cannot on the facts distinguish this case from *Shaw v. Port Phillip and Colonial Gold Mining Company*, and by that case I feel myself bound. If I had not felt myself so bound—I say it, of course, with profound respect for the learned judges who decided it—I should have preferred the view that a company is not in such a case as the present legally liable to make good the loss to a third party which has been caused by the fraud and forgery of its servant wholly without authority, and not for the company's purposes or benefit, but solely for his own private purposes and ends. Of course, in a case of so much gravity, and in which so large a sum of money depends upon the issue, the litigation will not stop here, and I have felt it my duty to deal at a length which I should otherwise have wished to avoid with the facts and the arguments and considerations relevant to those facts in order to give all the help I may to the parties concerned and to those who may hereafter have to consider this important case.

Judgment for the plaintiffs.

Solicitors: Gilbert Samuel and Co.; Ashurst, Morris, Crisp, and Co.

[PROB.]

In the Goods of WILLIAM SMITH.

[PROB.]

PROBATE, DIVORCE, AND ADMIRALTY
DIVISION.

PROBATE BUSINESS.

Thursday, Dec. 3, 1903.

(Before BUCKNILL, J.)

In the Goods of WILLIAM SMITH. (a)

*Probate—Colonial grant—Limited grant—Re-sealing—Colonial Probate Act, 1892 (55 & 56 Vict. c. 6).**If the proper conditions prescribed by the Colonial Probate Act 1892 have been complied with, a limited colonial grant may be resealed in the United Kingdom.*

APPLICATION.

William Smith, a person domiciled and resident in the island of St. Vincent, West Indies, died on the 1st April 1900. At that time the said William Smith was the administrator of the estate of one George Smith, who had died in 1894. George Smith was also domiciled and resident in St. Vincent at the time of his death. Part of the estate of George Smith consisted of certain deposit receipts and other documents contained in a box, and this box was in the possession of the Colonial Bank at Kingston, St. Vincent, when William Smith died in 1900. The deposit receipts and the documents stood in the name of William Smith. After the death of William Smith the Supreme Court of Judicature of St. Vincent granted letters of administration *de bonis non* in respect of the estate of George Smith to Elspet Smith, his widow. On the 28th June 1901 the widow applied for and obtained from the Supreme Court letters of administration to the estate of William Smith, but limited to "all the moneys and interests standing in the Colonial Bank in St. Vincent on deposit or otherwise in the name and to the credit of the said William Smith, and also so far only as concerns all the moneys in a box in the said bank left there for safe custody by Alexander Smith, William Alexander George Nanton, and Conrad Johnson Simmons, and the following securities, namely, (1) the Colonial Bank of New Zealand deposit receipt for the sum of 50*l.*, dated the 20th Dec. 1884, and numbered 181,194, and the moneys thereby secured; (2) the Colonial Bank of New Zealand deposit receipt for the sum of 100*l.*, dated the 1st July 1890, and numbered 8453, and the moneys thereby secured; (3) the East London Savings Bank book, showing a deposit of 10*l.* in favour of the said William Smith, and the moneys thereby secured," being the property of George Smith in the hands of William Smith. All the next of kin of William Smith had consented to the application of the widow, Elspet Smith, for the limited grant in the colonial court, and had made affidavits in favour of the application. It was now sought to have the letters of administration resealed in accordance with the provisions of the Colonial Probate Act 1892 (55 & 56 Vict. c. 6). Before making formal application for the re-sealing of the limited grant the solicitors for the applicant wrote the following letter to one of the principal registrars of the Probate Division, dated the 24th Oct. 1903:

On the 28th June 1901, letters of administration of the effects (limited as after mentioned) of William Smith,

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

the younger, who died on the 1st April 1900 at St. Vincent, where he was domiciled, were granted by the Superior Court of Judicature in St. Vincent to Elspet Smith, widow of George Smith, of whose estate his brother, William Smith, was administrator. William Smith received various sums of money belonging to the estate of George Smith, which, according to the custom of St. Vincent, were deposited in his own name, and not as administrator, and included a deposit of 50*l.* at the Colonial Bank of New Zealand, another for 100*l.* at the same bank, and 10*l.* in the East London Savings Bank. The letters of administration granted in 1901 as above were limited to some money in St. Vincent and to the funds above specified, and they were granted upon the renunciation and with the consent of Alexander Smith, Isabella Nanton, Margery Smith, and Rosalie Mitchell, the sole next of kin of the deceased. The letters of administration and office copies of the several renunciations are here, and Elspet Smith desires to have them resealed with the seal of the English Court to enable her to obtain payment of the sums in this country, amounting to about 160*l.* On the 19th Sept. 1903, letters of administration to the effects of the said William Smith, the younger (except those included in the grant of 1901, which is therein mentioned), were granted by the court in St. Vincent to Alexander Smith, one of the next of kin. The next of kin of William Smith, the younger, considered the said Elspet Smith, under the circumstances above stated, to be a creditor of the intestate as regarded the securities specified in the grant to her, and therefore renounced and consented to it. The above facts can, if necessary, be verified by the affidavit of Elspet Smith, and no doubt by an independent party. We shall be glad to know whether, under these circumstances, the letters of administration of the 8th June 1901 will be resealed on presentation, as in the case of a Scotch or Irish grant, or what further evidence will be required. It will be observed that the assets are very small, and it is therefore desirable to save expense as much as possible.

The registrar of the Probate Registry refused to deal with the question by correspondence, but suggested an interview, which was accordingly arranged. At the interview the registrar saw all the documents referred to, and expressed an opinion that the letters of administration could be resealed. The notice required by the rules was thereupon advertised in the *Times*, and the ordinary steps taken for obtaining the re-sealing. When application was made, however, for the letters of administration to be handed out, the solicitors for the applicant were informed that the registrars had found that there was no precedent in the matter and declined to make one, as the Colonial Probate Act only said that letters of administration "may" be resealed, and not that they "must" be.

In order that there should be no mistake as to facts if the case had eventually to be brought into court, another letter was addressed to the registrars on the 28th Nov. 1903, in the following terms:

The facts of this case are fully stated in our letter of the 24th Oct. 1903. In consequence of your reply objecting to entering into the question in writing, we attended on the 27th Oct., and the registrar in attendance at once said that the letters of administration granted by the court in St. Vincent could be resealed here as desired. We accordingly gave notice by advertisements, as required by your orders, of the intended application, and obtained and lodged the necessary affidavits and bond; but, to our surprise, on applying for the letters resealed, we were informed that as this was the first application of the kind, and as the

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Act of Parliament used the word "may" and not "must," the registrars refused to allow the letters of administration to be resealed. This statement seems so utterly incredible that we considered it would be an injustice to you to take further action and publish such a statement without giving you an opportunity of correcting it, if not correct. Moreover, it is very desirable that, in any future development of this case, there should be no dispute as to facts, as many people would be inclined to doubt that such an objection could have been raised. There always must be a first case, and therefore if this is one, that can be no objection; and if the point raised as to the words "may" and "must" had any weight, it would simply enable an application to be capriciously refused. Our client is much inconvenienced by the delay, and has already been put to some expense, so we should not feel justified in letting the matter drop. As there can be no mistake about a written statement, though there may be about a verbal one, we think it better, notwithstanding your previous letter, to write to you; and, unless we receive a reply within a week stating in what respects (if any) the above statement is inaccurate, or on what grounds you refuse to reseat the letters of administration granted in St. Vincent, we shall assume that the statement is accurate, and that there is no other ground than that above stated for refusing the application to reseat.

The registrars again refused to commit themselves by a written reply, but at an interview the solicitors were informed that the refusal to reseat was not grounded upon the word in the Act of Parliament being "may" and not "must," but because they had a discretion under the Act, and they refused to make a precedent. It was further suggested that the grant made by the Court of St. Vincent was irregular.

In consequence of the refusal and the objections of the registrars, an application was made to the court, on motion, for the resealing of the limited colonial grant.

Barnard for the applicant.—The Bank of New Zealand, having their principal office in London, had refused to part with the securities until the limited grant of the letters of administration had been resealed in England. There was no limitation contained in the Colonial Probate Act, 1892, as to the kind of grant which might be resealed. It was necessary to get the authority of the Colonial Bank of New Zealand in England to draw out the money on deposit. The registrars had raised the point as to the grant being *ultra vires*, but they had no power to consider that.

BUCKNILL, J.—There is no necessity to consider the last point. The difficulty seems to me to be as to what ought to be done in this country, and why it could not be done in St. Vincent. However, I am of opinion that if the facts set out in the letters to the registrars are verified by affidavit, the court has power, under the Colonial Probate Act, to order that the limited grant made in the colonial court be resealed here. I shall therefore order that the grant be resealed.

Solicitors: *Pickering and Neilson*.

Wednesday, Jan. 27.

(Before Sir F. JEUNE, President.)

In the Goods of MARY GOODRICH; PAYNE v. BENNETT. (a)

Certificate of Birth—Date of birth—Births and Deaths Registration Act 1836 (6 & 7 Will. 4, c. 86)—Evidence.

When an entry of a birth is made in the register ordered to be kept by the Births and Deaths Registration Act 1836 (6 & 7 Will. 4, c. 86), the certified copy of such entry is evidence not only of the fact of the birth, but also of the actual date on which the birth took place.

Re Wintle (21 L. T. Rep. 781; L. Rep. 9 Eq. 373) not followed.

ACTION.

Suit for the revocation of a grant of letters of administration, but there was a further question raised as to the legitimacy of the defendant.

The plaintiff was Abraham Payne, and he claimed, as the lawful nephew and one of the next of kin of Mary Goodrich, late of Shelland, Suffolk, who died a widow, intestate, and without child or parent, on the 6th March 1902, that the grant of letters of administration made on the 16th May 1902 to the defendant, Ellen Bennett, should be revoked. The ground for seeking revocation was that the said Ellen Bennett was not the natural and lawful daughter of the deceased intestate. There was a further claim by the plaintiff that letters of administration should be granted to him. The defendant denied these allegations, and declared that she was entitled to the grant.

The plaintiff, Abraham Payne, was the son of James Payne, the brother of the deceased intestate, Mary Goodrich. The defendant, Ellen Bennett, was the daughter of the deceased intestate; but there was a question as to whether she was or was not born in wedlock. Mrs. Goodrich was married on the 9th April 1844, but it was alleged that Ellen Bennett was born on the 20th Feb. of the same year, and was therefore illegitimate, and not entitled, therefore, to a grant of letters of administration.

Priestley, K.C. and *Sherrington* for the plaintiff.—They put in a birth certificate, dated the 1st May 1844, recording the fact of the birth of one Ellen Goodrich on the 20th Feb. 1844, the daughter of George Goodrich and Mary Goodrich, formerly Payne. The evidence of Thomas Pearson Johnson, taken on commission, was also put in. The witness deposed to the fact that he had been taken by his grandfather to the wedding of George Goodrich and Mary Payne when he was seven years of age; that the defendant, Ellen, was their daughter; and that Mrs. Goodrich had told him that Ellen was her illegitimate child. As to the admissibility of this evidence they referred to

Goodright v. Moss, 2 Cowp. 591;

Whitelocks v. Baker, 13 Ves. 511.

May for the defendant.—The document as to the birth was not admissible. There was no compulsion under the Act of William IV. on any person to give information as to the birth of a child. Registration had to be paid for. It was a well-known fact that immense numbers of births were never registered. The document was only

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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evidence of the fact of birth, and that the birth took place before the date of the registration:

Re Wintle, 21 L. T. Rep. 781; L. Rep. 9 Eq. 373.

[The PRESIDENT.—I cannot really follow the reasoning of Lord Romilly in that case. Sect. 38 of the Act of 1836 says that a certified copy is to be received as evidence "of the birth," whereas Lord Romilly says "of the fact of birth, and nothing more."] In *Wiher v. Law* (3 Stark. 63) Bayley, J. held that a certificate of baptism was not evidence as to the date of birth so as to prove the age of the party. He also cited

Doe d. Wollaston v. Barnes, 1 Moo. & Rob. 386;

Huntley v. Donovan, 15 Q. B. 96;

Ryan v. Ring, 25 L. Rep. (Ir.) 184.

Priestley in reply.—The point now raised had been decided in *Reg. v. Weaver* (29 L. T. Rep. 544; L. Rep. 2 C. C. R. 85). There, upon an indictment for carnally knowing a girl, being above the age of ten years and under the age of twelve years, a certified copy of an entry similar to the present, showing that the child was of the age of eleven years and eight months, was held sufficient proof of the age, there being independent evidence of the identity of the girl with the child whose name was entered in the book. The decision in *Re Wintle* (*ubi sup.*) had been adversely criticised by the editor in *Taylor on Evidence*.

The PRESIDENT.—I am of opinion that this certificate which has been produced is evidence not only of the fact of the birth of the defendant, but also of the date of the birth. It seems to me that a much too limited force has been placed upon the word "required" used in sect. 38 of the Births and Deaths Registration Act 1874 (37 & 38 Vict. c. 88), and I see no reason why the Act of Parliament should have limited it. There is not, to my mind, any ground for suggesting that information given under compulsion is more likely to be true than information which is given voluntarily. I do not feel any difficulty at all in holding that the certificate is evidence, and evidence of the contents of the document. It is true that there is the decision of Lord Romilly in the case of *Re Wintle* (*ubi sup.*), which is opposed to my own view of the matter, for it is clear that Lord Romilly did draw a distinction between the evidence of the fact of the birth of a child and the evidence of the actual date of birth. But it seems that that case has never been followed, and the opinion of one eminent authority has been quoted against it. Again, the case of *Reg. v. Weaver* (*ubi sup.*) has been referred to, and that seems to me to be conclusive, for, being a criminal case, it is certain that a conviction would not have been upheld if there had been any doubt as to the law upon the subject and the admissibility of the evidence. Personally I had always thought that the production of a certificate of this kind was the ordinary method of proving the date of birth of a person, and that every court of justice held the same view. I have no hesitation and no doubt in the matter.

[The court eventually found for the plaintiff, and revoked the letters of administration granted to the defendant.]

Solicitors for the plaintiff, *Aldridge, Thorn, and Sherrington*, for *Gudgeons, Pescock, and Prentice*, Stowmarket.

Solicitor for the defendant, *T. E. Crocker*.

Friday, Jan. 29.

(Before Sir F. JEUNE, President.)

TOMALIN v. SMART. (a)

Probate—Action for revocation—Counter-claim propounding will—Notice by plaintiff to cross-examine—Order XXI., r. 18—Costs—Practice.

The plaintiff brought an action for revocation of probate which had been granted in common form, and the defendant, by way of counter-claim, propounded the will. In his reply and defence to the counter-claim the plaintiff gave notice, under Order XXI., r. 18, of the Rules of the Supreme Court, that he merely insisted on the will being proved in solemn form, and that it was simply his intention to cross-examine the witnesses.

Held, that in the construction of this rule the principle which guided the Ecclesiastical Courts and the Probate Courts ought to be considered; that there was a distinction between a party who sought a revocation of probate and one who entered a caveat and took the ordinary steps to oppose a will being admitted to proof; and that the present plaintiff could not secure the benefit of the rule as to costs, since the notice given by him was bad.

ACTION.

Action for revocation of probate, in which the question of the right of a plaintiff to give a notice under Order XXI., r. 18, together with his defence and counter-claim, arose.

The plaintiff was George Reynolds Tomalin, and he sought to obtain revocation of the probate of the will of his wife, Alice Tomalin, who died in Guy's Hospital on the 11th Feb. 1903. The will was executed on the 28th Jan. 1903, and probate was granted in common form on the 22nd Feb. 1903. In his statement of claim the plaintiff alleged that

The pretended last will was not signed or executed by Alice Tomalin in the presence of R. W. Henstie, one of the alleged attesting witnesses; that the said Alice Tomalin did not request the said R. W. Henstie to sign or subscribe his name to the said pretended will as an attesting witness; and that the alleged attesting witness, John Groves, did not subscribe his name to the said pretended will in the presence of the said R. W. Henstie. The above are the only reasons why the plaintiff alleges . . . that the said pretended will is not the will of the said Alice Tomalin.

He also claimed a grant of letters of administration to himself.

The defendant, George Smart, was one of the executors named in the will. In his defence he denied the allegations set up in the statement of claim as to undue execution, and propounded the will by way of counter-claim. With his reply and defence to the counter-claim the plaintiff filed the following notice:

Take notice that the plaintiff merely insists upon the pretended will, dated the 28th day of January 1903, of Alice Tomalin being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the said will propounded in the counter-claim, and gives this notice pursuant to Order XXI., r. 18, of the Rules of the Supreme Court.

Order XXI., r. 18, is as follows:

In probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists upon the will being

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall not, in any event, be liable to pay the costs of the other side, unless the judge shall be of opinion that there was no reasonable ground for opposing the will.

The notice was returned by the defendant's solicitors, who asserted that the rule did not apply, and gave notice that the defendant would take objection to it if the plaintiff attempted to make use of it. At the hearing of the case objection was taken to the notice on the ground that it was the rule in probate actions that the party opposing the will might give notice of his intention to cross-examine along with his defence, but that the plaintiff was not such a party, since he was seeking a revocation of probate.

W. L. Richards, for the plaintiff, submitted that the notice was good. It was delivered along with the defence to the counter-claim. The defendant was seeking to establish the will, and his counter-claim was the same thing as an original action. The words of the rule refer to a "party" who gives the notice, and certainly the plaintiff was a party.

Pritchard for the defendant.—The plaintiff was not in the position of a defendant who opposed probate. He had brought his own action to revoke a probate already granted, and that made all the difference. He cited

Beale v. Beale, 30 L. T. Rep. 770; L. Rep. 3 P. & D. 179.

Plaintiff might have entered a caveat, and could then have taken advantage of the rule. Instead of doing so, he had rushed into litigation on his own account.

Richards in reply.—The case of *Beale v. Beale* (*ubi sup.*) was distinguished in *Leigh v. Green* (1892) P. 17. The former case was decided before the present rules came into existence. Now, under the rules of the Supreme Court of 1883, a statement of claim included a counter-claim, and a defence to a counter-claim was the same thing as a defence to a statement of claim. There was no difference as to this between the Probate and other divisions of the High Court. It would be a great hardship if it was held that there was any difference. In the present case the probate was obtained very few days after the death of the testatrix, and the plaintiff was practically precluded from being placed in the position of a defendant by the action of the executor. He also cited

Spicer v. Spicer, 79 L. T. Rep. 707; (1899) P. 38.

The PRESIDENT.—I am very much impressed with the practice in the Prerogative Court, where it was clear that a distinction was drawn between a person who opposed a will in the first instance and one who attacked a will after probate had been granted. And now, after the arguments that have been addressed to me, I realise the effect of the decision in *Beale v. Beale* (*ubi sup.*), which illustrates the distinction. I think the sense of the distinction lies in the fact that a person who wishes to oppose the probate of a will ought to announce his intention by entering a caveat as soon as possible, and taking the subsequent steps in the usual way. In such circumstances he is able to put the party who is setting up the will to proof in solemn form without much fear of having to pay the costs of the proceedings,

because, although there has been a modification in the former rule of practice so as to give the court a discretion as to costs, this modification does not affect the point that the safety from being condemned in costs is afforded to the party opposing the will. It does not say that the same protection will be afforded to a person who opposes the probate of a will—that is, a person seeking to recall a probate already granted, as here. It is certainly true that a counter-claim is, under the rules of the Supreme Court, to be treated as a statement of claim; but when I am called upon to construe a rule which is admitted to be a modification of a previous rule, I think that it is only fair and proper to inquire into the principles which were applied under the earlier rule, and to hold that the same principles ought to be applied under the new rule. If my view is the correct one, Order XXI., r. 18, does not apply to the case of a party who is seeking the revocation of a probate already granted. Its operation is confined to the case of a party who opposes a will which another party is seeking to prove in solemn form. There is, however, a discretion conferred on the court as to dealing with the costs, and I shall deal with them after the case has been heard.

[Eventually the court found that the will had been duly executed, and ordered probate to be delivered out to the defendant. The plaintiff was ordered to pay the costs.]

Solicitor for the plaintiff, *H. Cubitt Ireland*.

Solicitors for the defendant, *G. and W. Webb*.

DIVORCE BUSINESS.

Dec. 11, 1903, and Jan. 28, 1904.

(Before BUCKNILL, J.)

WYKE v. WYKE (The King's Proctor showing cause). (a)

Divorce—Wife's petition—Decree nisi—Adultery of petitioner—Discretion of court—Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85), s. 31.

The court has full discretion as to granting a decree nisi in favour of a petitioner, who has been found guilty of adultery, under sect. 31 of the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85), where the misconduct of the petitioner is more or less pardonable or can be excused, but in order that it may exercise this discretion the misconduct of the petitioner must have been caused by the misconduct or the offences of the respondent.

Constantinidi v. Constantinidi and Lance (89 L. T. Rep. 340; (1903) P. 246) distinguished.

MOTION on behalf of the King's Proctor for a rescission of the decree nisi pronounced on the 21st April 1903, and for the dismissal of the petition.

Victor Russell for the King's Proctor.

Le Mesurier, for the petitioner, called the petitioner and cited the following cases:

Symons v. Symons, 77 L. T. Rep. 142; (1897) P. 167;

Burdon v. Burdon, (1901) P. 52;

Constantinidi v. Constantinidi and Lance, 89 L. T. Rep. 340; (1903) P. 246;

Coombs v. Coombs, 89 L. T. Rep. 343.

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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The facts of the case are fully set out in the judgment.

Cur. adv. vult.

Jan. 28.—BUCKNILL, J.—In this case the wife is the petitioner, and she seeks to be divorced from her husband on the ground of his adultery and cruelty. The parties were married on the 28th Oct. 1891. There were three children born of the marriage: Lillian, born in March 1893; Harold, born in 1895; and Ada Ethel, born in Sept. 1897. The petitioner, in her petition, which was filed in Nov. 1902, alleged frequent acts of cruelty by the respondent in 1893 down to 1899; also, that he committed incestuous adultery in Jan. 1899, up to October in that year; and that, so soon as the petitioner became aware of it, in Sept. 1899, she left him, and had not since returned to cohabitation with him. The petition came on for hearing before the President on the 21st April 1903, when a decree nisi was pronounced. On the 14th Oct. 1903 the King's Proctor intervened, and, by his plea, alleged that the petitioner had often committed adultery with one William Earle, and had, on the 28th July 1903, borne a child to him, and had, since the 4th May 1903, been living with him as his wife. To this plea there was no answer, and on the 11th Dec. 1903 the matter came before me on motion, when the petitioner gave evidence. Her story was that when she left her husband in Sept. 1899, she obtained a situation as a barmaid, and managed to save enough money to institute these divorce proceedings; that she afterwards fell ill, and was in hospital for a long time, leaving it shortly before her petition came on for hearing, and could not afterwards get another situation, and was unable to do any hard work in consequence of a bodily ailment, which incapacitated her. "Then" (to use her own words) "when this young gentleman asked me to go and live with him, it was the only thing left for me to do, as I had expended all my earnings, which I had saved up, on the decree, to get what I wanted, so that I could marry again." She also stated that this same man was the father of her child, which was born in July 1903. Therefore, although she says she only went to live with him after the decree nisi, she committed adultery with him when she was earning her living as a barmaid, and whilst she says she was preparing her case for the divorce proceedings. On these facts can I exercise the discretion given to me by the 31st section of the Matrimonial Causes Act 1857, and pronounce a decree absolute, dissolving the marriage notwithstanding the adultery of the petitioner? In *McCord v. McCord, Ogle, and Coxon* (33 L. T. Rep. 264; L. Rep. 3 P. & D. 237) Sir James Hannen thus stated the position: "The instances in which the court has pronounced a decree for dissolution of marriage, notwithstanding the adultery of the petitioner, are very rare. I am only aware of two cases, that of *Joseph v. Joseph and Wentzell* (13 W. R. 872; 34 L. J. 96, P. & M.), where the petitioner had committed what may be called innocent adultery by marrying again in the mistaken belief that his wife was dead, and the case of *Coleman v. Coleman* (13 L. T. Rep. 684; L. Rep. 1 P. & D. 81), where it appeared to the court that the petitioner had been compelled by her husband to prostitute herself." At p. 241 of the report the President pointed out that whilst he would not say that under no circumstances

would the court grant relief to a guilty petitioner when he or she had been fully forgiven for an act of adultery, yet the court would never act on a loose and unfettered discretion, as Lord Penzance had expressed it in *Morgan v. Morgan and Porter* (20 L. T. Rep. 588; L. Rep. 1 P. & D. 644), but always on some definite principle which would serve as a future guide. That principle had been laid down by Lord Penzance, in the same case, to be, that there must be some special circumstances attending the adultery of the petitioner, or special feature placing it in some category capable of distinct statement and recognition. Twelve years afterwards, in *Story v. Story and O'Connor* (57 L. T. Rep. 536; 12 P. Div. 196) Sir James Hannen referred to his judgment in *McCord v. McCord, Ogle, and Coxon* (*ubi sup.*). He said: "I had occasion, as long ago as in 1875, to go very carefully into this question, examining the principles on which my predecessors had acted, and I endeavoured to lay down a guide for myself. I have acted in accordance with those principles ever since." It was not until ten years after that case that it was decided, in terms, that misconduct of a petitioner, which in fact conduced directly to the subsequent adultery of the wife, might be taken into consideration as a ground for exercising the discretion given by the 31st section. I refer to *Symons v. Symons* (77 L. T. Rep. 142; (1897) P. 167), decided by the President (Sir F. H. Jeune). There the wife was petitioner, and she obtained a decree nisi on the grounds of her husband's adultery and desertion. The Queen's Proctor intervened, alleging her adultery. It is not necessary to refer to the facts of that case, but I quote the language of Jeune, P. He said: "I have no doubt that the husband's adultery and cruelty before his desertion and his prolonged desertion were the main causes of the wife's adultery, and he was guilty, therefore, of misconduct conducing to her adultery. So far as I know, this has not yet been decided to be one of the circumstances on which the discretion to allow a divorce may be exercised." And he said, referring to the facts of that case: "On principle, there appear to me to be strong reasons for holding that wilful neglect or misconduct by a husband should constitute matters, possibly not always conclusive, but fit to be taken into consideration in exercising the discretion whether a divorce shall be granted against him." In that case the decree nisi was made absolute. That decision was followed by *Constantinidi v. Constantinidi and Lance* (89 L. T. Rep. 340; (1903) P. 246). There the husband was petitioner, and a decree nisi was granted. The President pointed out during the arguments that in *Symons v. Symons* (*ubi sup.*) he found as a fact that the husband (the respondent) was actually responsible for and drove his wife to commit adultery; by which I understand that his misconduct conduced directly to her adultery. In his judgment the President said that sect. 31 conferred "a discretion on the Divorce Court, without imposing specifically any limitations or any direction with regard to its exercise." Whilst accepting that dictum as binding it seems to me that it goes farther than any previous authority on the subject. That case must, of course, be determined according to its own facts. No feeling of sympathy, as, for instance, on behalf of an ill-treated woman, as in this case, can be entertained; nor may I

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listen to the appeal that she made to me, that if she can obtain her divorce to-day, another man is ready to marry her, and take her child. The only question is this, Was her misconduct caused directly by her husband's cruelty and adultery? It is not enough that I could find, using the language of Lord Penzance in *Morgan v. Morgan and Porter* (*ubi sup.*), that her conduct was "more or less pardonable or capable of excuse." Perhaps it was to some extent, and, in a sense, her husband's misconduct conduced to that which she did three years after she left him, because, but for his cruelty to her and his adultery with her sister, she would probably be living with him now. Her leaving him was directly caused by his conduct, but, in my opinion, her subsequent adultery was not. From Oct. 1899 to Oct. or Nov. 1902 she lead a respectable life, earning her living, and was, she says, saving money slowly, so that she might take proceedings for divorce. Then she met the man with whom she is now living, and by whom she had a child in July 1903. How can it be truly said that her conduct then was directly caused by her husband's conduct before she left him? In my opinion it is impossible so to decide, and my judgment must therefore be, and is, that the decree *nisi* be rescinded and the petition dismissed with costs.

Solicitors, *The King's Proctor.*

Solicitors for the petitioner, *Nordon, De Frece, and Benjamin*, for *William H. Quilliam*, Liverpool.

Tuesday, Feb. 2.

DIVISIONAL COURT.

(Before Sir F. JEUNE, President, and BARNES, J.).

WILLIAMS v. WILLIAMS. (a)

Separation — Desertion — Condonation — Second separation — Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39), ss. 4, 7.

Where an offence has been committed which prima facie entitles a married woman to an order under sect. 4 of the Summary Jurisdiction (Married Women) Act 1895, and the offence has been condoned by the wife, the effect of such condonation depends upon the common law and not upon any section of that Act.

A married woman issued a summons against her husband complaining of his desertion. The hearing of the summons was adjourned by the justices before whom it came, and before the resumed hearing the wife resumed cohabitation with her husband. She subsequently left him — this also before the resumed hearing — and the justices at the hearing granted her an order for separation and an allowance for maintenance.

Held, the order must be discharged since the wife had put an end to the original cause of complaint by the resumption of cohabitation, and that the justices had nothing to adjudicate upon at the date of the adjourned hearing when the order was made.

APPEAL from justices.

Appeal by William Henry Williams from an order, dated the 28th Oct. 1903, made by the justices of Salford, under which he was adjudged

to have been guilty of desertion of his wife, and in virtue of which she was granted a separation and maintenance at the rate of 10s. per week.

The parties were married on the 16th May 1903 and the husband left his wife on the 3rd Aug. The wife lodged a complaint two days later, and the summons came on for hearing on the 14th Aug. After the wife had given her evidence the justices suggested that there should be an adjournment with a view to the reconciliation of the parties. The hearing was accordingly adjourned until the 28th Oct.

On the 29th Aug. cohabitation was resumed, and Mr. and Mrs. Williams lived as husband and wife for a month, when fresh differences arose. They remained, however, under the same roof, and when the date of the adjourned hearing arrived the wife obtained an order from the justices, unknown to her husband, by representing to them that she was living apart from her husband. A week later the husband applied to the justices for a rescission of the order on the ground that the original offence, if any, had been condoned by the resumption of cohabitation. The justices refused, however, to rescind the order.

The husband appealed.

Lushington for the appellant.—There was no power for the justices to make the order after a resumption of cohabitation. The cause of complaint, the original alleged desertion, was gone. It was expressly provided by sect. 7 of the Act that any order made under the Act was put an end to by the resumption of cohabitation. There must be actual desertion at the date when the order is made. In a matrimonial suit in the Divorce Court condonation would be a complete answer to a charge of desertion, and the same thing must have been intended by the Legislature under the Act of 1895. At common law condonation is an answer:

Harris v. Morris, 4 Esp. 41.

If a man had been convicted of an assault upon his wife, had served his sentence, and then lived with her again, could the fact of the assault be brought up against him again? Condonation is expressly recognised under sect. 6 of the Act in the case of the adultery of the wife.

The respondent was not represented.

The PRESIDENT.—It is unfortunate that the wife is not represented here to-day, as it would have been an advantage to hear what might have been said on her behalf. As far as I can judge, however, it is scarcely possible to conceive any argument which could afford an answer to what has been urged by the counsel for the appellant. From the facts of the case it seems that during the adjournment of the summons a resumption of cohabitation took place between the husband and wife, the very thing the justices desired. Now, what is the effect of this? It is true that the case does not come exactly within the terms of sect. 7 of the Act of 1895, because it took place during the course of the litigation and before the date of the order. The effect of the condonation was to put an end to the cause of complaint by force of law, and not by virtue of the Act. The principle that an end is put to desertion by a resumption of cohabitation, a principle acted upon by the judges of this court and by their predecessors in the Ecclesiastical Courts, is founded

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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on the common law. During the course of the argument the case of *Haddon v. Haddon* (56 L. T. Rep. 716; 18 Q. B. Div. 778) was referred to by Barnes, J. It appears from that case that there had been a conviction before a court of summary jurisdiction under the Matrimonial Causes Act 1878 (41 & 42 Vict. c. 19)—and it should be noted that the Act of 1878 contained a provision as to condonation similar to that found in the Act of 1895—and afterwards a resumption of cohabitation took place. It was held by Hawkins and Smith, J.J. that the wife could not, after leaving her husband a second time, enforce the order which had originally been made by the justices. In the course of his judgment in that case Hawkins, J. referred to the case of *Bateman v. Countess of Ross* (1 Dow, 235), decided by Lord Eldon, who, speaking of the effect of a reconciliation of married persons after a separation, “held the general doctrine to be clear that a reconciliation after a separation entirely did away with the effects of it,” and that “this rested upon the ground of public policy, as it must not be permitted to parties to make arrangements for themselves, to hold good whenever they chose to live separate.” And he added farther, “I am not aware that this general proposition has ever been dissented from.” And I believe that such is the case, though no doubt the reason given by Lord Eldon is obsolete. Under the circumstances I have no hesitation at all in holding that the resumption of cohabitation during the adjournment of the summons in this case put an end to the cause of complaint, and that the power of the justices to make any order under the Act had completely passed away. The appeal will, therefore, be allowed, and the order discharged.

BARNES, J.—I entirely agree, but I wish to make a reference to the last clause of sect. 7 of the Act of 1895, which provides that “if any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband . . . such order shall, upon proof thereof, be discharged.” That provision is based upon the principle that the resumption of cohabitation by the wife condones and puts an end to the cause of complaint. If, therefore, it is shown that the parties have voluntarily resumed cohabitation any cause of complaint which one of them had against the other must have been put an end to by the mere fact of the resumption of cohabitation.

Solicitors: *Fielder, Le Riche, and Co.*, for *E. Desquesnes*, Salford.

Tuesday, March 1.

(Before Sir F. JEUNE, President, and BARNES, J.)

FROWD v. FROWD. (a)

Separation order—Desertion of husband—Reasonable cause—Rejection of evidences—Appeal—Remission to justices—Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39), ss. 4, 6.

The word “desertion” used in sect. 4 of the Summary Jurisdiction (Married Women) Act 1895

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

has the same meaning as in the *Matrimonial Causes Act 1857* (20 & 21 Vict. c. 85). It does not signify simply cessation of cohabitation, but cessation of cohabitation without reasonable cause.

It is the duty of justices before whom a summons under the Act of 1895 is heard to allow the husband to cross-examine his wife as to her conduct, and to admit evidence on his behalf showing that the husband has a reasonable excuse or cause for refusing to live with his wife and so to leave her.

If the justices find that the husband had reasonable cause for separating from his wife, there is no desertion under sect. 4 of the Act of 1895, and the wife is not entitled to any order.

APPEAL from justices.

Appeal by the husband, Herbert Haddon Frowd, from an order of the justices of Eastbourne, dated the 1st Feb. 1904, by which a separation order was granted to the wife, Rose Fanny Frowd, on the ground of the desertion of her husband. By the order a sum of 15s. per week was awarded to the wife for her maintenance, and she was allowed reasonable access to her child, the custody remaining with the husband.

The parties were married on the 28th April 1896, and the only child of the marriage was born in 1899.

Early in 1902 the wife confessed to having committed adultery with one Dyer on numerous occasions, and Dyer subsequently admitted the offence.

On the 14th Feb. 1902 the husband forgave his wife, and the parties became reconciled on her undertaking to hold no further communication with Dyer, and on the payment of a sum of 25l. by Dyer to the appellant.

Early in July 1902 the wife remained out all night, and the husband charged her with having committed adultery with one Wenham. She denied the charge, and for ten days remained under the same roof as her husband; but he treated her with such unkindness and kept her so short of food that she was compelled to leave the house on the 18th July.

Immediately after her departure she took out a summons against her husband for desertion, but the hearing was adjourned on the understanding that divorce proceedings were pending between the parties.

Meanwhile the husband discovered that his wife had been in constant communication with Dyer, and had written a large number of letters of a questionable character to him. She was also alleged to have made an indecent sketch and to have written some amorous verses. These were produced at the hearing of the divorce suit in May 1903, when the jury found that the wife had not committed adultery with Wenham.

After the divorce suit Mrs. Frowd wrote to her husband asking him to take her back, but he refused absolutely, offering, however, to agree to a separation and to pay her a sum of 10s. per week, he retaining the custody of the child. This offer was declined by Mrs. Frowd, and a summons under the Act of 1895 was taken out by her and came on for hearing before the justices at Eastbourne on the 1st Feb. 1904.

After hearing the facts as to the circumstances under which she left her husband's house on the

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18th July 1902, the justices were of opinion that nothing except adultery could exonerate the husband from liability to provide maintenance for his wife, and declined to allow her to be cross-examined as to her conduct, or witnesses to be called on behalf of the husband to show that there was reasonable cause on his part for refusing to live with her. They granted a separation order as above stated, and maintenance at the rate of 15s. per week.

The husband appealed.

The grounds of appeal set out in his notice were:

(1) That defendant had not and never has deserted the said applicant within the meaning of sect. 4 of the Summary Jurisdiction (Married Women) Act 1895.

(2) That the evidence upon which such order or finding was made was not sufficient in law or in fact to justify such judgment, order or finding.

(3) That the said justices were wrong in refusing to allow the said applicant to be cross-examined, and in refusing to admit the evidence tendered on behalf of the defendant with a view to showing that the separation (if any) which had taken place between the said applicant and the said defendant had been brought about by the conduct of the said applicant, which conduct, though not amounting to a matrimonial offence, disabled the said applicant from contending that the said defendant had deserted her.

Le Bas for the appellant.—The justices were wrong in refusing to admit the evidence tendered. Whatever the conduct of the husband had been at the time when the wife left her home, the justices were bound to take into consideration the conduct of the wife before and after the separation took place. The whole of the correspondence with Dyer had not been discovered on the 18th July, 1903. Desertion had been considered over and over again in that court, and the meaning of the word had been well defined. Even if there was not sufficient cause in the first instance for the husband to turn his wife out of doors, the knowledge afterwards obtained by him might be sufficient to justify him in refusing to resume cohabitation with her. He referred to

Yeatman v. Yeatman, 18 L. T. Rep. 415; L. Rep. 1 P. 489;

Russell v. Russell, 73 L. T. Rep. 295; (1895) P. 315;

Oldroyd v. Oldroyd, 74 L. T. Rep. 281; (1896) P. 175;

Wassell v. Wassell, 81 L. T. Rep. 496.

J. A. Slater (E. E. Humphrys with him) for the respondent.—The desertion intended by sect. 4 of the Act of 1895 was not the same thing as that of the Act of 1857. In the latter Act the words "without reasonable cause" occur. These are wanting in the Act of 1895. It was sufficient for the justices to find the fact that the husband had left his wife or acted in such a manner that she had been compelled to leave him, and then, by virtue of sect. 6 of the Act, there was nothing but her uncondoned adultery that could disentitle her to an order. [The PRESIDENT.—If the conduct of the wife is so bad that it is intolerable for her husband to live with her, can he be said to have deserted her if they live separate? The Act says that if the husband has neglected his wife by wilfully failing to provide her with reasonable maintenance and has so caused her to "leave and live separately and apart from him" she may apply for an order for

maintenance, and nothing but adultery can disentitle her to such an order if the justices find the facts in her favour. If desertion, as used in sect. 4, was to be qualified by the words "without reasonable cause," sect. 6 of the Act was superfluous, for the wife's adultery would be a sufficient answer to her allegation of desertion. In any case the evidence which it was desired to tender was totally irrelevant, and had nothing to do with the desertion.

The PRESIDENT.—The question in this case turns upon the meaning of the word "desertion" used in sect. 4 of the Act of 1895. For the appellant it has been urged that the word is used in the same sense and with the same meaning that it has acquired in all the proceedings of this court, whilst for the wife it has been contended that the word has a separate and distinct meaning. In the cases that have been referred to by Mr. Le Bas the matter has been fully considered, and it has been made quite clear that desertion is not merely a cessation of cohabitation, but a cessation of cohabitation without reasonable cause. This court has always acted on that principle. If a wife brings a suit for restitution of conjugal rights no order will be made in her favour if she has been guilty of cruelty which does not amount to a matrimonial offence. The conduct of a wife may be such that it is intolerable for her husband to live with her. If, then, he leaves her, or if they begin to live apart, is there not some reasonable ground for his action? In such a case there is no desertion on the part of the husband. It seems to me absurd to suggest that there is a distinction between the Act of 1857 and the Act of 1895. If there is a reasonable excuse and a husband leaves his wife there is no desertion. Desertion is a continuing offence. It may commence on a certain date, and afterwards the husband may discover other facts and refuse to take his wife back. He may think that he has reasonable grounds for his refusal, and that whatever were the original reasons for the separation his subsequent knowledge of facts will place his conduct in a different light. In the present case the husband made certain discoveries after the 18th July 1902, and he desired on the hearing of the summons to lay the grounds for his conduct before the magistrates, and to point out to them that he was, in his opinion, fully justified in refusing to live with her. The magistrates declined to hear any evidence on the subject. They thought that after evidence had been given of the fact of desertion, adultery alone could be set up in answer to the wife's complaint. In that view I think the magistrates were distinctly wrong. They ought to have heard the evidence for what it was worth. Even after hearing it they may come to the same conclusion, and hold that the husband has been guilty of desertion. Upon that I do not express any opinion, for I have not read the letters in question. But that is not the point. What has to be decided is whether the husband had a reasonable cause for leaving his wife, and without hearing the whole of the evidence tendered the justices could not arrive at a proper decision upon the matter. The case must be remitted to them to hear the evidence.

BARNES, J.—I agree. It has been argued for the wife that the husband has no right to refuse,

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to live with his wife, and that he is guilty of desertion if he leaves her or causes her to leave him. If a wife were to beat her husband with a poker would he not have a reasonable excuse for leaving her? It has been urged that a husband's only excuse is adultery on the part of his wife. That is a wrong idea. Adultery is an excuse when desertion has been found. But what is desertion? It has the same meaning in the Act of 1895 as in the Act of 1857 and signifies desertion without reasonable cause. The case must be sent back.

Solicitors for the appellant, *Hillman and Burt*, Eastbourne.

Solicitor for the respondent, *F. W. A. Cushman*, Brighton.

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 10 and 11.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re DALLAS. (a)

APPEAL FROM THE CHANCERY DIVISION.

Mortgage — Priority — Notice — Charges upon expectant legacy — Fund not in existence or under control of any person at date of creation of incumbrances — Notices given by incumbrancers on fund coming under control.

Where charges were created, during the lifetime of a testator, by a beneficiary upon his expectant legacy under the will of the testator—of which charges no effective notice could be given by any of the incumbrancers until the legacy charged came into existence and some person had control of it—it was held that the order of the dates at which notices were given, by the incumbrancers of their respective securities, to the legal personal representative of the testator, was sufficient to determine the priorities of the several incumbrancers, according to the principle of *Johnstone v. Cox* (45 L. T. Rep. 657; 19 Ch. Div. 17) and similar authorities; and that such priorities ought not to be regulated by reference to the dates of the securities themselves.

Ward v. Duncombe (69 L. T. Rep. 121; (1893) A. C. 369) considered.

Decision of Buckley, J. affirmed.

ROBERT DALLAS, by his will dated the 7th July 1893, after directing the payment of his just debts and funeral and testamentary expenses gave and bequeathed to his son Frederick Dallas the sum of 10,000*l.*, and after a bequest of like amount to his daughter Emily Beedell, and other bequests, appointed his son Frederick Dallas, his son-in-law William Beedell, and Edgar Francis Jenkins executors of his will, and gave all the residue of his property to them upon the trusts and for the benefit of the persons therein mentioned.

Subsequently to the date of his executing his will the testator became of unsound mind; and by an order of the Court of Lunacy dated the

28th June 1898 a receiver was appointed of his estate.

Edgar Francis Jenkins died in the lifetime of the testator, on the 18th Jan. 1898, having by his will appointed Charles Elliott Edward Jenkins and Edward William Hansell executors and trustees thereof, but the latter renounced probate, and disclaimed the trusts of the will.

William Beedell also died in the lifetime of the testator, on the 21st Jan. 1899.

The testator died on the 24th Dec. 1902, without having altered or revoked his will.

At the date of the testator's death his estate consisted of moneys and investments either standing in court in Lunacy or under the control of the court.

On the 9th Jan. 1903 the testator's son Frederick Dallas renounced probate of the will, and on the same day by deed disclaimed the trusts thereof.

On the 4th March 1903 letters of administration with the will annexed of the personal estate of the testator were granted to his daughter Emily Beedell.

By an order of the Court of Lunacy dated the 27th March 1903 (but made on the 17th March 1903) it was ordered that the whole of the estate of the testator should be paid out and transferred to Emily Beedell as the legal personal representative of the testator.

On the 12th May 1903 Frederick Dallas was adjudicated bankrupt.

On the 28th May 1903 Emily Beedell paid into court, under the Trustee Act 1893, the sum of 9985*l.*, being the legacy of 10,000*l.* bequeathed to Frederick Dallas, less 15*l.* the costs of and relating to such payment.

It appeared that during the period from Jan. 1894 to April 1903 Frederick Dallas had created a great number of incumbrances upon the estate or interest of or to which he was or should or might become possessed or entitled under the will or intestacy of his father.

These incumbrances amounted in the aggregate to a sum largely exceeding the amount of the legacy of 10,000*l.* bequeathed to Frederick Dallas by the testator.

The will of the testator had been prepared by his solicitors, the firm of Brooks, Jenkins, and Co., of which Edgar Francis Jenkins was then a member, and which now consisted of Stanley Herbert Scott and Arthur Edward Heatley.

Among the incumbrances the most important were the following:

A charge, dated the 30th March 1896, consolidating mortgages of the 13th Jan. 1894, and a charge of the 18th May 1894, created in favour of Edgar Francis Jenkins; a charge, dated the 8th Jan. 1897, in favour of the British Empire Mutual Life Assurance Society; charges dated the 18th May 1897 and the 3rd Nov. 1898 in favour of Frederick Stuart; a charge dated the 28th April 1898, in favour of John Edward Evans; charges, dated the 15th June 1898, the 12th May 1899, the 13th Nov. 1899, and the 14th Dec. 1900, in favour of Stanley Herbert Scott and Arthur Edward Heatley; a charge dated the 23rd May 1900 in favour of the Staffordshire Financial Company Limited.

On the 9th Jan. 1903—i.e., before the grant of the letters of administration—Emily Beedell had received from Charles Edward Elliott Jenkins

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law. Vol. XC., 2317.

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(the sole executor of Edgar Francis Jenkins), the British Empire Mutual Life Assurance Society, Stanley Herbert Scott, Arthur Edward Heatley, and the Staffordshire Financial Company Limited notices of their claims with the dates of their respective securities (referred to in the judgment of Williams, L.J. as the "Brooks-Jenkins incumbrances")."

On the 5th March 1903—i.e., after the letters of administration had been granted—Emily Beedell received notices from the same parties.

On the 12th March 1903 Frederick Stuart, on his first hearing of the grant of administration, gave notice to Brooks, Jenkins, and Co., who were the solicitors acting for Emily Beedell, of his charges.

On the 17th March 1903, and on subsequent dates, Emily Beedell received notices of the incumbrances held by various other persons.

A petition was presented by Charles Elliott Edward Jenkins, the British Empire Mutual Life Assurance Society, Stanley Herbert Scott, and Arthur Edward Heatley, asking that it might be declared that the incumbrances in favour of the petitioners were entitled to priority over all other incumbrances created by Frederick Dallas on the fund in court; and that as between the petitioners their respective incumbrances ranked in the order of the date of the indentures creating them respectively.

The petition also asked that an account might be taken of the amounts due to the petitioners in respect of their respective incumbrances; that, if necessary, an inquiry might be ordered as to what incumbrances created by Frederick Dallas other than the incumbrances of the petitioners affected the legacy of 10,000*l.* and the fund in court; that, if necessary, an inquiry might be ordered as to what were the priorities of such last-mentioned incumbrances; and that, if necessary, an inquiry might be ordered as to what was due to the persons entitled to such last-mentioned incumbrances and by virtue thereof.

On the 4th July 1903 the petition came on to be heard before Byrne, J., when his Lordship ordered the following inquiries and accounts to be made and taken: An inquiry what incumbrances created by Frederick Dallas affected the legacy of 10,000*l.* and the fund in court; an inquiry what were the respective priorities of such incumbrances; an account of what was due to the respective parties entitled to such incumbrances under and by virtue of their respective securities; and the master was to be at liberty in case he should consider it convenient either for saving expense or otherwise to bring before the judge any question which might arise between any competing parties before making his certificate. And it was ordered that the further hearing of the petition should be adjourned, with liberty to apply.

On the 31st July 1903 a summons was taken out on behalf of the petitioners to proceed upon the order of the 4th July 1903.

The master before settling the certificate desired to have certain points of law determined by the judge.

The questions left for the judge were as to the four points of view taken by the different parties interested: (1) Whether the incumbrances all ranked in order of date; (2) whether they ranked in order of notice; (3) whether one creditor hold-

ing a charge could obtain priority over another of previous date of which the administratrix had received notice before she was appointed by giving notice before the other after the grant of the letters of administration; (4) whether the estate of Frederick Dallas was distributable among all the creditors *pari passu*.

The points of law came on for argument before Buckley, J., when his Lordship reserved judgment.

On the 18th Dec. 1903 the following judgment was delivered by

BUCKLEY, J.—On the 7th July 1893 Robert Dallas made his will. He appointed three executors, of whom his son Frederick Dallas was the survivor. He gave Frederick Dallas a legacy of 10,000*l.* The testator died on the 24th Dec. 1902. In the meanwhile—viz., the 28th June 1898—upon proceedings taken in lunacy, a receiver had been appointed of the testator's property and his personality was paid into court in Lunacy. In the interval between the date of the will in 1893 and the date of the testator's death in 1902, Frederick Dallas, the legatee, executed a very large number of charges upon his expectant legacy under his father's will. I suppose the fact was that the father was never likely to be again of sound mind; and of course Frederick Dallas had an expectancy in the event of the testator dying without altering the legacy which he had given by his will in 1893. I have a list of these charges. They are thirty in number, and they run from the 30th March 1896 down to the date of the testator's death, and after the testator's death, the last being in April 1903. I gather that Frederick Dallas, in point of fact, raised upon his expectations of this legacy a very much larger sum than the 10,000*l.* The father having, as I have already said, died in Dec. 1902, Frederick Dallas was his sole surviving executor, the two other executors having predeceased the testator. On the 9th Jan. 1903 Frederick Dallas renounced and disclaimed. On the 4th March 1903 administration with the will annexed was granted to Mrs. Beedell, the sister of Frederick Dallas. By an order made on the 17th but completed on the 27th March 1903, payment out of the funds standing in court in the lunacy was directed to her. On the 3rd or 4th May 1903 the funds in fact reached her hands, and she paid them into court under the Trustee Act 1893. On the 12th May 1903 Frederick Dallas was adjudicated bankrupt on a petition presented on the 24th Feb. 1903. The funds having come into court a petition was presented on the 5th June 1903 for payment out to the parties entitled. On the 4th July 1903 an order was made on that petition directing inquiries in order to work out the rights of these exceedingly numerous incumbrancers. The inquiries proceeded in chambers. The matter which has come before me is a reference by the master to the judge on points of law to be determined before he can settle his certificate. Now, the points of law which arise are as to the priorities of the incumbrancers, having regard to the various notices which they gave, if notice is necessary at all, for the purpose of determining the priorities under the circumstances which I have stated. The notices may be said to be of several classes: First, notice was given after the death of the testator on the 24th Dec. 1902 and before Frederick Dallas renounced probate on the 9th Jan. 1903 to a firm

of Messrs. Brooks, Jenkins, and Co., solicitors. At that date they were not solicitors for any person who could be described as the legal holder of the fund, and at no date, so far as I know, did any question arise with regard to that fund. Secondly, notice was given to Messrs. Brooks, Jenkins, and Co. on behalf of certain clients to Mrs. Beedell before she obtained administration on the 4th March 1903. Thirdly, notice was given by Messrs. Brooks, Jenkins, and Co. to Mrs. Beedell immediately that she obtained administration on the 4th March 1903. Such notice was given the next day. Lastly, if that has to be considered last of all, notice was given to the administration immediately after the date in May when the fund in fact reached her hands. The question I have to determine on the arguments which have been addressed to me seem now to be as follows: First, whether notice is necessary at all; and, secondly, if it be, then at what time and to whom ought the notice to be given? Now, at the date between the will in 1893 and the death in 1902 Frederick Dallas, of course, had no property as regards this legacy. He had merely a possibility or expectancy, if the testator died without revoking his will, that he would be entitled; an event which happened. But he had no property in the legacy at all. That an equitable incumbrance may be given upon a mere possibility or expectancy or upon future property of course is well settled. I will read from the judgment of Cotton, L.J. in *Re Clarke; Coombe v. Carter* (57 L. T. Rep. 823; 36 Ch. Div. 348), which shows the ground upon which plaintiff rests. His Lordship says (at p. 351 of 36 Ch. Div.): "It is clear that an assignment cannot at law pass future property, but it may be made effectual against future property on the ground that a court of equity will in a suitable case enforce it as a contract." Again, there is the well-known passage in Lord Macnaghten's judgment in *Tailby v. Official Receiver* (60 L. T. Rep. 162; 13 App. Cas. 523, at p. 543). Lord Macnaghten thus says: "It has long been settled that future property, possibilities, and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract when it comes into existence, if it is of such nature and so described as to be capable of being ascertained and identified." That proposition I need scarcely say has not been contested at all at the bar in the present case. When you are dealing with a property such as that, it is of course obvious that there is no legal holder of the fund to whom the incumbrancer can give notice. There is no fund; therefore, of course, no legal holder of the fund. And it is impossible to give notice to anybody. There is a considerable body of cases of this description which arose in the old days before purchase by an officer of his commission in the army was abolished. An officer's commission was not his property which he could bind in any way. But it was something which by virtue of the system which prevailed as to the purchase of commissions might in an event be represented by money. There was an expectancy or a possibility of a

fund coming to the officer if he retired from the army, or was gazetted out of the army. The result would be that a fund would come to him. What happened in such a case was this: The money in question was paid into the names of army agents and became the property of the officer at the moment when his retirement was accepted. At that moment the fund became his. Down to that moment he had nothing at all beyond the expectancy to which I have referred. Perhaps I had better mention the names of the cases that have been cited in the course of the arguments before me for the purpose of reference; there are eight of them. They are: *Buller v. Plunkett* (1 J. & H. 441); *Yates v. Cox* (17 W. R. 20); *Boss v. Hopkinson* (18 W. R. 725); *Somerset v. Cox* (33 Beav. 634); *Calisher v. Forbes* (25 L. T. Rep. 772; L. Rep. 7 Ch. App. 109); *Addison v. Cox* (28 L. T. Rep. 45; L. Rep. 8 Ch. App. 76); *Johnstone v. Cox* (43 L. T. Rep. 690; 16 Ch. Div. 571, affirmed on appeal, 45 L. T. Rep. 657; 19 Ch. Div. 17); and *Roxburghe v. Cox* (45 L. T. Rep. 225; 17 Ch. Div. 520). In all those cases what was distinguished was this: Before the moment at which the fund in the army agent's hands became, by the gazetting of the officer's retirement, his property, there was, as I have already remarked, no fund of which there was any legal holder at all. The fund became the officer's on the gazetting, with the result that the notices given to the army agents before the gazetting were perfectly useless and idle. It was not open to say that the army agents when the *London Gazette* appeared ought to have remembered the notice which they had received the previous day or the previous week. The previous notice was void altogether because it was not given to a person who was the legal holder of the fund. But immediately on the appearance of the *London Gazette* the equitable incumbrancers, if they were wise, took care to serve the army agents with notice. And the rule adopted was that all notices received on the same day ranked *pari passu* for this purpose, and as between them they went in date of priority of charge. Indeed, the practice went to this extent that, if notice was served after office hours on the day next preceding the publication of the *London Gazette*, that should be treated as good notice on the day that the *London Gazette* appeared, because it would be assumed that the parties who received it would open it the next morning. But, if it arrived previously, it was a bad notice and void. In all those cases it was held that the right of the incumbrancers was according to priority of date on which each notice was received after the *London Gazette* appeared, and the fund belonged to the officer. Now, from those cases it is perfectly obvious that two things follow: First, that where the subject of the equitable incumbrance is an expectancy or possibility notice is necessary, and priority goes according to the date of the receipt of the notice; and, secondly, that as between notices of even date the incumbrancers rank according to the priority of charge. That being so, there is no distinction at all between such a case as that and a case such as this. During the time that the testator was alive Frederick Dallas enjoyed in respect of his legacy the prospect of having a sum of money if something happened. So did the officer in the case I have referred to. Now, for the respondents

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I have heard an argument which is certainly not deficient in courage. I am told that all those cases are wrong, and are wrong because of two recent decisions in the House of Lords—in which those cases were not referred to or commented on or dealt with—and which have laid down principles that are inconsistent with the principles upon which those cases were decided. Now, among the learned judges who decided the earlier cases are found Page-Wood, V.C., James, L.J., Mellish, L.J., Sir George Jessel, M.R., and Lord Selborne—a formidable array of names if one is to say that the decisions of those learned judges were wrong. That, nevertheless, is the argument which I have heard. I will go on to deal with the two cases upon the authority of which it is now contended that I must say that the earlier authorities are all wrong. The first of them is *Tailby v. Official Receiver* (*ubi sup.*), to which I referred just now. Let me recall what the facts in *Tailby v. Official Receiver* (*ubi sup.*) were. Tailby was the assignee of certain book debts due from the firm of Wilson Brothers. He gave notice to the debtors. Subsequently the assignor became bankrupt; the debtors paid Tailby; the official receiver sued Tailby in the County Court, and after many vicissitudes, in which every court in succession reversed the court immediately preceding it, the official receiver failed in the House of Lords. The whole point argued and decided in *Tailby v. Official Receiver* (*ubi sup.*) was whether the property which was there referred to was so sufficiently identified as to be within the principles of *Holroyd v. Marshall* (7 L. T. Rep. 172; 10 H. of L. Cas. 191). But the question now before me did not arise in that case in any way whatever, and the House of Lords has said nothing about it. I think, therefore, that I have mentioned enough to show that *Tailby v. Official Receiver* (*ubi sup.*) has nothing to do with the present case. The other case is *Ward v. Duncombe* (69 L. T. Rep. 121; (1893) A. C. 369). Now, when the judgments in *Ward v. Duncombe* (*ubi sup.*) are read, I think that it will be found that what was established there was this: That the doctrine of notice rests upon the principle that the equitable assignee ought to take such steps as will prevent the assignor from retaining the apparent ownership of the fund; and, secondly—if it be different, although I think it is only an application of the former principle—that the equitable assignee must take such steps as will give him a right *in rem* against the fund assigned, as distinguished from the right against the conscience of the assignor of the fund; and that that ought to be done by him to some extent at any rate, not necessarily, but so far as possible before taking possession of the fund. Now, *Dearle v. Hall* (3 Russ. 1) is, of course, a case which has been very often criticised, and it is criticised largely by Lord Macnaghten in *Ward v. Duncombe* (*ubi sup.*), the case to which I have been referring. But *Dearle v. Hall* (*ubi sup.*) is indisputable law. Many judges have said that they will not extend it; but there it is. *Ward v. Duncombe* (*ubi sup.*) has left the doctrine of notice to perfect or complete or establish the title of the equitable assignee wholly untouched as it seems to me. Whether it has left it as resting so much as it was supposed to do upon a doctrine of negligence I am not clear, but the principles which it

enunciates are those which I have endeavoured to express. If that be the whole effect of *Ward v. Duncombe* (*ubi sup.*)—and I think that it is the whole effect—how does that touch in any way the doctrine of the earlier cases as regards an equitable incumbrance on a possibility as decided in those earlier cases? I do not see that it touches it at all. The argument presented to me has been largely to this effect: At a moment when the equitable incumbrance is given the equitable incumbrancer could not give notice to a legal holder of the fund, because there is no fund in existence and no legal owner; *ergo*, he need never give notice to the legal holder of the fund when there is a fund in existence. It is sufficient to answer that that is in direct contravention to all that is decided in the earlier cases; and the earlier cases are, I think, good law. That, perhaps, is an expression which I scarcely ought to use. I do not need to say whether or not they are good law. It suffices for me to say that they are binding decisions absolutely untouched by anything which was decided in the House of Lords in the two cases to which I have referred. To put the argument which has been addressed to me on behalf of the respondents in a slightly different form, it runs thus: As has been said the equitable incumbrance upon an expectancy is only that thing which binds the conscience of the assignor, and it is argued that through the conscience of the assignor no one can get more than the assignor generously can give him; or, secondly—respecting what I have already stated—that at the date of the incumbrance there was no legal holder of the fund, and no notice therefore could be given to a legal holder at that time; *ergo*, no notice need be given at any time. For that last proposition a passage in particular was referred to in the judgment in *Re Wyatt; White v. Ellis* (65 L. T. Rep. 841; (1892) 1 Ch. 188), the case which was affirmed under the name of *Ward v. Duncombe* (*ubi sup.*). The passage referred to is at p. 207 of (1892) 1 Ch., and it runs thus: "The time of the taking of the subsequent charge, or more exactly the time when inquiry was or ought to be made of the trustees, and not the period of distribution, thus appears to be the critical moment." Now, the argument that rests upon that sentence is not, I think, a bad illustration of the fallacies into which you may fall if you allow yourself to read that sentence divorced from the context and divorced from the circumstances under which the language is used. That language was used without reference in any way to such a point as I am considering here, but with reference to a case where, of two trustees, one had a notice. And the question was whether, he having died, and having been succeeded by a new trustee, and the new trustee and the original trustee not knowing the equitable incumbrancer, he was entitled to say: "Well, the man who had notice from the man who gave notice is no longer a trustee, and therefore the doctrine does not apply." Directly you see that that was the circumstance under which the language was used, it becomes apparent that the principle is not applicable at all to a case like that which is now in question. In the case here there was, down to the death of the testator, no legal holder of the fund. At the death of the testator there was a legal holder. Ought you to give notice to the legal holder when there is a legal holder? Now,

to that argument, which I have endeavoured to state again in a different form, the army agents' cases, of course, are a complete reply. The equitable assignee of the officer who gave his notice—if he was earlier in point of time with his notice—did through the conscience of his assignor get more than his assignor could properly have given him because he stepped in with the notice and then accepted priority. I therefore hold that notice in the present case is necessary. I pass on to consider what notice must be given, and to whom. As regards the person to whom notice must be given I will read a sentence from the judgment of Lord Selborne in one of the earlier cases—*Addison v. Cox* (28 L. T. Rep. 45; L. Rep. 8 Ch. App. 76, at p. 79)—to the effect that the notice must be a notice given to a person who is "bound by some contract or obligation existing at the time when the notice reaches him." The whole substratum of the army agents' cases was that the notice given to the army agents when they were not bound by any contract or obligation was altogether futile and useless. It was only a notice given when, by the gazetting of the officer out of the army, the army agents became the trustees for him. The notice, therefore, must be given to a person bound by some contract or obligation. Next, the notice if acquired in fact by the legal holder of the fund is operative even though it be obtained not by direct notice from the encumbrancer, but under such circumstances as that as a matter of business he would be taken to have known it. I read this from Lord Cairns in *Lloyd v. Banks* (L. Rep. 3 Ch. App. 488, at p. 491): "If it can be shown that in any way the trustee has got knowledge of that kind—knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—then, I think, the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created." Further, suppose that there are several trustees, notice to one of their number will be sufficient if he be not a trustee standing in such a position that it is his interest to conceal the notice. And this is none the less true because the question arises after that one who has received the notice is dead and when the survivor and the new trustee have not knowledge. It was decided *Re Wyatt; White v. Ellis* (65 L. T. Rep. 841; (1892) 1 Ch. 188)—in the House of Lords *sub nom. Ward v. Duncombe* (69 L. T. Rep. 121; (1893) A. C. 369)—that an effective notice is not displaced by any change of the trustees; so that, if notice be given, say, to all of three trustees, and they all cease to be trustees, and three other people become trustees who have no notice, the original notice would be good. That is the decision in *Re Wasdale; Brittin v. Partridge* (79 L. T. Rep. 520; (1899) 1 Ch. 163), decided by Stirling, J. But this last proposition is, it may be, subject to exception in the case which arose in *Timson v. Ramsbottom* (2 Keen, 35), upon which Lord Herschell commented in *Ward v. Duncombe* (*ubi sup.*). If, however, the assignee be himself one of the trustees, and he is the only person who receives notice then, according to *Browne v. Savage* (4 Drew. 635), notice to him will not do. In *Browne v. Savage* (*ubi sup.*) Kin-

dersley, V.C. says: "In the case where the assignor is himself one of the trustees, he being the only one of the trustees who has any notice or knowledge of the assignment which he has made, if he should afterwards apply to another person to advance him a sum of money on an assignment of his interest, concealing the fact of the prior assignment, such proposed assignee could not, by any caution in making inquiry of all the trustees, discover the fact of the prior assignment; for it is the interest of the trustee, who is the proposed assignor, to conceal the prior assignment; and the other trustees know nothing about it." I pass on to consider who were the persons who had notice, and who were the persons who ought to have had notice, on the facts of the case before me. Now the first proposition which it will be necessary to deal with is this: Frederick Dallas, the sole surviving executor, was himself the assignor, and, of course, he knew all of his own assignments. When the testator died was he or was he not a legal owner of the fund so that his knowledge operated in favour of all the equitable assignees as being within *Lloyd v. Banks* (*ubi sup.*)—knowledge which he had which would be effectual? Now the first proposition to deal with is this: Frederick Dallas, as I have said, renounced probate. What was the effect of his renunciation? The enactments 20 & 21 Vict. c. 77, s. 79, and 21 & 22 Vict. c. 95, s. 16, are sections which deal as regards the former with the case of renunciation, and the latter the case of death of the executor or failure of the executor to appear and take probate when cited. As regards all those cases the earlier statute provides, and I will read sect. 79 as to renunciation (which is the relevant one here) that: "Where any person after the commencement of this Act renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person in respect to the executorship shall wholly cease, and the representation to the testator and the administrator of his effects shall and may, without any further renunciation, devolve, and be committed in like manner as if such person had not been appointed executor." Now, upon that first ground, as it seems to me, the executor who subsequently renounced as the result of the renunciation stood from the first in such a position as that he was not for this purpose a legal holder of the fund. Leaving the statute and regarding it upon general grounds according to *Ward v. Duncombe* (*ubi sup.*), what you have to do is to give a notice to the person who has the disposition of the fund. You serve the legal holder because it is he who holds the purse strings and keeps the money. Now it seems to me that the executor who renounced never was a person who had the disposition of the fund. He could not have had the disposition of the fund except by intermeddling with the estate. If he intermeddles with the estate he cannot renounce. He therefore is a person who never had the disposition of the fund; and therefore he is not the person to whom a notice ought to be given. He never had the purse at his disposition and he would not be properly addressed. But, further, suppose that you serve the sole executor with a notice would it be his duty when an administration is subsequently granted to somebody else to hand on that notice to the person who would then be the legal holder of the fund

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and would that have a retrospective operation as if it had been served on the date of the renunciation by the renouncing executor? By that again I say that the renouncing executor can owe no duties at all to the estate. His position is this, that the testator has by his will nominated him to an office, and the tenure of that office no doubt comes to the executor not by virtue of the probate, but by virtue of the will. But he is not bound to take the office. The testator cannot impose it upon him against his wish. And if he refuses to take it then he is a person who refuses to have anything to do with the estate, and he cannot be a person who owes to the estate the duty of handing on to a legal personal representative, when subsequently constituted, notices which in his hands were of no value at all. Again, apart from this ground altogether, what was Frederick Dallas's position? He was the sole surviving executor and the assignor. Suppose that a notice to him under any circumstances could be effectual—effectual, I mean, as being a service on the legal holder of the fund. This question then arises, Where the sole legal holder is also the equitable assignor is the knowledge which he necessarily possesses, a knowledge which enures for the benefit of the equitable incumbrancers? It is but an application of the principle of *Browne v. Savage* (*ubi sup.*) to say that that cannot be so. *Browne v. Savage* (*ubi sup.*) lays down that if you give notice to one of several trustees, he being himself the assignor, that will not do. In the same way notice to a sole legal holder who is himself possessed of the fund will not do. On all these grounds it seems to me that Frederick Dallas had knowledge, and the fact that he had knowledge was not any notice at all for the purpose of protecting the equitable incumbrancers. Then, if he was not the person, who was the person to whom the notice could be given? The answer is easy. There came into existence for the first time a legal holder of this fund when on the 4th March 1903 administration with the will annexed was granted to Mrs. Beedell. I am not, in saying that, saying that there was in the interval no legal owner at all. The legal ownership must be somewhere, but it was not in Frederick Dallas. Whether it was in the Crown or the President of the Probate Division, as it would have been under the old law, I need not set myself to inquire. It was somewhere no doubt, but it was not in Frederick Dallas. It was not in any person who was served on the 4th March 1903, when Mrs. Beedell took out letters of administration. She was the legal owner, and she was, in my opinion, the person upon whom notice could effectually be served. Substantially that determines all the questions that have been argued before me. But I have to say a word or two with respect to some subsidiary arguments that have been addressed to me for the purpose of showing that I have not overlooked them. In the first place an argument was addressed to me by counsel for one of the incumbrancers, which was to this effect, that the notice to the administratrix after the administration does regulate the priorities except, so counsel said, that as against a person who has given notice before an administration a subsequent incumbrancer in date cannot by notice to the administratrix obtain priority. I took that down from the counsel, arguing the matter so that I

might say that I was accurately representing his proposition. Counsel assented to it when I read it to him. I fail to see the argument in support of it. There was the case of *Lloyd v. Banks* (*ubi sup.*). I have looked into that case, and I fail to see that it has any bearing on the point discussed here. In that case no notice was given to a person who was not a trustee; nor was there any question argued as to what the effect of that would be. And I am myself unable to appreciate how a notice given to a person who is not the legal holder can, upon the principle I have endeavoured to explain, have anything to do with it. Another argument advanced was for another incumbrancer, by whom a notice was given on the 25th Jan. 1901—that is to say, during the testator's lifetime. Of course, such a notice would be perfectly idle. That is no good at all. But it was argued that if the administratrix after she became such heard of that previous notice in 1901 that would be a good notice, and there ought to be an inquiry to find out if that was so. I fail to see any ground whatever for that argument. It has been decided over and over again that a trustee being a person who is not the legal holder can have no notice at all. Another argument was that the first charge, which was executed after the testator's death, and of which notice was given to the legal personal representative, takes priority of everybody. I fail to see any ground for that contention at all. With previous incumbrancers the question is whether they have so given notice as to entitle them to avail themselves of it. The last argument was—that the fund did not actually reach the hands of the administratrix until early in May 1903, after the order for payment by the Court of Lunacy was made; and that until the fund reached her hands notice to her was ineffectual. That was argued upon the authority of a case of *Mutual Life Assurance Society v. Langley* (51 L. T. Rep. 284; 26 Ch. Div. 686; on appeal 54 L. T. Rep. 326; 32 Ch. Div. 460, at p. 473). The argument presented is that so long as the fund was in the Court of Lunacy notice to the trustee, the legal holder, was not sufficient, and a stop order ought to be obtained. Now, *Mutual Life Assurance Society v. Langley* (*ubi sup.*) was a case in which a fund was in the Court of Chancery and the Court of Chancery had the execution of the trusts or the administration of the fund. Under those circumstances the court may not be altogether incorrectly described as standing in the position of a trustee. What was held was that where a fund is so in court notice to the trustee alone is not sufficient; but that you must get a stop order also. Of course the distinction between that case and the present case is obvious. The Court of Lunacy is not executing a trust or administering the estate in any way. The Court of Lunacy is only a custodian of the property of the person who is, by reason of his unsoundness of mind, unable to control it himself. The moment that person dies the basis of the jurisdiction in Lunacy has gone. There is no lunatic, and the person who is left becomes entitled by devolution of the fund, and is for all purposes the owner and holder of the fund. The Court of Lunacy is in no sense a trustee in any way. Some of the parties have endeavoured to obtain priority and failed because the Court of Lunacy cannot give it them. Their argument also, I

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think, fails. I believe I have now travelled over the whole field, and it is a very large one, of the numerous authorities. The result is that I come to the conclusion that the priorities will rank according to the date of the notice given to the administratrix after the administration was granted, and I so declare. I will only add this: The respondents have argued—I will not say without reason—that in such circumstances it is very difficult for the equitable incumbrancers to protect themselves by notice. That is the difficulty which arose in the old cases of the army agents. It used to be the practice, I believe, to post a notice every day to the army agents in case by misfortune the fund should come into their hands without the incumbrancers being provided for. Each incumbrancer had to endeavour to be first in the field, or as early as anybody else. It is said truly enough that, inasmuch as the fund was created or became the property of the officer by the publication in the *Gazette* which was open to everybody, everybody had the means of knowing it, and therefore he could protect himself. It is said—I am not sure how far that is so—that in the case of the granting of letters of administration there is not the same facility of obtaining information. That may be so, but it appears to me that it has nothing to do with the question of law which I have to decide. If it be the law, as I hold it is, that an equitable assignee with a possibility of future priority can only secure himself to the enjoyment of his security by giving notice to the legal holder when there is one; he must meet that difficulty as best he can. He may have to return to the old practice of posting a letter daily. I declare that the priority of these incumbrancers will be according to the dates of the notices given by them respectively to the administratrix after administration was granted; and that, of course, in the case of notices received on the same day, they will rank in priority of the date of the charge.

From that decision Frederick Stuart now appealed.

Henry Terrell, K.C. and P. F. S. Stokes for the appellant.—The main question raised by this appeal is whether the priorities of the several incumbrancers are to be regulated by the dates of their respective securities or by the dates given by them respectively to the administratrix. From the observations of Lord Cairns in *Shropshire Union Railways and Canal Company v. The Queen* (32 L. T. Rep. 283; L. Rep. 7 E. & I. App. 496, at p. 506) will be seen the general rule applicable to priorities. The question is whether within those words the court can find, as Buckley, J. did, “something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced,” in order to take away the pre-existing equitable title of the appellant, and so to deprive him of his priority. There was no negligence on the part of the appellant as to giving notice of his charges. The moment he heard of the grant of the letters of administration he gave notice to the administratrix. [COZENS-HARDY, L.J. referred to the “army agents’ cases,” such as *Buller v. Plunkett* (1 J. & H. 441), where notices were given to army agents by money-lenders daily who did not know when the money realised by officers upon the sale of their com-

missions would reach the agents’ hands. STIRLING, L.J.—Did not *Ward v. Duncombe* (69 L. T. Rep. 121; (1893) A.C. 369) deal with the question of negligence in giving notice of an incumbrance? Yes; and in that case the whole of the authorities upon the question of priorities were discussed. The decision there proceeded on *Dearle v. Hall* (3 Russ. 1), the foundation of which was negligence. Unless the present case comes within the doctrine of *Dearle v. Hall* (*ubi sup.*) the several incumbrancers must rank according to the dates of their respective securities. Lord Herschell in *Ward v. Duncombe* (*ubi sup.*), at p. 376 of (1893) A. C., stated the judgment of Sir Thomas Plumer in *Dearle v. Hall* (*ubi sup.*), and that he relied on the law laid down in *Ryall v. Rowles* (1 Ves. 348). The question of notice can, we submit, have no application here. [WILLIAMS, L.J.—Is there any case in which it has been decided that a second incumbrancer who has not given notice takes priority over a first incumbrancer who has also not given notice in a case similar to that to which you are referring? Is not *Dearle v. Hall* (*ubi sup.*) a case of that kind? [WILLIAMS, L.J.—No. Certainly not. COZENS-HARDY, L.J. referred to *Tailby v. Official Receiver* (60 L. T. Rep. 162; 13 App. Cas. 523).] The object of the principle upon which notice gives priority was to do equity. Is this court going to apply that doctrine to enable one person to deprive another of a right of which he could not avail himself? [WILLIAMS, L.J. referred to *Foster v. Cockerell* (3 Cl. & Fin. 456, at p. 462).] None of the grounds referred to in the authorities can possibly apply where at the date of the incumbrance there is no fund in existence and no trustee of it. None of the competing incumbrancers can know that the fund has come under the control of some person. The rule in *Dearle v. Hall* (*ubi sup.*) does not touch a case like that. No question of negligence can arise here. The foundation of that case be it what it may is quite different from what it is here. As regards the numerous “army agents’ cases,” referred to by Cozens-Hardy, L.J., the principle ones are the following:

Buller v. Plunkett, 1 J. & H. 441;

Webster v. Webster, 31 Beav. 393;

Somerset v. Cox, 33 Beav. 634;

Earl of Suffolk and Berkshire v. Cox, 16 L. T. Rep. 374;

Calisher v. Forbes, 25 L. T. Rep. 772; L. Rep. 7 Ch. App. 109;

Johnstone v. Cox, 43 L. T. Rep. 690; 16 Ch. Div. 571; affirmed on appeal, 45 L. T. Rep. 657; 19 Ch. Div. 17.

[WILLIAMS, L.J.—Referred to *Collyer v. Isaacs* (45 L. T. Rep. 567; 19 Ch. Div. 342).] In *Johnstone v. Cox* (*ubi sup.*), there was a trustee the moment the fund came into existence. Therefore the fact that the moment that the incumbrancer gave notice to the army agents and thereby got there a priority does not affect the present case as the administratrix was not appointed until some time after the fund came into existence; and the assignment operates as soon as the fund comes into existence. It would be extending the rule to a state of circumstances to which it was never intended to apply if the principle of the army agents’ cases is held to govern the present case. They referred also, on the question of notice, to

Re Wasdale; *Brittin v. Partridge*, 79 L. T. Rep. 520; (1899) 1 Ch. 163.

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As to the effect of renunciation of probate, see Williams's Executors and Administrators (9th edit., vol. 1. p. 233) citing 20 & 21 Vict. c. 77, s. 79. The words of that section are such that they do not cause the executor to cease to be an executor for all purposes, but he is the person to whom notice may be given of an incumbrance upon a legacy. The case of renunciation and appointment of an administrator is similar to the case of a new trustee being appointed. The person who gave the executor notice is entitled to priority. [WILLIAMS, L.J. referred to Williams's Executors and Administrators, 9th edit., vol. 1. p. 250.] The case of *Browne v. Savage* (4 Drew. 635), cited by Buckley, J. upon the question of the effect of notice by an assignee to one of several trustees, was followed by Cozens-Hardy, L.J. (when Cozens-Hardy, J.) in

Lloyd's Bank Limited v. Pearson, 81 L. T. Rep. 314; (1901) 1 Ch. 865.

They referred also to

Willes v. Greenhill, 4 De G. F. & J. 147 cited in *Ward v. Duncombe* (*ubi sup.*).

Buckmaster, K.C. and *A. R. Macklin* for the respondents, the petitioners; *L. R. Ryland* for the respondents, the Staffordshire Financial Company Limited; and *Vaughan Williams* and *H. Marshall* for the respondents, other incumbrancers, were not called upon to argue.

WILLIAMS, L.J.—I think that the decision of Buckley, J. is quite right and ought to be affirmed. Really with regard to very nearly all the questions which have been argued before us on behalf of the appellant we are bound by authority. I wish in order to clear the ground first without giving details to shortly state sufficient to show how the question arises which we have to determine in the present case. [His Lordship summarised the facts of the case, and continued:] The incumbrances created by Frederick Dallas upon the fund which has come into existence and became his are in the aggregate very much larger than the fund itself. The result is that the question has arisen as to the priority of the several incumbrancers. On the 5th March 1903, the date of the grant of the letters of administration, notices were given to the administratrix of certain incumbrances which for brevity I will call "the Brooks-Jenkins incumbrances," for either Messrs. Brooke, Jenkins, and Co. or their clients were the incumbrancers. There was a much earlier incumbrance in point of date than some of the Brooks-Jenkins incumbrances—namely, one in favour of Stuart. There could be no effective notice given by an incumbrancer so as to enable him to obtain priority until the fund came into existence and there was some person who had control of the fund and to whom notice could be given. So we begin with this, that there could be no notice given during the lifetime of the testator. The next period with which we have to deal is the period between the death of the testator and the renunciation of probate by Frederick Dallas. With regard to that period we have not got to decide to-day whether there could be good notice so as to affect the priorities given to the executor appointed by the will, but who subsequently renounced probate before such renunciation, because it is plain on the authorities that if the person to whom the notice is

given is himself the assignor both in the case of the incumbrance first created and also in the case of the later assignment that notice cannot be an effective notice. The reason of that is this: Whatever view one takes of the principle upon which notice is allowed to affect priorities is common to all the theories as to the principle on which notice is effective to alter priorities that notice is given upon the hypothesis that the trustee or other person who dominates legally the fund will give information to the person giving the notice if there is any prior incumbrance in existence. And it is plain that if it is a case in which there is only one such trustee or person controlling the fund, and he has made the first assignment, it is futile to give him notice of the second assignment at all, because it is his obvious interest to conceal from the puisne incumbrancer the first incumbrance which he has made. If he were aware of the first incumbrance he might refuse to advance money on the security of the second assignment. We can dispose of this part of the case at once by referring to a case which Buckley, J. mentioned in his judgment of *Browne v. Savage* (4 Drew. 635). That was a case in which the actual question which had to be decided was whether a notice to one of several trustees—that one being the assignor—was a sufficient notice, and it was held that it was not a sufficient notice. It was so held on the ground that it was his interest to conceal from the person giving the notice the very fact the discovery of which, if it existed, was the object of the notice. I thought at first, when the case was cited to us, that the ground of the decision was that the assignor would be likely to conceal the fact of his incumbrance from his fellow trustees. But when one comes to look more fully into the report of the case, and particularly at p. 640 of 4 Drew., one sees that the object of the concealment referred to by Kindersley, V.C. was not concealment from the other trustees, but concealment of the fact of the earlier incumbrance from the person who was invited to make an advance upon a second mortgage. That this is so is to my mind made very plain by the observations of my brother Cozens-Hardy in *Lloyd's Bank Limited v. Pearson* (81 L. T. Rep. 314; (1901) 1 Ch. 865). That also, like *Browne v. Savage* (*ubi sup.*), was a case where several trustees had control of the fund; but it is the principle which was dealt with by Cozens-Hardy, J. That I propose to refer to, and it is dealt with on p. 873 of (1901) 1 Ch. He says: "It would be whittling away the rule, and indeed would be making it a mere trap, if it were to be held that the knowledge which an assignor trustee has of his own incumbrance is sufficient to give the assignee priority against a subsequent incumbrancer who gives due notice to all the trustees. This, I take it, was the view of Kindersley, V.C." The result of these authorities, to my mind, is this, that inasmuch as notice to or knowledge of a sole assignor-trustee is not an effective notice to operate upon priorities, we may dismiss at once from this case all considerations of the knowledge of Frederick Dallas, the named executor who subsequently renounced probate. Even if there had been an express notice to him, it would not have been an operative notice for this purpose. When one passes from this and looks to see when the next notice was given, one finds that no other notice was given by any other incumbrancer at all until

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after the grant of letters of administration to Mrs. Beedell. That was on the 4th March 1903, and notice was given to her by the Brooks-Jenkins incumbrancers on the 5th March 1903 and any notice which was given by Stuart was given several days subsequently to that. In that state of things, therefore, the question which we have to answer here is, ought those of the Brooks-Jenkins incumbrances which in point of date of creation were subsequent to Stuart's incumbrance to take priority of his incumbrance? All that are of these incumbrances have all got is an equitable title, and their equities would in the ordinary course be enforced in order of date. But the Brooks-Jenkins incumbrances have been the first to give notice of their incumbrances. The ground on which counsel for the appellant sought to argue that that notice ought not to give any priority was this: He said that the whole principle upon which giving notice is allowed to affect priorities was that those who have not given notice have been guilty of some neglect of duty; and that if that be so, it cannot be said here that Stuart had been guilty of any neglect of duty whatever, because he could not have given notice during the lifetime of the testator. That so far as Frederick Dallas—the assignor and named executor—is concerned he could not have given any effective notice to him; and that therefore the first time at which he could have given an effective notice was upon the grant of the letters of administration, and he could not tell when that was to take place, and could not prevent the Brooks-Jenkins incumbrancers from giving the first notice, as it was through their solicitors that application was made for the grant of the letters of administration, which were granted to Mrs. Beedell. I agree so far with counsel for the appellant that there is no reason to attribute any negligence to Stuart. But the answer is that that is not the true principle to be applied. The true principle has been determined once and for all by the case of *Ward v. Duncombe* (69 L. T. Rep. 121; (1893) A. C. 369). It seems to me that that case decides that the principle which has been suggested by counsel for the appellant in his argument as the ground on which notice when given has been allowed to have the effect which it is allowed to have upon priorities is not the true principle. That case has been a good deal discussed in the course of the argument here, and I do not propose to go into it at any length. But if one turns to the observations of Lord Macnaghten (at p. 390 of (1893) A. C.) one finds the following: "It may perhaps be doubted whether the views of Sir Thomas Plumer in *Dearle v. Hall* (3 Russ. 1) were quite correctly appreciated in *Foster v. Cockerell* (3 Cl. & F. 456)—that was a case in the House of Lords—" which gives the go-by to all considerations founded upon the conduct of the parties. But however that may be, *Foster v. Cockerell* (*ubi sup.*) unquestionably lays down that the rule known as the rule in *Dearle v. Hall* (*ubi sup.*) is independent of any consideration of the conduct of the competing assignees, where the assignee second in date has no notice of the earlier assignment. Priority in such a case depends simply and solely on priority of notice." I cannot imagine any words which could more clearly lay down the principle upon which these notices are supposed to operate. They operate independently of any consideration

of conduct of the competing assignees and priority of incumbrance depend simply and solely upon the priority of notice. It is true that subsequently Lord Macnaghten goes on to say (at p. 394 of (1893) A. C.): "My Lords: I have made these observations, not for the purpose of impugning the authority of the rule in *Dearle v. Hall* (*ubi sup.*). The rule is settled law. But it seems to me that when your Lordships are asked to extend the rule to a case not already covered by authority, it is proper to inquire into the principles upon which the rule is said to be founded. For the reasons which I have already given I do not think that those principles are so clear or so convincing that the rule ought to be extended to a new case." Having said that, I think that I ought not to occupy any time by referring to the arguments or to the opinions of the Law Lords in the case of *Foster v. Cockerell* (*ubi sup.*) to show that Lord Macnaghten's view of what was decided in that case is perfectly accurate further than to say this: That when one looks at those arguments it is perfectly obvious that the contention of the counsel for the appellants in that case was almost identical with the contention of counsel for the appellant in this case; and their contention was really answered by the court holding that the rule known as the rule in *Dearle v. Hall* (*ubi sup.*) was a rule to the effect and based on the principle stated by Lord Macnaghten in his judgment in *Ward v. Duncombe* (*ubi sup.*). Having said that, I have now disposed of the principal argument in this case. But there is a word or two more to be said, because counsel for the appellant were relying rather on what Lord Macnaghten said with regard to not extending the rule in *Dearle v. Hall* (*ubi sup.*). They suggested that in the present case there was no fund and no trustee at all until after the death of the testator and that after the fund came into existence there was no person to whom an effective notice could be given. And they said, therefore, that we should be extending the rule in *Dearle v. Hall* (*ubi sup.*) if we allowed it to apply to such a case as this. That contention is really completely answered by what are commonly known as, and what are still called for short, "the army agents' cases." It is quite plain that in those cases there was a time during which there was no trustee to whom a notice could be effectively given, and yet the result of those cases was that a notice given when there came into existence such a person was held to be a good notice effective to alter priorities. I think that there is no other point which we have to deal with in order to dispose of this case, and I have only to say that, in my opinion, the judgment of Buckley, J. ought to be affirmed and the appeal dismissed.

STIELING, L.J.—I am of the same opinion, and I have very little to add. The question to be determined here is whether the rule laid down in *Dearle v. Hall* (*ubi sup.*) is applicable to the present case. The rule is stated by Lord Macnaghten in *Ward v. Duncombe* (at p. 381 of (1893) A. C.) thus: "That an assignee of an equitable interest in personal estate without notice of an existing prior assignment may gain priority, simply by the act of giving notice to the person who has legal dominion over the fund before notice is given by the earlier assignee." It has been contended before us that that rule

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ought not to be applied to a case where the earlier assignee has not been guilty of any negligence in giving notice. But what was said by Lord Macnaghten in *Ward v. Duncombe* (at pp. 390, 391 of (1893) A. C.), cited by my Lord, appears to me entirely to negative that argument. It is quite true that Lord Macnaghten there points out that there is great difficulty in stating exactly the principle upon which the rule in *Dearle v. Hall* (*ubi sup.*) was established, and at least he warns those who have to apply that rule against extending it to cases not covered by that authority. The question, then, which we have to consider in the present case is whether this case is covered by that authority. If so, we have to apply that rule. It may be said possibly that it is not so covered. There is no case reported which is in its facts entirely like the present. But, in my opinion, in principle it is covered by the army agents' cases, and particularly by the principle stated by Bacon, V.C. in *Johnstone v. Cox* (*ubi sup.*), the decision in which was affirmed by the Court of Appeal. At that time, in accordance with the law that then applied to the sale of commissions in the army, the Regulation of the Forces Act 1871 (34 & 35 Vict. c. 86), an officer when he retired from the service was entitled to certain money usually called "purchase money for his commission." It was paid by the Government to army agents, and it was placed on deposit and could not be paid to the officer until his retirement was gazetted. In that case the incumbrancer who was first in date gave notice of his charge to the army agents after the money had been paid to them, but before notice of the officer's retirement appeared in the *Gazette*. The second and third incumbrancers gave notice the day after the retirement was gazetted, and then the first incumbrancer in point of date gave another notice five days after the notice in the *Gazette*. It was held that the order of priority of the incumbrancers was—first the second, then the third, and then the first; so that the second and third incumbrancers, by giving notice after the fund was in the hands of the agents as agents for the officer before the first, gained priority over the first incumbrancer. What happened here was that Frederick Dallas executed several assignments of his expectancy. At the death of the testator he was himself sole executor of the will, and no notice was in fact given while that state of things existed. He renounced his executorship, and letters of administration with the will annexed were granted to his sister. Then notices were given to her by some of the incumbrancers on the 5th March 1903, and on the 12th March notice was given by Stuart, another incumbrancer. Now, the question is whether the principle of *Johnstone v. Cox* (*ubi sup.*) does not apply to the facts of this case, and it seems to me that it does, and that it applies in this way—that although at the time when the incumbrances were created there was no person who had legal control of the fund, yet the position was altered the moment when a person came into existence who had legal control of the fund and to whom effective notice could be given. Here there was no person who had control over the fund until the grant of the letters of administration, and the fact that at the time of the death of the testator there was no one who had legal dominion over the fund

does not make any difference. It was said that the distinction between this case and the army agents' cases was that in those cases directly the fund came into existence there was a person who had control over it to whom notice could be given, while in this case there was not; but, in my opinion, that is a matter of detail and does not make any difference. Then, as regards the point that Frederick Dallas was himself the executor and that the position was the same as where notice of an incumbrance has been given to a trustee who has died or retired and ought not to be prejudiced by the fact that there is an appointment of a fresh trustee who is not aware of the notice already given and receives a fresh notice. I agree with what has been said by my Lord on this point. I only say that we are not now deciding whether notice to an executor who does not act and renounces is of any value whatever. I should, presumably, be very slow to hold that it was.

COZENS-HARDY, L.J.—I am of the same opinion. I agree with what has been held by Buckley, J., and I am so entirely satisfied with the reasons assigned by him for his decision, and also with what has been said by my brethren, that I shall not occupy more than a few minutes in giving my judgment. It is not open to us since *Ward v. Duncombe* (*ubi sup.*) to do otherwise than say that the rule in *Dearle v. Hall* (*ubi sup.*) is independent of the conduct of the incumbrancers. It is also clearly settled that the rule applies although there was no trust fund and no trustee in existence at the time of the several assignments. The army agents' cases are only intelligible on that view. *Johnstone v. Cox* (*ubi sup.*) was a clear decision on the point. The matter was not elaborately dealt with either by Bacon, V.C., or by the Court of Appeal, in that case, but it had been dealt with before in *Calisher v. Forbes* (25 L. T. Rep. 772; L. Rep. 7 Ch. App. 109), and the principle was recognised by Lord Selborne in *Addison v. Cox* (28 L. T. Rep. 45; L. Rep. 8 Ch. App. 76) in 1872, so that it is not open to us to reconsider it. Therefore there is only one point left. It was said that Frederick Dallas as assignor had knowledge—as of course he had—of his own incumbrances, and that the knowledge which he possessed of his own incumbrances, he being an executor named in the will, must be regarded as equivalent to a notice entitling the assignees to priority in order of date. I do not agree. It seems to me that the knowledge of the assignor is an entirely different thing from the knowledge obtained by notice given by the assignee to the person who has control of the fund. Under these circumstances it is not necessary, therefore, to decide whether notice to an executor who renounces and disclaims has or has not any force or validity. But, speaking for myself, I should require a great deal of argument to induce me to accede to the proposition submitted to us in the present case on that point.

Appeal dismissed.

Solicitors: for the appellant, *George S. Warmington and Co.*; for the respondents, *Brooks, Jenkins, and Co.*; *Smiles and Co.*, agents for *Duignans and Elliot, Walsall*; *Arthur J. Speechly*; *Marshall and Marshall*.

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BORTHWICK V. ELDEBSLIE STEAMSHIP COMPANY.

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Monday, Jan. 25.

(Before Lord ALVERSTONE, C.J., COLLINS, M.R.,
and ROMER, L.J.)BORTHWICK V. ELDEBSLIE STEAMSHIP
COMPANY. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

*Ship—Bill of lading—Construction—Exceptions
—Damage to goods—Unseaworthiness—Liability of shipowner.*

Frozen meat was shipped on a steamer under a bill of lading, which contained two clauses relating to exceptions. The first clause, printed in Roman type, provided: "Neither the ship nor her owners shall be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any cause whatsoever, whether existing at the commencement of the voyage or at the time of shipment of the goods or not." The second clause, printed in small italics, provided: "The act of God . . . and loss or damage resulting therefrom or from any of the following causes or perils are excepted—viz. . . . or from any accidents to or defects, latent or otherwise, in hull . . . or otherwise (whether or not existing at the time of the goods being loaded or the commencement of the voyage) . . . if reasonable means have been taken to provide against such defects and unseaworthiness."

The vessel, being tainted with carbolic acid, was not in a fit condition to carry the meat when it was shipped, and the meat was thereby damaged during the voyage. If reasonable care had been taken to cleanse the ship before the meat was shipped the damage would not have occurred.

Held (reversing the judgment of Walton, J.), that, reading the two clauses together, the shipowner was not exempted from liability for damage caused by the unseaworthy condition of the vessel.

APPEAL of the plaintiff from the judgment of Walton, J., at the trial of the action without a jury.

The plaintiff brought this action to recover from the defendants damages for breach of contract and of duty in and about the carriage of frozen meat by sea.

The meat was shipped on the defendants' steamship *Nairnshire* at Melbourne, Australia, to be delivered at London, under several bills of lading, all in the same form, by which it was acknowledged that the meat had been shipped in good order and condition.

The plaintiff was the indorsee of the bills of lading.

The *Nairnshire* was fitted with refrigerating chambers for the purpose of carrying frozen meat. Before the voyage in question she had made two voyages with cargoes of horses, which were carried in different parts of the vessel and 'tween decks. For the purpose of cleansing the vessel whilst she was carrying the horses, and in order to disinfect her for the purpose of carrying frozen meat, a quantity of carbolic acid was used.

The bills of lading were headed "Refrigerating

Bill of Lading," and contained two clauses relating to exceptions.

The first clause was printed in Roman type and was as follows:

Neither the steamer nor her owners nor her charterers shall be accountable for the condition of goods shipped under this bill of lading nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention; nor for the consequences of any act, neglect, default, or error of judgment of the masters, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever, and steamer shall be at liberty to jettison the whole of the goods, or any part thereof, considered necessary on account of decomposition or otherwise.

The second clause was printed in small italics and was as follows:

The act of God, the King's enemies, pirates, robbers or thieves on land or sea (but not pilferage), arrests or restraints of princes, rulers, or people, riots, strikes, lock-outs, or other labour disturbances, or delay or hindrance caused directly or indirectly thereby and loss or damage resulting therefrom or from any of the following causes or perils are excepted—viz., insufficiency in packing or in strength of packages, loss or damage from coaling on the voyage, rust, vermin, breakage, leakage, drainage, sweating, evaporation, or decay, resulting from bad stowage or otherwise, or from the breakage or flow of or from contact with the urine, manure water, or drainage from horses, cattle, sheep, or other animals carried on the said ship or from their stalls, however caused, or otherwise howsoever; injurious effects of other goods, whether arising from bad stowage or otherwise; effects of climate, insufficiency of ventilation, or temperature of holds; risk of craft, of transshipment, and of storage afloat or on shore; fire on board, in hulk, in craft, or on shore; rain, hail, snow, frost, or ice; explosion, barratry, jettison; collision, whether with another ship or any other obstacle; stranding, lying upon, or touching the ground; perils of the seas, rivers, or navigation of whatever nature or kind, or howsoever caused; whether or not any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by or arise from any act or omission, negligence, default or error in judgment of the master, pilot, officers, mariners, engineers, crew, stevedores, ship's husband or managers, or other persons whomsoever in the service of the owners or charterers; whether on board the said ship or on shore, or on board any other ship belonging to or chartered by them, or for whose acts they would otherwise be liable whether such act, omission, negligence, default, or error in judgment shall have occurred before or after the commencement of or during the voyage, or any other causes beyond the control of the owners or charterers or by or from any accidents to or defects latent or otherwise in hull, tackle, boilers, or machinery, refrigeration, or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness.

The plaintiff contended that the clause in Roman type must be read with and be limited by the clause in small type, and that the defendants were not protected from liability because reasonable means had not been taken to provide against unseaworthiness.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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The defendants contended that the clause printed in Roman type protected them from any liability for the damage to the meat caused by the vessel being tainted with carbolic acid, and that it was not limited by the clause in small type.

The action was tried before Walton, J. without a jury.

J. A. Hamilton, K.C. and Loehnis for the plaintiff.

Carver K.C. and D. C. Leck for the defendants.

Cur. adv. vult.

March 9, 1903.—WALTON, J.—This is an action in which the plaintiff asks for a declaration that he is entitled to recover damages in respect of damage to a certain cargo of frozen meat which was shipped under bills of lading which are dated in Dec. 1901, and of which the plaintiff is indorsee, and he alleges the property in the goods passed to him by the indorsement. The case raises a question of construction of the bill of lading and a question of fact, and although my decision in this case will not depend upon my findings of fact, it will, no doubt, be convenient, as I have heard the evidence, to state what conclusion I have arrived at upon the question of fact. The cargo was shipped on the defendants' steamer called the *Nairnshire* at Melbourne, and was, as I have said, a shipment—not a full cargo—of frozen mutton. On the two voyages preceding the voyage in question upon which the mutton was carried, the *Nairnshire* had carried horses for the Government to South Africa, one voyage, I think, from Fiume to South Africa, and the second voyage from Australia to South Africa. On those voyages the horses were carried in different parts of the ship, but, amongst other parts, in the 'tween decks. For the purpose of those voyages a quantity of carbolic acid had been shipped before the commencement of the first of the voyages. The quantity was admitted—there were eighty five-gallon drums shipped, and of those drums a considerable quantity was made use of. After completing the second voyage with the horses the vessel went to Australia, and got orders on arrival in Australia to load frozen meat at various Australian ports. At Sydney the holds and the 'tween decks were cleaned out, and for this purpose a quantity of carbolic acid and chloride of lime was used to sweeten or disinfect the bilges. At any rate it is admitted by the defendants that it was used to an extent for that purpose. On the two voyages with horses it is also admitted by the defendants that carbolic acid to some extent—to what extent we do not know—had been used for the purpose of sweetening or disinfecting the stalls or spaces which were occupied by the horses, and, as I have said, horses were carried in the 'tween decks. The vessel was cleaned out at Sydney and then proceeded to other ports in Australia before going to Melbourne, where the frozen meat, the damage to which is in question in this case, was shipped. At Townsville, which was one of the ports at which the vessel called, all the carbolic acid that was left on board the vessel was landed with an exception—two or three drums (I think three) were kept on board by the chief engineer for the purpose of sweetening the engine-room. These three drums were kept during the voyage in question—that is the voyage home with frozen meat—in the engine-room, and

I think it is reasonably clear, and I do not think it is disputed, that those drums had nothing to do with the damage which it was afterwards found the frozen meat had sustained. More than twenty drums of carbolic acid had been used for one purpose or another in the course of the two voyages with horses, or in cleansing and disinfecting the ship at Sydney before the frozen meat was shipped. With the exception of the three drums in the engine-room and what was actually in the ship, that is what remained in the bilges or wherever else the carbolic acid may have been used, no carbolic acid was left on board the vessel. The vessel proceeded to Melbourne, and at Melbourne the frozen meat in question was shipped. With that frozen meat and other cargo the vessel made her voyage from Australia to this country, calling at the Cape, and at Durban, and at Cape Town discharged a quantity of cargo. I do not think it is necessary for me upon this question of fact to go very much further into the details. I have considered the evidence which I have heard and I have considered all that was said on both sides upon this question, and it seems to me that there is nothing in the world to show that any kind of accident occurred during the voyage to cause the frozen meat to become tainted by the smell of carbolic acid. I am satisfied that if the frozen meat was tainted by the smell of carbolic acid it must have arisen from a taint in the ship or from carbolic acid in the ship at the time the ship sailed from Melbourne. I know there are some difficult things to explain; I do not need to dwell upon them; I have not forgotten them, but it is sufficient for me to say that I have arrived at the conclusion that nothing happened in the course of the voyage, independently of the condition of the ship at the commencement of the voyage, to cause a taint to the frozen meat, or to cause the damage which is complained of in this action. The vessel arrived, and I find as a fact that the meat in question on arrival was found to be tainted with the smell of carbolic acid and was damaged. I have not to say anything as to the amount of damage, but I find as a fact that the meat was damaged by having become tainted during the voyage with the smell of carbolic acid. I find, as I have said already, that that arose from the condition of the ship at the commencement of the voyage, and I further find that if proper care, skill, and attention had been paid to the cleansing and preparation of the ship before she started on her voyage from Melbourne, the damage would not have occurred. I think that sufficiently disposes of the questions of fact, and expresses the conclusions at which I have arrived upon the material questions so far as they are questions of fact. As I have said, there is another question, and that is a question of construction of the bill of lading under which the frozen meat in question was shipped. It is a bill of lading which is headed "Refrigerator Bill of Lading," and it contains two clauses which may be called exception clauses—one of them is in larger print, and the other in smaller print. I do not attach much importance to the difference of type. I will only say this, that the clause which is in larger print, and is more legible, is not of the less importance at any rate on that account. But I deal with the clauses themselves. The clause in the larger type is a very far-reaching clause. It

contains exceptions of the widest possible kind, and it seems to me to be perfectly plain and easy to understand. It says this: "Neither the steamer nor her owners nor her charterers shall be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention; nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever, and steamer shall be at liberty to jettison the whole of the goods, or any part thereof, if considered necessary on account of decomposition or otherwise." Applying that to the present case, the damage here arose from a defect; that is to say, a defect existing at the commencement of the voyage, the defect being the taint in the ship—the fact that the ship was impregnated with the smell of carbolic acid, or was carrying carbolic acid in such a way as to taint the cargo and, therefore, I think the damage comes clearly within the words of this clause in the larger type. It was damage to the cargo arising, not from failure or breakdown of machinery, insulation or other appliances, but certainly within the words, "or from any other cause whatsoever," and it arose from a defect which existed at the commencement of the voyage, or at the time of shipment of the goods. It was the consequence of a neglect or default on the part of the crew, notwithstanding that it was a defect arising at the commencement of the voyage. And, the defect arising from the neglect or fault of the crew, it seems that if this clause in the larger type stood alone it would be perfectly plain that the shipowners had in unambiguous language protected themselves from liability arising from such defect. But now it is said that the clause in the larger type must be read together with the clause in the smaller type, and that the effect of reading the two clauses together is to qualify and cut down the extent and effect of the first clause, which is the clause in the larger type. Coming to the clause in the smaller type, in the first place, reading it through, one is struck with this—that it refers to a great many things, possible causes of damage and matters which do not seem at any rate very appropriate to a bill of lading for the carriage of carcases of mutton. It is a very long clause; it is very much more verbose than the clause in large type. It contains a longer enumeration of excepted perils in detail, and then that enumeration of excepted perils—which I need not read, and which is very long—is followed by these words: "Whether or not any of the perils, causes or things above mentioned, or the loss or injury arising therefrom be occasioned by or arise from any act or omission, negligence, default, or error in judgment of the master, pilot, officers, mariners, engineers, crew, stevedores, ship's husband or managers, or other persons whomsoever in the service of the owners or charterers, whether on board the said ship, or on shore, or on board any other ship," and so on. I just stop to observe that in this long

clause in the smaller type the negligence clause, to begin with, is much more limited than the negligence clause in the larger type, because the negligence clause in the smaller type is a negligence clause which is limited to the negligence of the persons in the employment of the ship bringing about any of the enumerated perils which are enumerated separately and particularly; whereas the negligence clause in the larger type is a perfectly general one, applying to loss arising in consequence of any negligence of persons in the employment of the shipowner. Returning to the clause in the small type, after the negligence clause, which is limited in the way I have mentioned, there come certain general words which add something to the perils which have been enumerated in detail, and they are these: "Or any other causes beyond the control of the owners or charterers." I may say in passing I cannot find that the negligence clause in the small type refers to these other causes; it seems to refer only to perils which are enumerated in detail. I only point that out as going to show that the negligence clause in small type is more limited than the negligence clause in the larger type. With regard to these general words, I may point out that in the small type the general words which sweep in other causes are these: "Any other causes beyond the control of the owners or charterers." In the clause in the larger type the general words are not so limited at all, but they are: "Loss arising from any other cause whatsoever." Then comes the clause with regard to the seaworthiness, in the small type: "Or by or from any accidents to or defects, latent or otherwise, in hull, tackle, boilers, or machinery, refrigeration or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage) or insufficiency of coals at the commencement, or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness." So that the exception with regard to seaworthiness in the small type is no doubt qualified in that way—that is to say, the shipowner is not to be liable for defects or other losses arising from defects existing at the commencement of the voyage if reasonable means have been taken to provide against such defects and unseaworthiness. So it is obvious that the clause in small type, although, as I have said, much longer, is in reality very much narrower and much more limited than the clause in the larger type. The question is whether I am to restrain the plain sense of the first clause, the more general one, by reading with it the longer clause in small type—whether I am to say that the wider clause is to be cut down by the narrower clause, or whether I am to say that the narrower clause is to be extended by the more extended clause. It seems to me the plain common sense is that the clause in the larger type has been put in for the express purpose of giving a wider scope to the narrower clause in the small type. It seems to me a most unnatural reading of this bill of lading to say that the clause in large type is cut down by the clause in the smaller type—I am not saying on account of the size of the type, but for the reasons which seem to me fairly obvious. The shipowner has had his doubts about this very long and somewhat complicated clause in small type, and to make the matter clear he has inserted a perfectly plain, intelligible, but very far-reaching

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clause, which is the clause in the larger type, and I think that must prevail. That being so, as the loss does fall within the exception expressed in the clause in the larger type, which I think is the governing clause, I think the shipowners are exempt from liability in this case, and therefore there must be judgment for the defendants.

Judgment for the defendants.

The plaintiff appealed.

J. A. Hamilton, K.C. and Loehnis for the appellant.—The decision of the learned judge, that the defendants were protected from liability by the provisions of the large print clause was wrong. Even if that clause stood alone in the bill of lading, it would not protect the shipowner from liability for this damage. The learned judge has found as a fact that the damage was caused by the unseaworthy condition of the vessel at the time the meat was shipped, and not by any failure or breakdown of the machinery or insulation. The *prima facie* construction of that clause is that it applies only to something happening during the voyage and that it does not protect the shipowner from liability caused by the ship being unseaworthy at the commencement of the voyage. The shipowner is bound to provide a ship which is seaworthy at the commencement of the voyage, and this clause does not exempt him from that obligation:

Steel v. State Line Steamship Company, 37 L. T. Rep. 333; 3 App. Cas. 72;

Tattersall v. National Steamship Company, 50 L. T. Rep. 209; 12 Q. B. Div. 297.

The words "or from any other cause whatsoever" in this clause must be construed as referring to matters *ejusdem generis* with the specifically enumerated perils—that is, failure or breakdown of machinery, &c.—and not as wide general words intended to include every kind of peril:

Richardsons v. Samuel and Co., 77 L. T. Rep. 479; (1898) 1 Q. B. 261.

The large print clause and the small print clause must be read together as far as possible, and, when they are so read together, the true construction of the document plainly is that the shipowner is not exempt from liability for damage caused by unseaworthiness unless reasonable means have been taken to provide against unseaworthiness. The learned judge has found as a fact that reasonable means were not taken to provide against unseaworthiness, and therefore the defendants are not protected. The vessel was not in a fit condition to receive and carry a cargo of this kind, and therefore was not seaworthy:

Owners of Cargo on Ship Maori King v. Hughes, 73 L. T. Rep. 141; (1895) 2 Q. B. 550.

If a shipowner wishes to except the implied warranty of seaworthiness, he must do so in clear and unambiguous language:

Price and Co. v. Union Lighterage Company, 88 L. T. Rep. 428; (1903) 1 K. B. 750;

Rathbone Brothers and Co. v. MacIver, Sons, and Co., 89 L. T. Rep. 378; (1903) 2 K. B. 378.

It cannot be said that, in any view of this bill of lading, the shipowner has clearly protected himself against this liability.

Carver, K.C. and D. C. Leck for the respondents.—The learned judge rightly held that the

large print clause was the governing clause, and was not cut down or qualified by the small print clause. The small print clause only limited the liability of the shipowner for unseaworthiness in a qualified manner, and it was a very long clause not too clearly expressed. The shipowner, therefore, inserted the large print clause in order to clearly protect himself by using the widest possible language. The clause containing the lesser protection cannot control or qualify the clause which gives the larger protection. By the large print clause the shipowner is protected from liability for "loss or damage arising from . . . or any other cause whatsoever." Those words clearly cannot be intended to refer only to matters *ejusdem generis* with breakdown or failure of machinery. They are clear and unambiguous words, exempting the shipowner from liability for any damage arising from anything existing at the commencement of the voyage. Even if the words of the large print clause are to be construed as referring only to breakdown or failure of machinery, &c., this damage was caused by failure of the insulation, for if the meat had been properly insulated it could not have been tainted.

J. A. Hamilton, K.C.—The learned judge has found that there was no failure or breakdown of the insulation. If there had been, the meat would have become putrid instead of being tainted with carbolic acid.

Lord ALVERSTONE, C.J.—With all deference to the weighty opinion of Walton, J. in a case of this kind, I have come to the conclusion that in this case he has overlooked and not given effect to certain broad considerations which must, I think, be borne in mind in construing commercial documents, and, indeed, all documents which have to be considered from a legal and business point of view. In my opinion, it is true in the case of a bill of lading, as in the case of other documents, that where there are a number of clauses they are as far as possible to be read together, as being consistent with one another, and that a clause is not to be treated as being mere surplusage, or as inoperative, unless the language of the document leads to the conclusion that it cannot be read consistently with rest of the document. There is one other general rule of construction to which I think the learned judge did not give sufficient attention, which I will state in the language of Williams, L.J. in his judgment in the case of *Rathbone Brothers and Co. v. MacIver, Sons, and Co.* (89 L. T. Rep. 378; (1903) 2 K. B. 378). In that case Williams, L.J. said: "With reference to the carriage of goods by sea, the law implies certain warranties on the part of the shipowner. It puts upon him certain obligations which will always bind him, unless there are in the contract clear and express words which without ambiguity relieve him from that which I may call his common law obligations." I think that Romer, L.J., in that case, was referring to that principle when he said: "Shipowners have been for a long time endeavouring to limit the general liability cast upon them by law as carriers by sea by inserting special exceptions, without going the length of excepting their liability in respect of the warranty of seaworthiness, and they have been, as I understand, from time to time extending the special exceptions. I think, however, I am

right in saying that as a principle of construction the warranty of seaworthiness will be held not to have been excepted unless it plainly appears that it was intended to except it. In other words, the court will not readily infer an exception of that warranty." It seems to me that those statements in the judgments in the Court of Appeal lay down in the clearest possible language the principles which were applied in many earlier cases. In the present case I think that the learned judge has not given sufficient effect to the fact that the small print clause undoubtedly deals with unseaworthiness. Mr. Carver has argued that the small print clause leaves the matter of unseaworthiness where it was, except to the extent to which it limits it. In other words, there being a warranty of seaworthiness, the small print clause provides that the shipowner excepts damage caused by or from any accidents to, or defects, latent or otherwise, in hull, tackle, boilers, or machinery, refrigeration, or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness." Therefore I accede to the first part of Mr. Carver's argument, that the small print clause leaves the warranty of seaworthiness where it was except to the extent that it affords further protection to the shipowner by providing that, if reasonable means have been taken to prevent unseaworthiness, the shipowner shall be protected. I am, however, unable to follow the other part of Mr. Carver's argument, that the large print clause, in the construction of which there is undoubtedly considerable difficulty, is intended to be an overriding clause exempting the shipowner from liability for unseaworthiness, whether existing at the commencement of the voyage or not, and that by reason of the words, "from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage, or at the time of the shipment of the goods or not," the shipowner is protected in this case notwithstanding the limited protection given to him by the small print clause. I am unable to come to the conclusion that, construed fairly and with every wish to give the fullest possible effect to the exception, the large print clause further limits the warranty of seaworthiness beyond the limitations contained in the small print clause. I will not repeat the reasons which have been given why the two clauses should as far as possible be read together as being consistent with each other and operative. The large print clause says: "Neither the steamer, nor her owners, nor her charterers shall be accountable for the condition of goods shipped under the bill of lading, nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention." Then, it is very material to observe that the clause proceeds: "Nor for the consequence of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or

charterers, nor from any other cause whatsoever, and steamer shall be at liberty to jettison the whole of the goods or any part thereof." It is, therefore, quite plain that this clause cannot be considered as having been framed to put in the words, "or from any other cause whatsoever," so as to completely get rid of any liability for unseaworthiness. We find those words, "or from any other cause whatsoever," whether existing at the commencement of the voyage, &c., following the words which relate specially to failure or breakdown of machinery, insulation, or other appliances, and I have no doubt that we ought to read those words, "or from any other cause whatsoever," as relating to the subject-matter there dealt with and not to read them as a general clause exempting the shipowner from the consequences of unseaworthiness. I read this clause, therefore, in this way—that the shipowner is protected from liability from loss or damage arising from failure or breakdown of the machinery, &c., or from any other cause whatsoever, whether arising from a defect in the machinery, &c., which existed at the commencement of the voyage or at the time of shipment of the goods or not. I adopt the argument of Mr. Hamilton that those words were intended to widen the exception, which was put in for the purpose of protecting the shipowner, and relates to breakdown of machinery, &c. That being so, I have now only to deal with the argument for the respondents that, even if that view of the clause ought to be adopted, and they are wrong in their contention that the clause was intended to cover unseaworthiness however occasioned, and whether existing at the commencement of the voyage or not, yet this was a defect of insulation. I think that that point was not really raised in the court below. I cannot think that Walton, J. would have dealt with the case in the way in which he did deal with it if that point had been really raised. I think that this was not a defect or breakdown of machinery, insulation, &c., within the meaning of this clause. The learned judge has found, as I understand, that the ship was tainted with carbolic acid, and was, therefore, unfit to carry a cargo such as frozen meat, independently altogether of the particular chamber in which the meat was being carried, and independently of any function which the insulation, as insulation, had to fulfil. That being so, I think that the facts do not bring this case within the narrower and proper construction of the large print clause; and, inasmuch as that clause cannot be construed as a general exception protecting the shipowner from liability for the consequences of unseaworthiness, I think that, in the words of Williams and Romer, L.J.J., which I have quoted, he has failed to indicate in plain language that the warranty of seaworthiness is cut down to any greater extent than by the small print clause. Therefore, I have come to the conclusion that this appeal must be allowed.

COLLINS, M.R.—I am of the same opinion, and I think that I cannot usefully add anything to the reasons given by the Lord Chief Justice.

ROMER, L.J.—I agree.

Appeal allowed.

Solicitors for the appellant, *Waltons, Johnson, Bubb, and Whalton.*

Solicitors for the respondents, *Lowless and Co.*

[CT. OF APP.]

HANDLER v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

[CT. OF APP.]

Friday, Jan. 15.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

HANDLER v. MUTUAL RESERVE FUND LIFE ASSOCIATION. (a)

APPLICATION FOR A NEW TRIAL.

Insurance (life)—Lapse of policy on failure of payment of premium—Subsequent payment—Conditional receipt by insurance company—Neglect of assured to read conditions of receipt—Duty of insurance company—Estoppel.

A policy of life insurance effected with an insurance company was expressed to be conditional upon the payment of the premiums each year within thirty days of their becoming due. The holder of the policy failed to pay a certain premium within thirty days of its becoming due. On his afterwards sending the money to the company they sent back to him a receipt upon a printed form, which stated that the policy had lapsed and that the payment was accepted subject to certain conditions printed on the back of the receipt. He received this receipt, but did not read it.

One of these conditions was that the person whose life was insured had been during the past twelve months in continuous good health and free from all disease; and he was in fact, and to his knowledge, suffering at that time from a disease of which he afterwards died. Until he died the subsequent premiums were punctually paid. On his death the company refused to pay the sum for which his life had been insured on the ground that the policy had lapsed, and the conditions of the receipt above mentioned had not been complied with. In an action to recover the amount of the insurance money:

Held, that, as the policy had lapsed on account of the breach of its conditions, and the plaintiff had given no evidence of any conduct on the part of the company which would justify him in thinking that the policy had not lapsed, and would estop them from relying on the lapsing of the policy, he was not entitled to succeed in the action.

APPLICATION by the defendant company for judgment or a new trial in an action tried before Mr. Commissioner Bray, K.C. with a jury at Liverpool.

The action was brought to recover a sum of 1000*l.* under a policy of insurance issued by the defendant company on the life of James Clarke Williams in favour of the plaintiff.

The plaintiff carried on a tailoring business in Liverpool in partnership with J. C. Williams and another person, and the policy in question was taken out in order to secure the plaintiff against certain partnership liabilities that had arisen, or might arise, between him and J. C. Williams.

The policy was dated the 21st March 1890, and was in the following terms:

Mutual Reserve Fund Life Association.—In consideration of the application for this certificate of membership, or policy of insurance, and the declarations made to the medical examiner, which are hereby referred to and made a part of this contract, every person accepting or acquiring any interest in this contract hereby adopts as his own and admits the statements contained therein to be the only statements upon which this contract is

made, and of the first year's dues paid, the Mutual Reserve Fund Life Association does hereby receive James Clarke Williams, of Liverpool, in the county of Lancaster, as a member of said association; and upon the further condition of the payment of the dues for expenses to be paid on or before the 21st March in every year during the continuance of this certificate, or policy of insurance, and also upon the further condition of the payment of all mortuary premiums payable at . . . within thirty days of the first weekdays of the months of February, April, June, August, October, and December of each and every year during the continuance of this certificate or policy of insurance . . . there shall be payable to the legal representatives of said member the sum of 1000*l.* sterling. . . Benefits under this certificate or policy of insurance shall not be impaired or restricted by travel or change of residence, and if this certificate, or policy of insurance, shall have been in continuous force for two years from its date, it shall thereafter be incontestable and indisputable, except for fraud or nonpayment of dues or mortuary premium at the times and in manner herein stipulated. . . .

On the 1st Feb. 1896, 2*l.* 5*s.*, for a mortuary call, became due on the policy, and the company, in accordance with their practice, sent the plaintiff a notice that it was due, and that it must be paid on or before the 2nd March following, and that, if it was not paid within the time stated, the policy and all payments thereon would become forfeited and void.

The plaintiff failed to pay the mortuary till the 6th March, and then when he paid it he received from the company a receipt in the following form:

Mutual Reserve Life Insurance Company.—Received of C. J. Williams, Esq., this 6th day of March 1896, 2*l.* 5*s.* 0*d.*, being for payment of past due mortuary call, No. 84, 2*l.* 5*s.* 0*d.*, which became due 1st Feb. 1896 on policy No. 94,424, which said policy lapsed by reason of the non-payment of the above on or before the date the same became due. The above payment is offered and the same received by the company subject to the conditions on the back hereof, which are hereby made a part of this receipt . . . George W. Harper, Treasurer. See other side.

On the back of the receipt was printed the following:

The conditions upon which the within payment (for which this receipt is given) is accepted, are as follows: First: That said member is now living, and of temperate habits, and is now and has been during the past twelve months in continuous good health and free from all disease, infirmity or weakness, otherwise said payment and this receipt and said policy shall be and is null and void, and the sum paid hereon shall be subject to the order of the within named person. Second: The receipt and acceptance of the within sum by the company shall not be held to waive forfeiture or expiration of membership, or to reinstate membership, or create any liability on the part of the company under said policy, except upon fulfilment of the first condition of this receipt. Third: The acceptance of the within sum after the same became due shall not establish a precedent for acceptance of future payments to the company, nor shall any subsequent payment upon said policy impair, waive, alter or change any of the conditions of this receipt or of said policy. Special Notice. On the first weekday of the months of February, April, June, August, October, and December of each year mortuary calls will be made which must be paid within thirty days from the date of such call, or the policy will lapse. Members who desire can make payments annually or semi-annually in advance. . . .

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

At the time when this mortuary call was sent in and the above receipt given, J. C. Williams was suffering, to his own knowledge, from an incurable form of heart disease, in consequence of which he had retired from business the year before, and from which he died on the 2nd March 1903.

The plaintiff continued, up to the death of J. C. Williams, to pay the premiums on the dates as they became due.

Upon the death of J. C. Williams the company refused to pay the sum assured by the policy upon the ground that it had lapsed.

The plaintiff thereupon brought the present action.

At the trial of the action at Liverpool, before Mr. Commissioner Bray, K.C. and a jury, the plaintiff gave evidence that he had not read the policy or the calls or the receipt. The questions left to the jury, and their answers, were as follows: (1) Did the plaintiff know that there was writing or printing on the receipt?—Yes. (2) Did the plaintiff know that the writing or printing upon this receipt contained terms imposing conditions upon the receipt that did not exist in the original policy?—No. (3) Did the defendants do what was reasonably sufficient to give the plaintiff notice of those conditions?—No.

On these findings the learned commissioner gave judgment for the plaintiff. The defendants applied for judgment or a new trial.

McColl, K.C. (Hugh Fraser with him) for the defendants.—The plaintiff gave evidence at the trial that he did not read the policy or the mortuary calls or the receipt. It is not denied by him that the policy had lapsed when the payment in question was made on the 6th March 1896 and the conditional receipt given, but it is contended by him that by his neglect to read the policy, the calls, and the receipt he is put in as good a position as if the receipt had been an unconditional one. The policy is expressly declared to be conditional upon the payment of all mortuary premiums "within thirty days from the first weekday of the month of February, &c., of each year." There was an admitted breach of that condition. If the plaintiff relies upon something which occurred subsequently to validate the lapsed policy, the onus is on him to prove an estoppel on the other side from relying on that which is the fact. That differentiates this case from all the cases which were relied upon at the trial of the action referring to printed tickets given to railway passengers and persons depositing goods. In all those cases the question was as to what was the original contract made between the parties. Here, under the terms of the original contract, a forfeiture undoubtedly occurred, and the plaintiff has to show something to enable him to get out of that. He has shown nothing, and the defendants are therefore entitled to judgment.

Pickford, K.C. and Lias for the plaintiff.—The defendants went on receiving premiums up to the date of the deceased's death. They are estopped from denying the continued validity of the policy. It was the duty of the company to do what was reasonable to bring to the knowledge of the plaintiff the fact that they only accepted the payment in 1896 upon certain conditions, and the jury have

found that they failed to do that. The questions left to the jury were substantially the same as those which were held by the House of Lords to be the right ones to be left to the jury in the case of

Richardson Spence and Co. v. Rowntree, 70 L. T. Rep. 817; (1894) A. C. 217.

There the House of Lords expressed approval of the decision of the Court of Appeal in

Parker v. South-Eastern Railway Company, 36 L. T. Rep. 540; 2 C. P. Div. 416.

That was a case of a cloak-room ticket, and the court held that the plaintiff was not bound by the conditions on the ticket, if he was ignorant of them, unless the defendants had taken reasonable means to bring them to his notice. There can be no difference in this respect between making a new contract and reviving one that is dead. This conditional receipt does in fact bring a new condition into the policy, that the policy is to be void unless the assured had been in good health for a certain time previous to the receipt. The third condition is also an entirely new one. It was the duty of the defendants to call the attention of the plaintiff to the effect of the receipt. He accepted the receipt as an ordinary receipt, and as an intimation that the policy was just as it always had been.

COLLINS, M.R. (after stating the facts, continued).—Now, under these circumstances, what are the rights of the parties? The plaintiff had failed to fulfill one of the conditions of the policy, that the premiums should be paid within certain limited times. He did afterwards pay a premium that he had failed to pay within the proper time, and received a receipt from the company, but, as the policy had, *ex hypothesi*, come to an end, it seems to me that he can only succeed in this action on the foundation of an estoppel, that is to say, he must show that though the policy had come to an end the defendants have so acted that by their conduct they led him to suppose that the policy was still alive. It is for the plaintiff to make that out, and he can only do it by producing the receipt. That is the document upon which he must found—if he can do so at all—the implication that the defendants treated the policy as still subsisting, and induced him to act upon their conduct. It is said that the question must be decided by the finding of the jury that reasonable steps were not taken by the defendants to bring to the plaintiff's notice the conditions attached to the receipt. I am not at all myself disposed to accept that view as the true measure of the obligation of the parties in this case. It seems to me that the burden in this case is most distinctly upon the plaintiff. He begins the discussion with a policy of insurance that has lapsed, and if he is going to assert that notwithstanding the fact that it has lapsed the company are estopped from averring the truth that it has lapsed, it seems to me the burden is upon him to show that he has been misled, and it is not enough for him to say that he received from them a document which he did not read. If he showed, for instance, that the receipt which they sent him had some ambiguous phraseology in it which might reasonably be construed to mean that the policy was still alive, then I could understand his raising a question of fact for the

jury, whether or not the form of the receipt was such as to mislead him into supposing that the policy was still alive. His only answer is that it had conditions on the back of it which he did not read. It seems to me that he was not misled by them. He does not prove that he was misled by them if he does not choose to read the receipt, which on the face of it says that the policy has lapsed by reason of non-payment of premiums, and refers to conditions which are set out upon the back of the receipt. Whether or not there was any question at all here for the jury I do not feel at all clear. I am not at all clear that the question whether the defendants did what was reasonably sufficient to give the plaintiff notice of these conditions was the true question in this case. But, assuming that it was for the purposes of this discussion, it seems to me that there was no evidence fit for the consideration of the jury, or upon which any jury could find that there was a misleading by the defendants of the plaintiff so as to create an estoppel. Even if it were a question for the jury I do not think there was any evidence in this case for them. Furthermore, I think that the particular form in which the second question was put to the jury was misleading, as it suggested that this receipt introduced some new condition which had not been originally imposed by the policy. Very possibly that may have accounted for the extraordinary view which the jury seem to have come to upon the facts. No doubt the learned commissioner who tried this case with very great care, put these questions because it was suggested to him that they were the questions which had been sanctioned by a high authority in another case; but it seems to me, although those questions may have been the proper questions in that other case, the second of the two here certainly had no special reference to the particular facts in the present case, and under the circumstances I think it was misleading. However, it is not necessary to go into that because in my judgment the whole point here is: Were the defendants estopped from affirming that the policy had come to an end? It was for the plaintiff to prove that they were, and in my opinion he has given no evidence upon which that estoppel could rest. Under these circumstances I think the appeal must be allowed.

ROMER, L.J.—I am of the same opinion. I may add that, as was pointed out in the course of the argument, the case would have been precisely the same even if the plaintiff were in a position to set up a new contract on the footing of the old policy. The only other observation that I wish to make is this: When the payment was made, or purported to be made, of the mortuary call after the thirty days had elapsed, there was nothing whatever which could possibly have induced the plaintiff to suppose, or justified him in supposing, that that premium would be unconditionally received. That being so, when he made that payment he had no reasonable ground for supposing that it would be simply received, and nothing more. When he sent this money after the time within which it ought to have been paid he received a communication with reference to that payment. He had no reason to suppose that it was a mere formal acknowledgment of the money without more. Under the circumstances it was clear that he was bound to look to see on

what terms the money payment had been received, and, if he had looked, he would have found it. I conceive, therefore, that this case was not one where there were any circumstances upon which the jury could possibly find that there was such conduct on the part of the company as would justify the plaintiff in thinking that the policy had not lapsed.

MATHEW, L.J.—I am of the same opinion. It is incumbent on the plaintiff to prove that at the time of the death there was a subsisting policy of insurance. Now, the original policy was gone—that is not disputed. According to these terms, it only subsisted so long as the payments were regularly made. The original policy is gone. It was open to the plaintiff to show a new contract of insurance. He might do that in one or other of two ways. First, by showing an actual agreement on the lapse of the policy; secondly, by showing that he had been misled by the conduct of the defendants in inducing him to think the policy was still a subsisting policy. The first ground, of course, cannot be sustained for a moment. The second ground, that there was an estoppel, seems to me wholly to fail. There was no evidence upon which the jury could reasonably find that the plaintiff had been misled by the defendants. The plaintiff unfortunately misled himself by reason of his failure to do what any business man might be expected to do—namely, to look at the form of the receipt sent to him. There being no ground upon which the jury could have found an estoppel, it is plain the plaintiff fails in the action. The judgment must therefore be reversed.

Appeal allowed.

Solicitors for the plaintiff, *Sharpe, Parker, Pritchards, Barham, and Lawford*, for *Cleaver, Holden, and Co.*, Liverpool.

Solicitors for the defendants, *Robinson and Stannard*.

Friday, Feb. 5.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

STONE AND CO. v. MIDLAND RAILWAY COMPANY. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Railway—Rates—Carriage of non-perishable goods by passenger train—Absence of statutory duty to carry—Right of company to impose its own terms—Inclusive charge for collection, carriage, and delivery—Equality clause—Midland Railway Company Act 1844 (7 & 8 Vict. c. xviii.), s. 203—Railway Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), s. 90—Midland Railway Company (Rates and Charges) Order Confirmation Act 1891 (54 & 55 Vict. c. ccxiz.), Part 5, clause 3.

A railway company which is under no statutory obligation to carry non-perishable goods by passenger train is entitled to demand from all persons who wish to send non-perishable goods by passenger train a single rate including collection, carriage, and delivery.

Judgment of the King's Bench Division (88 L. T. Rep. 92; (1903) 1 K. B. 741) affirmed.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

APPEAL by the plaintiffs from the judgment of the Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.), reversing the judgment of the judge of the Bristol County Court.

The action was brought to recover the sum of 1s., money received by the defendants to the use of the plaintiffs, under the following circumstances:

The defendants published a list of rates for the conveyance of parcels by passenger train from Bristol. Among the articles which in this list they expressed themselves as willing to carry were "tailors' unfinished and finished clothing." For the conveyance of this by passenger train they announced only one rate which was inclusive of collection and delivery.

On the 7th Aug. 1901 the plaintiffs, who were common carriers at Bristol, collected three boxes of tailors' goods and handed them over to the defendants at the passenger station at Bristol for conveyance by passenger train to Southampton.

In accordance with the published rate the defendants demanded payment of 1l. for the conveyance of the goods.

The plaintiffs paid this sum under protest and brought this action in the Bristol County Court to recover the sum of 1s. in respect of the collection of the goods by them, that amount being one which might reasonably be held to represent the cost of collection.

The County Court judge gave judgment for the plaintiffs for the amount claimed.

Upon the defendants' appeal the King's Bench Division (Lord Alverstone, C.J., Wills and Channell, JJ.), reversed the decision of the County Court judge, but gave leave to appeal.

The case is reported 88 L. T. Rep. 92; (1903), 1 K. B. 741.

The plaintiffs appealed.

The Midland Railway Company's Act 1844 (7 & 8 Vict. c. cxviii.) provides as follows:

Sect. 198. And with respect to the tolls to be levied for the use of the railway, be it enacted, that the company may lawfully demand any tolls not exceeding the following (that is to say):

Sect. 200. And with respect to small packages and single articles of great weight, be it enacted, that the company may lawfully demand the tolls following; (that is to say) for the carriage of small parcels (that is to say, parcels not exceeding 500lb. weight each), the company may demand any sum which they may think fit.

Sect. 203. And be it enacted, that all tolls for the use of the railway shall be at all times charged equally to all persons, and after the same rate, whether per mile or per ton per mile, or otherwise, in respect of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine; and that all tolls or charges for conveyance by the company, or for the use of carriages or locomotive power, shall be at all times charged equally to all persons, and after the same rate, whether per mile or per ton per mile, or otherwise, in respect of all passengers, and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line of railway only, and under the like circumstances; and no reduction or advance in any such tolls for the use of the railway, or such tolls or charges for conveyance by the company, or for the use of any carriages or locomotive power to be supplied by them, shall be made, either directly or indirectly, in favour of or against any particular company or person

travelling upon or using the same portion of the railway only, and under like circumstances.

The Railway Clauses Consolidation Act 1845 (8 & 9 Vict., c. 20) provides as follows:

Sect. 90. And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit, provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the railway.

The Midland Railway Company (Rates and Charges) Order Confirmation Act 1891 (54 & 55 Vict. c. cexix.) provides as follows:

Part 5. The following provisions and regulations shall be applicable to the conveyance of perishable merchandise by passenger train . . . (3) The company shall not be under obligation to convey by passenger train, or any similar services, any merchandise other than perishables.

J. A. Foote, K.C. (*Balfour Browne*, K.C. and *Weatherley* with him) for the plaintiffs.—These tolls are really charged under sects. 198 and 200 of the defendant company's Act of 1844, and under the equality clause in sect. 90 of the Railway Clauses Consolidation Act 1845 the company is bound to charge equally all persons who send goods of this sort for conveyance by passenger train. It is not in accordance with the equality clause to have only one rate including collection and delivery. Where a railway company was empowered by statute to charge for the conveyance of small parcels "any sum which they think fit," it was held by the Exchequer Chamber, affirming the Common Pleas, that the company was still bound to charge equally, and could not lawfully demand a sum including the cost of collection and delivery, so as to impose an unequal burthen on those who did not require the performance of the latter service:

Baxendale v. Great Western Railway Company, 8 L. T. Rep. 833; 14 C. B. N. S. 1; affirmed 9 L. T. Rep. 814; 16 C. B. N. S. 137.

Here the company, under sect. 200, may demand for the carriage of small parcels "any sum which they may think fit." Even if the tolls which the company demand for the carriage of non-perishable goods by passenger train are not demanded under any special statutory provision, yet when once they have fixed and published definite rates for such conveyance they are bound to charge all persons equally. Sect. 203 of their private Act of 1844 applies to "all tolls for the use of the railway," and has the same provision for equality as is to be found in sect. 90 of the Rail-

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way Clauses Consolidation Act 1845. The decision of the Exchequer Chamber in *Bazendale v. Great Western Railway Company* (*ubi sup.*) has been approved by the House of Lords:

Great Western Railway Company v. Sutton, 22 L.T. Rep. 43; L. Rep. 4 H. L. 226.

There Lord Chelmsford said that the notion that the clauses for making equal charges were inconsistent with the power given to the railway company to demand any sum they think fit for small parcels appeared to him to be unfounded. Therefore the equality clauses apply just as much to a toll fixed by a railway company under a discretionary power, as to a toll for which a maximum has been provided by Act of Parliament. Section 200 of the Midland Railway Company's Act of 1844 does not say anything as to the carriage of the goods whether by goods or by passenger train, but that may be explained by the early date of the Act, when railway companies did not divide their traffic so rigidly as now into goods and passengers. The charge made by the defendant company for carrying non-perishable goods by passenger train is a "toll" within the definition of the word in sect. 3 of the Railway Clauses Consolidation Act 1845. [COLLINS, M.R.—I do not think anything turns upon the technical meaning of "toll"; the point is whether the charge made by the company is payable under the Act, if they are under no obligation to carry these goods by passenger train.] Sect. 203 is not limited to tolls payable under the Act of 1844. It applies to "all tolls." I agree that there is no statutory obligation on the defendants to carry non-perishable goods by passenger train, but that is not enough to show that the equality clause does not apply to rates in fact charged by them for so doing.

Cripps, K.C. and *W. G. Clay* (*W. J. Noble* with them) for the railway company.—The charging sections of the company's special Act of 1844 do not apply now. That legislation has been superseded by the Railway and Canal Traffic Act 1888 and the provisional orders confirmed by Act of Parliament under that Act. The company's powers of making charges are now governed by the Midland Railway Company (Rates and Charges) Order Confirmation Act 1891, except so far as some old special charges are still kept alive. Under that Act the company is under no obligation to carry non-perishable goods by passenger train. It has therefore power to demand any rate it pleases for such a service. For this service the company is in the position of a common carrier, free from statutory obligations. As was pointed out by Blackburn, J., when he gave his opinion to the House of Lords in *Great Western Railway Company v. Sutton* (*ubi sup.*), at common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation imposed on him at common law was to carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a reasonable compensation for so doing. Subject to that, a common carrier may at common law give any particular individual any privilege he likes. The case of *Bazendale v. Great Western Railway Company* (*ubi sup.*), which is relied upon

by the plaintiff, has no application here. It applies only to a case where the toll charged is one authorised by the special Act. The court said that the toll in that case was none the less charged under the special Act because the company were empowered to fix the maximum. Sect. 90 of the Railway Clauses Consolidation Act 1845, in which the equality clause is to be found, has reference only to "the tolls by the special Act authorised to be taken." The charging sections of the Act of 1844, even if still in force, do not apply to the carriage of non-perishable goods by passenger trains. Moreover, sect. 203, in speaking of "all tolls," is referring to the tolls authorised to be taken in the preceding sections, and therefore has no reference to a toll such as the one charged to the plaintiff, which is not authorised by any special Act. In *Bazendale v. Great Western Railway Company* (*ubi sup.*), and in *Great Western Railway Company v. Sutton* (*ubi sup.*), the company was carrying on business as a common carrier of goods from station to station. In the present case the company does not hold itself out as a carrier of non-perishable goods by passenger train from station to station, but only from house to house. There being no obligation on the company to carry non-perishable goods by passenger train, they may lawfully refuse to do so at all, but, if they choose to carry such goods, they are at liberty to ask any rate they please:

Dickson v. Great Northern Railway Company, 55 L. T. Rep. 868; 18 Q. B. Div. 176.

Foots, K.C. in reply.—*Bazendale v. Great Western Railway Company* (*ubi sup.*) was a case of carriage of goods by goods train. In other respects it was similar to the present case. Carrying goods from house to house is not a matter within the equality clause. It is not enough that the company charges the same rate to all persons for carriage from house to house. It is the conveyance of the goods over the rails that must be charged for at an equal rate to all persons.

COLLINS, M.R.—This is an action brought by a carrier against the Midland Railway Company, claiming to recover back money which he says has been improperly obtained from him by some species of duress—that is to say, that they demanded and received from him a sum beyond that which they were entitled to charge him. He now claims that he is entitled to recover that money back, and he relies for that purpose on the equality clause in sect. 90 of the Railway Clauses Consolidation Act 1845, and in sect. 203 of the Midland Railway Company Act 1844. Now the point arises in this way: The railway company say they are not bound to carry by passenger train goods such as he tendered, which are non-perishable merchandise, and that therefore, being entirely free whether they will carry them or not, being under no obligation to carry them, and there being no toll by statute with respect to them, they do not come under the railway legislation as to equality at all. That is their point. Mr. Foots, on the other hand, contends that they do. Now, sect. 90 of the Railway Clauses Consolidation Act 1845 is in these terms: [His Lordship read the section.] Now let me first point out upon this section that that which is being there dealt with is the power conferred by law

upon the company to demand certain tolls and to vary those tolls. The section says that it is expedient that the company should be enabled to vary the tolls, but that such power of varying—it is all statutory—should not be used for the purpose of prejudicing or favouring particular parties. The class of toll that is being dealt with is that which is demanded under statutory powers, and the legislature emphasises that a little further down in the section by saying this: "Subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken." That is the power of alteration, and that is the power which is checked by the introduction of the equality clause in the special proviso at the end of the section. Now, it has been hardly contended by Mr. Foote that that clause is not directed to the tolls which by special legislation the company is empowered to demand, and, recognising that difficulty in that section, though he does not say it is insuperable, he prefers to rest his case upon the equality clause in the private Act of the company, and his ground for that preference is that the words of the section do not in terms appear to limit the word "toll" to the tolls specially authorised by the special Act. The section which he relies upon is sect. 203 of the Midland Railway Company's Act of 1844. It begins in these terms: "And be it enacted, that all tolls for the use of the railway shall be at all times charged equally to all persons." I will not read any more of it, for the rest of the section is practically in the same words as sect. 90 of the Railways Clauses Consolidation Act 1845. Mr. Foote suggests that the words "all tolls" mean all tolls which are in fact charged by the company—not merely all tolls which by law the company are entitled to demand, and that, therefore, sect. 203 is larger in its terms than sect. 90, and brings under its operation any charges which the company in fact make, whether they are the subject of legislation by special Act of Parliament or not. But when one looks to the place in which the 203rd section comes in the Act, one finds that it is simply a section in what I may call a particular code as to tolls. The Act deals with a number of different things, and then, in sect. 198, it comes to tolls: "And with respect to the tolls to be levied for the use of the railway, be it enacted that the company may lawfully demand any tolls not exceeding the following." Therefore this legislation is both empowering and limiting: it empowers the company to demand certain tolls, and it limits the amount of those tolls; and it is to those tolls, which are provided for or referred to, directly and indirectly, in sects. 198 to 203, and several others afterwards, that in my judgment the words in sect. 203 apply. The expression "all tolls" in that section means all tolls which are the subject-matter of the legislation in this code, beginning with sect. 198, a code which prescribes in detail for every possible merchandise which they, the company, are empowered to carry and authorised by law to demand a rate or charge for carrying. Therefore, in my judgment, when you look at the legislation in the private Act of 1844 it in no way differs from the legislation in the public Act of 1845. They are both statutory enactments with respect to statutory rights to demand

special tolls. Then what are the statutory rights now governing the Midland Railway's undertaking? They are these. By the Railway and Canal Traffic Act 1888 (51 & 52 Vict. c. 25), when the whole scheme of railway rates was under discussion, an enactment was made by sect. 24 to this effect: "Notwithstanding any provision in any general or special Act, every railway company shall submit to the Board of Trade a revised classification of merchandise traffic, and a revised schedule of maximum rates and charges applicable thereto, proposed to be charged by such railway company." I need not read in detail the further details of the section, which are numerous, but they provide in terms that the company shall submit a schedule, that that schedule shall be discussed before the Board of Trade, and that when sanctioned by the Board of Trade it shall be issued under the terms of a provisional order. Sub-sect. 4 provides: "If, after hearing all parties whom the Board of Trade consider to be entitled to be heard before them respecting the classification and schedule, the Board of Trade come to an agreement with the railway company as to the classification and schedule, they shall embody the agreed classification and schedule in a provisional order." That is the genesis of the provisional order. Then comes the statutory sanction. That is sub-sect. 10: "The Act of Parliament confirming any provisional order made under this section shall be a public general Act, and the rates and charges mentioned in a provisional order as confirmed by such Act shall from and after the Act coming into operation be the rates and charges which the railway company shall be entitled to charge and make." Those, and no others, are the rates which now govern the Midland Railway Company, because an Act such as is contemplated by this section—namely, the Midland Railway Company (Rates and Charges) Order Confirmation Act 1891—has been passed, which has given legislative sanction to the provisional order previously agreed to, under the terms of the Railway and Canal Traffic Act 1888, by the Board of Trade. So we have to look to that Act of 1891 in order to see what are the charges they are empowered to make. Now, the Act contains a schedule of maximum rates and charges, and clause 2 of that schedule provides thus: "The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train; and, subject to the exceptions and provisions specified in this schedule, includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not hereinafter provided for." Then follow a number of provisions as to the different services which are to be rendered, and which may be the subject-matter of rates. Then we come to the actual tariff for the different classes of merchandise. Part 5 is headed "Perishable merchandise by passenger train," and it provides: "The following provisions and regulations shall be applicable to the conveyance of perishable merchandise by passenger train: (1) The company shall afford reasonable facilities for the expeditious conveyance of the articles enumerated in the three divisions set out hereunder (which articles are hereinafter called 'perishables') either by passenger train or by

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other similar service. (2) Such facilities shall be subject to the reasonable regulations of the company for the convenient and punctual working of their passenger train service, and shall not include any obligation to convey perishables by any particular train." Then comes clause 3: "The company shall not be under obligation to convey by passenger train, or other similar service, any merchandise other than perishables." The merchandise in this case is merchandise other than perishables. I think that is perhaps enough of that to read. Now we come to this point: Here is a company whose rates and charges are ascertained in the way I have described by this provisional order, which is sanctioned by an Act of Parliament in 1891. That regulates its charges. By that Act the company is under no obligation whatever to carry non-perishable merchandise by a passenger train; there is no tariff fixed for it, and no statutory obligation to make a tariff. They are absolutely at large. The merchandise sent by the plaintiffs in this case was non-perishable, and was carried by passenger train, and what the company do with respect to that is this. Being under no obligation at all to carry non-perishable merchandise by passenger train, they nevertheless have given certain facilities to the public in respect of it, and they have announced that they are prepared to take this traffic from the house of the sender and deliver it at its destination at a certain rate. I daresay it would be fair to say that that rate, if analysed, would be found to contain an element representing the cost of collection and delivery as well as the cost of transit. But the company say: "With respect to this class of merchandise, as to which we are entirely at large so far as the Legislature is concerned, we are willing, of our own motion, on our own rights at common law, apart from statute, being the owners of machinery whereby the conveyance of merchandise can be carried on, to give the public this facility if they like to take it. If they do not like to take it, they can leave it alone; and the only facility we will give for carrying merchandise by passenger train is this: We will charge an inclusive rate for the whole service, which you may avail yourself of or not, just as you like; but you must pay this inclusive charge, which is the only charge we make for this, whether you get the benefit of all the incidental services or not. If you like to collect your own goods and deliver them at our station, and ask us to send them from there, we tell you we will make the same charge as if we ourselves had collected and delivered; that is the only rate we quote for it. We are under no obligation to quote any rates; and if you like to take that facility you may take it or else leave it alone." Then say the plaintiffs: "That will not do; we collect our own goods, we tender them at your station, and therefore we ought not to be charged the same as other persons who cannot collect their own goods, and for whom you collect and take the goods to the station. We insist on your charging us only a rate which does not embrace collection and delivery in other words, we insist on your charging us a station to station rate." If the plaintiffs had a right to demand a station to station rate, that would undoubtedly be a very strong argument. But when they have no right to demand a station to station rate—when they

are not entitled by law to insist upon reasonable facilities being given for the transit of their goods in that particular way from one station to another—is not it obvious that they cannot complain when the railway company refuse to give them a station to station rate, and say: "The only terms upon which we will carry non-perishable goods by passenger train is upon a rate which includes collection and delivery"? I think it is perfectly true to say, as the Lord Chief Justice said in the court below, in effect you are demanding a station to station rate; you are demanding a facility which by law you are not entitled to ask; you are at the mercy of the railway company in this matter, and you can only get the facility of sending this merchandise by passenger train upon the terms of what they are exacting for it, no matter where it comes from—that is to say, on the terms of a rate embracing collection and delivery. Mr. Foote says that, even though there is no obligation to take it from the station, nevertheless, if the company, in point of fact, do carry these goods and make a charge which embraces collection and delivery against a person for whom they have not collected, they have in fact charged a sum which is unequal with regard to him; they have given him fewer facilities and advantages, and they have exacted a charge for the whole as though facilities had been given. He says that that raises an inequality, and he cites the case of *Bazendale v. Great Western Railway Company* (ubi sup.) to show that, even under these circumstances, the equality clause applies. But in the case cited the company were bound to take the particular class of goods in question and to carry them in the way they did carry them, and they were also entitled by law to demand a tariff in respect of doing it. It is true that the precise amount of that charge was left to their discretion; but they had no discretion whatever to refuse to carry the goods, and they had by law the right to demand a toll for them, and therefore the court said: "It is true you are at large as to the amount of the toll, but you are not at large as to anything else; whatever you demand for them you demand as a statutory right under the exigency of the statute, and therefore you come under the equality clause, and you must deal equally with all people." But the difference here—and it is the cardinal difference—is this, that this particular traffic is governed by no statute at all. There is no obligation to carry; there is no statute imposed for carrying it. That being so, the company are outside the railway legislation. That railway legislation, in my opinion, is limited to that which the company is by law placed in a position to demand. The company is a creature of the statute, and, in so far as the Legislature gives it special powers, it imposes special obligations. But where the Legislature leaves the company at large and gives no powers at all, then there is no necessity for imposing limitations, and it has not imposed them. In fact, I think the whole of this case may be summed up in the short and exceedingly conclusive judgment of Wills J. in the court below. The company have the right to carry the goods; they are not debarred from carrying the goods. They are not empowered to carry the goods, but they are not debarred from carrying the goods. Is there any statutory provision for them to carry these goods by passenger train? There is none. Then they are outside the

Act of Parliament. In my opinion this appeal fails.

ROMER, L.J.—So far as concerns the carriage of non-perishable goods by passenger train, the company, since the Act of 1891, is clearly under no obligation to carry at all, and, if it does carry at all, it appears to me that the company may prescribe as between what termini it will carry, and the amount of the rate. I think, therefore, the company is entitled to say that it will only carry non-perishable goods by passenger train, not from station to station, but only from house to house; and it is then further entitled to charge a through rate for that carriage, including collection and delivery. Even if it be admitted that there must be equality of charge, the only equality need be that the through rate is not charged differently as between different persons availing themselves of the company's offer of carriage from house to house at a through rate. I need not, perhaps, mention that it cannot be reasonably contended that there is inequality merely because one house may be more distant than another. Then, if a man voluntarily chooses to spare the company the necessity of collection, can he do more than offer to the company to treat his case as one where the goods are being sent from house to house at the through rate? I think not. The company is entitled to say that it will only send the goods on that footing. The case, in fact, is like one where the house from which the goods are sent happens to be very close to the railway station. The man sending the goods under these circumstances cannot afterwards say that there has been a carriage of his goods merely from station to station, and not from house to house, and claim a return of part of the through rate on that footing, and therefore I think the appeal fails.

MATHEW, L.J.—I am of the same opinion. It seems to me to be clearly made out that this arrangement of the company with respect to the carriage of non-perishable goods by passenger train was an option given to the public, imposing the terms upon which the goods would be carried. They were entitled to do that; they were entitled to do that as common carriers. That being the foundation of any contract with respect to non-perishable goods to be carried by passenger train by the defendants, the plaintiffs say: "That does not suit us, because we do not want the goods collected. Therefore we insist upon your making a new contract with us to carry non-perishable goods by passenger train from station to station." Is it not an answer for the company to say: "We made no such contract, nor undertook to make any such contract; you must accept the terms that we impose or else send your goods by goods train; you have that alternative. If they are to go by passenger train, it can only be upon the terms that we are entitled to offer." I therefore agree with my learned brothers in thinking that this appeal must be dismissed.

COLLINS, M.R.—I should like to add an observation. No question of undue preference arises in this case, and therefore there is no necessity whatever of any expression of opinion as to whether any claim upon that ground could be supported.

Appeal dismissed.

Solicitors for the plaintiffs, *Burgess, Cosens, and Co.*, agents for *Charles E. Isbell*, Bristol.
Solicitors for the defendants, *Beale and Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 14, 15, 16, 18, and 23.

(Before BUCKLEY, J.)

BRINCKMAN AND OTHERS v. MATLEY. (a)

Foreshore—Right of access—Limits of public user—Bathing in the sea from foreshore owner by private persons.

Where the foreshore lying between high-water mark and low-water mark of ordinary tides is owned by private persons, in the absence of proof of a customary right to go upon such foreshore, there is no common law right to go there, except for certain purposes, such as in order to avoid peril arising in the course of navigation on the sea, and probably launching a boat for the purposes of fishing. There is no common law right to bathe.

It is not to be inferred that the owner of the foreshore has dedicated it to the public from the mere fact that he does not object to people who do no damage wandering at will over the sand from time to time uncovered by the sea.

ACTION.

The plaintiffs were the owners of the manor of Minster, in the Isle of Thanet, and claimed to be the owners of the foreshore at a bay called Joss Bay.

The defendant was the headmaster of St. Saviour's Elementary School, Poplar.

In July 1903 the defendant brought some 200 boys from his school to a camp pitched on the cliffs immediately adjoining Joss Bay.

The camp was situated on land held by Mr. Harmsworth as customary freehold of the manor of Minster, who allowed the defendant and the boys to come down for a summer holiday and occupy his land for the time being.

The plaintiffs asked for (1) a declaration as to their rights to the foreshore; (2) an injunction to restrain the defendant, his servants, agents, and workmen, from bathing from the foreshore or any part thereof, and from wrongfully entering upon the foreshore or any part thereof for that purposes.

The question was whether the public were entitled to bathe in the sea from the above-named foreshore.

The facts are fully set out in the judgment.

Astbury, K.C. and *Leonard Mossop* for the plaintiffs. — This is an action substantially between the plaintiffs and Mr. Harmsworth to try whether Joss Bay is in fact situate in part of the manor, and whether the plaintiffs have ordinary manorial rights over it. Mr. Harmsworth has no lease of any land lying on the other side of the cliffs. From there to the point where the foreshore commences the defendants and Mr. Harmsworth have no rights. As to common law rights in the foreshore, there is for certain purposes a common law right of way along it parallel with the sea, but

(a) Reported by W. HUNTER BOND, Esq., Barrister-at-Law.

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there is no right to go down to the sea from inland. The original grant shows that this manor includes foreshore. Mr. Harmsworth, through whom the defendant claims, is the owner of customary freeholds of this manor, and plaintiffs need only prove reputation and acts of ownership assented to by all persons interested in disputing them over the portion in question. For instance, prior to the period when coastguards were introduced, the lord of the manor was allowed to collect and sell wreckage that drifted ashore. Subsequent to that period the Government have insisted that the Admiralty servants shall collect it, but they have directed that the collection shall be handed over by the owner of the coastguard to the owner of the foreshore, and shall account to him for the same. This was done to prevent squabbling as to who should collect it. There are also many records of courts of law recognising our title, and there are copies of accounts rendered by the Board of Trade to Lord Conyngham since the Admiralty collected wreckage. The Broadstairs Council admitted our title in 1897. Defendant's plea that he is seised in fee simple of Joss Farm, and that he and his predecessors in title and their tenants and all authorised persons by him had for forty years previous to this action enjoyed as of right and without interruption a right of way on foot from the farm to the foreshore to bathe in the sea is difficult to understand. The right must arise by prescription, as it certainly cannot by custom. For the purpose of a right of way you must have definite termini. A man who prescribes to bathe himself cannot afterwards say that because he bathed for a certain number of years, therefore he can go with 200 boys and do the same thing. Prescription must be certain. There is no customary right in the inhabitants of the parish of St. Peter to bathe in the sea. A custom must be defined, and the parish is a very large one. And even if there were a custom of this kind, it would not authorise 200 boys from Poplar to bathe. They are not inhabitants of the parish for the purpose of exercising a custom, inasmuch as they are not permanently resident there.

Buckmaster, K.C. and R. W. Sheldon for the defendant.—It may be well to differentiate the right of the 200 boys to bathe from the right of the defendant to bathe. The injunction asked for would restrain the defendant from bathing. [BUCKLEY, J.—The point to be determined is whether defendant and 200 boys are entitled to bathe.] The defendant claims for himself and the boys, but not jointly. He claims the right for himself and the right for the boys. All the subjects of the Crown have a common law right to use the foreshore for the purpose of bathing. Now, *Blundell v. Catterall* (5 Barn. & Alderson, 268) is the only case in which the point has been expressly decided. The facts in it are not identical with the facts in this case, unless in this case the lord of the manor is found to have exclusive rights of fishing, and there is also the minor point of distinction that there is strong evidence of a right of access to the foreshore at Joss Gap. The decision in *Blundell v. Catterall* (*ubi sup.*) was confined to the question whether there was a right of going across the seashore for the purpose of bathing. It did not deal with the general question of a public highway along the shore. It did not decide anything that would

affect any right that might be claimed by usage or custom. If the right to have access to the shore is established in this way, then there would follow from it the right to use this shore for the purpose of bathing. The defendant has either at common law or by statute a prescriptive right from the farm to enter upon the foreshore, and in connection therewith to use it for the purpose of bathing. If there is such a right of entering the foreshore in the owners of the Joss Farm and in persons by them authorised, the cases show a right to bathe, for, having entered, they may do all lawful acts there, and bathing is a lawful act. There is no private property in the sea. Prescription is based on acts of trespass. As soon as a man has prescribed it ceases to be an act of trespass. [BUCKLEY, J.—You cannot prescribe for a right to wander at will over a man's land except for a purpose.] A man can prescribe for a right of access to the foreshore. Once on the foreshore he is not trespassing, as it is admitted that the foreshore is a highway. One wants no common law right to bathe; one wants a right to have access to the sea for the purpose of bathing. There is also sufficient evidence of dedication in this case. Lastly, there is a custom for the inhabitants of the parish to come down and enter on the foreshore at this point and bathe therefrom. For the purposes of such a custom an inhabitant may be a temporary inhabitant. [At the conclusion of the evidence counsel abandoned the defence by prescription.]

Asbury, K.C. in reply.—In *Blundell v. Catterall* (*ubi sup.*) it is laid down that even on a part of the sea coast whether there is admittedly a highway parallel with the sea, and where people can admittedly be on the foreshore in the line of that highway, there is no common right of bathing, and that bathing can be stopped from that highway. As to the lord not being proved to have the exclusive right of fishing, there is no evidence that he has not the right of fishing as a right appendant to the foreshore. With regard to the right of access at Joss Gap, the excuse by the farmer of Joss Farm of a practice of getting seaweed or going down to the shore with his carts proves nothing at all against the lord. As it is impossible to prescribe against the lord, the right, if there be one, must have been acquired by dedication. There is no indication at Joss Gap that a footway was intended. The cutting was made for carts on the footing that the owner of the foreshore had no control over the road at Joss Gap, a double dedication would have to be shown: (1) dedication by the owner of the farm to some point on the foreshore; (2) a dedication by the owner of the foreshore from that point in a straight line to the sea for the purpose of bathing. The following cases were referred to in the course of the argument:

- Schwinze v. Dowell*, 2 F. & F. 845;
- Chamber Colliery v. Hopwood*, 73 L. T. Rep. 258; 32 Ch. Div. 549;
- Blount v. Layard*, (1891) 2 Ch. 631 n.;
- Chapman v. Cripps*, 2 F. & F. 864;
- Maddock v. Wallasey Local Board*, 55 L. J. N. S. 267, Q. B.;
- Doraston v. Pain*, *Smith's Leading Cases*, vol. 2, p. 162; 2 H. Bl. 527.

Cur. adv. vult.

Jan. 23.—BUCKLEY, J.—The question in this action is whether the public are entitled to bathe

in the sea off the foreshore, near Broadstairs, in Kent. The plaintiff, the Marquis of Conyngham, and the plaintiffs, Sir Theodore Brinckman, and the Hon. Arthur William de Moleyns, as trustees for him, are the owners of the manor of Minster, in the Isle of Thanet, and of the foreshore lying between the ordinary high-water mark and the ordinary low-water mark of the sea at a bay called Joss Bay, being the place at which rights are claimed by the defendant in this action. They were, until recently, the owners of a much larger extent of foreshore, but they have sold that which lies between Hackemdown Point near the North Foreland and Margate on the one side, and that which lies between Margate and Broadstairs on the other, remaining owners of all that which lies between Hackemdown Point and Broadstairs. In this last-mentioned length of foreshore lies the small bay or curvature of the coast called Joss Bay, the scene of the dispute in this action. The title of the plaintiffs, whom I have named, to the foreshore is, in my opinion, quite plain, and is derived under a grant by the King in the ninth year of James I, whereby he granted the manor of Minster, and all lands theretofore overflown with the water of the sea which had been gaining from the sea and reduced to dry ground, and lands then overflown with the water of the sea which should hereinafter be gained and be reduced to dry ground, abutting on the manor, and lands subject to the inundation of the sea between the flowing and ebbing of the sea. In the court rolls of the manor are to be found, for at least 150 years last past, entries of payments made upon the footing that the ownership of the foreshore was in the plaintiffs' predecessors in title. Thus there are entries from 1755 onwards in respect of fines for the groundage of vessels on the foreshore, and of sums paid for permission to gather seaweed and sand in the manor between high and low water mark, and of payments made for trespass to gather flints, and of payments made for trespass in working part of the cargo of a vessel, and going with carts for that purpose, and for trespass to get seaweed. There are also accounts of payments made to the lord of the manor for wreckage taken up on the foreshore. In later times, after the Board of Trade became entitled to collect wreckage, there are accounts rendered by the Board of Trade and payments made by them to the lord for proceeds of sale of wreck taken upon the foreshore. In 1889 there are two cases in which Stirling, J. granted injunctions at the suit of the plaintiff to restrain persons from digging and getting sand, shingle, stone, or beach from the foreshore. In brief, this foreshore is plainly proved to be the property of the plaintiffs, and as private owners. The other plaintiff, Frederick William Turner, is a man who, under a deed dated the 9th Feb. 1903, executed by the steward of the manor, obtained liberty to enter on a portion of the foreshore, including Joss Bay, for the purpose of placing bathing-machines, tents, and pay-boxes on the shore. In July 1903 he was exercising his rights under that deed. The defendant is the headmaster of St. Saviour's Elementary School, Poplar, in the county of Middlesex. In July last he brought some 200 boys belonging to his school down to a camp situate on the cliffs immediately adjoining Joss Bay. The land upon which he placed his camp belongs to a Mr.

Harmsworth. It is customary freehold held by Harmsworth of the manor at a quit-rent. Harmsworth has been admitted tenant on the court rolls with services, and pays the quit-rent. The defendant pitched his camp with the permission of Mr. Harmsworth, who, for the best motives, no doubt, allowed the master and the boys to come down for a summer holiday, and occupy his land for the time being. In July 1903 the attention of the steward of the manor was called to the fact that these boys were bathing in Joss Bay. On the 25th July the steward wrote a letter to the defendant to the effect that, as a matter of right, they were not entitled to do so, adding that, in the event of the defendant's considering the bathing beneficial to the boys under his charge, he would be prepared to make arrangements with him. The defendant, by his reply, did not accept the offer; said that the boys did no harm, and added that if the steward wished to raise the question of the right of the boys to bathe in Joss Bay, he must refer him to Mr. Harmsworth's solicitors, Messrs. Lewis and Lewis. The defendant thus setting up a claim of right the writ in this action was issued on the 28th July 1903. The question I have to try is simply whether the defendant and his boys are as of right entitled to go on the foreshore at Joss Bay, which is the private property of the plaintiffs, and bathe in the sea. The defendant contends that that which he is doing is justified by a common law right, which he says exists, to do the acts complained of. The proposition is put in two ways: First, that there is a common-law right to go upon the foreshore, to pass and repass there at will, and, further, being there, to bathe in the sea; and, secondly, supposing there is not this common law right to go upon the foreshore and pass and repass thereon at will, that if the defendant shows, as he says he does, that he has in some way a right of access, then, being there in exercise of such right of access, he and his boys are entitled to bathe. I deal with these two in order. As to the first, no facts are wanted beyond that which I have stated—that this foreshore is the private property of the plaintiffs. The defendant contends that he has a common law right to go upon this land, being private property of the plaintiffs, and to bathe therefrom, because it is the foreshore. I propose to state what I understand to be the law as to the right of a member of the public to go on the foreshore of a private owner. By the common law all the King's subjects have in general a right of passage over the sea with vessels for the purposes of navigation and have, *prima facie*, a common of fishery there, and they have the same rights over that portion of the sea which lies over the foreshore at the times when the foreshore is covered with water. But when the sea recedes and the foreshore becomes dry there is not, as I understand the law, any general common law right in the public to pass over the foreshore. There are certain limited rights, and the fact that such limited rights exist goes to show that there cannot be a general right. For purposes of navigation there exists a common law right to cross the foreshore in case of peril or necessity. For the purpose of exercising the right of fishing it may be that there is—I do not say that there is—a right to cross the foreshore in order to launch a boat. In Broke's Abridgment,

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Tit. Customs, pl. 46, all the judges agreed "that fishermen may justify going on the land adjoining the sea to fish in the sea, for this is for the good of the Commonwealth, affording sustenance to many persons, and is the common law." The right of navigation, it has been said, is for the general benefit of all the kingdom, and the right of fishing tends to the sustenance and beneficial enjoyment of individuals, and for these purposes it would seem that there are special rights to cross the foreshore. But it does not follow, and I think is not the law, that the public have the right to go upon or to cross the foreshore for all purposes. If there be such a general right by common law it must exist on every part of the foreshore; and the result would be that the erection of buildings, wharves, and quays, so as to reach the water, the reclamation of additional land from the sea and its conversion to pasturage and tillage, the erection of stakes for nets upon the foreshore, and the digging of sand or stones which might leave dangerous openings in the foreshore, would all be indictable as being interferences with a right of highway over the foreshore. I have endeavoured thus to summarise the reasoning upon which, as it seems to me, in *Blundell v. Catterall* (5 Barn. & Ald. 268), it was, after citation of numerous passages from Lord Hale, *de jure maris*, decided that there is no common law right of going upon the foreshore with a view to bathing therefrom and exercising any supposed common law right of bathing. Holroyd, J. at p. 301 of the report, puts the greater part of the matter in a small compass, thus: "The public common law rights, too, with respect to the sea, independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea and on the seashore when covered with water, and though, as incident thereto, the public must have the means of getting to and upon the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking where they please upon the seashore, or the land adjoining thereto, except in case of peril or necessity." In *Blundell v. Catterall* (*ubi sup.*) there was found to be a public right of way along the shore, but, looking at Holroyd, J.'s judgment at p. 289 of the report, the existence of such highway in no way affected the decision. The point was that the acts committed were committed for other purposes than as a general public highway, and out of the highway, by the latter of which I understand that the public left so much of the foreshore as was a highway, and crossed over the part which was not a highway down to the sea, and there bathed. *Blundell v. Catterall* (*ubi sup.*) has been followed in *Mace v. Philcox* (9 L. T. Rep. 766; 15 C. B. N. S. 600) and *Llandudno Urban District Council v. Woods* (1899) 2 Ch. 705. It is binding upon me. The defendant before me sought to distinguish *Blundell v. Catterall* (*ubi sup.*) from the present case by pointing out that the owner of the foreshore there had an exclusive right of fishing; but I cannot see that that fact formed any essential basis of the judgment. The judgment seems to me to have rested upon the general principles which I have endeavoured to state. I pass to the second point, and here I must state some facts. First, Joss Bay is

approached from the land down a cutting (made through the cliffs, which are here about 20ft. high) which is called Joss Gap. In Joss Gap, between the sides of the cutting and at a short distance above the upper limit of the foreshore, which is here practically at the foot of the cliff, there had stood for many years—as long as the recollection of any of the witnesses—either a bar between two posts or a single post in the middle of the roadway, which could be let down at will so as to allow a cart to pass. This post, and the bar which succeeded it, was locked, and the holder of the key and no one else could go down Joss Gap with carts. The key of that bar was held, and the bar was repaired, by the successive owners of Joss Farm, Mr. Harmsworth and his predecessors in title. Only he and the persons to whom he might allow the use of the key could get down Joss Gap with carts. There was, however, no physical obstacle to prevent any one on foot passing down, either by stooping under the bar or by passing between the post and the cliffs, if, as was sometimes the case, there was sufficient room there. The result was, that it was physically possible for persons on foot, without substantial obstruction, to pass down Joss Gap, and thus reach the foreshore. This had been the case for a great many years. The defendant says that I ought to infer from it that the lord of the manor has dedicated to the public, who could thus reach the foot of Joss Gap, the right to go upon and pass over the foreshore. Secondly, for many years, down to about fifteen years ago, there were some fishing boats at Joss Bay—some four or five of them. A few fishermen, who lived in Reading-street, an adjoining hamlet, owned these boats, and used to go down and launch and draw up their boats there. Thirdly, the defendant says—I will presently state the facts as I find them—that the tenant of Joss Farm, by unlocking the bar, and other farmers in the district, by going round from Broadstairs and otherwise approaching the foreshore, have gone with carts and collected seaweed. From these circumstances he seeks to evolve a right in the public to have access to the foreshore, and then argues that, having access to it, they have a common law right to bathe. As to the collection of seaweed, I find the facts to be as follows: The lord of the manor from time to time granted lease of the right to get seaweed, and many, at any rate, of the carts to which the defendant's evidence spoke, were carts of the lessees or of persons who went for them or by their authority. If there were any carts not included in that category (which was not plain upon the evidence), they did not in any case go adversely to the lord and under claim of right so to do. The accumulation of the seaweed on the foreshore was at times a nuisance, and it was an advantage to get rid of it. At most, I think, the evidence comes to this—that sometimes unauthorised persons went, perhaps to collect seaweed, and nobody interfered with them. From no one of the three sets of circumstances above mentioned can I find any right of the public to a way over the foreshore. As regards Joss Gap, there is no suggestion of a *terminus a quo* and a *terminus ad quem*. What is suggested is a dedication of a right to wander at will anywhere over the foreshore, and a right to wander at will in any direction down to the brink of the sea. Such a dedication cannot I think, be maintained:

(*Chapman v. Cripps*, 2 F. & F. 864). As a separate and independent consideration altogether, it is, I think, impossible to infer a dedication from the mere fact that the owner of the foreshore has not objected to the public wandering at will over the sand from time to time uncovered by the sea, they doing no harm in so doing. I refer, without reading them at length, to two passages upon this—the one in the judgment of Abbott, C.J. in *Blundell v. Catterall* (*ubi sup.*), at p. 315 of the report, as to wandering at will in all directions over wastes and commons, as to which he says: "No one ever thought that any right existed in favour of this enjoyment"; and the other in Bowen, L.J. judgment in *Blount v. Layard* (1891, 2 Ch. 691) (the Mapledurham fishing case), where he uses these words: "Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood. I can conceive nothing more unfortunate than that the owners of the right of fishing on large streams should be driven to prevent the successors and followers of Izaak Walton from dropping their lines for trout for fear that their doing so should crystallise into a right. It would be a most unfortunate thing for the public if that should ever happen, and I think that, however continuous, however lengthy the indulgence may have been, a jury ought to be warned against extracting out of it an inference unfavourable to the person who has granted the indulgence." I refer also to *Chamber Colliery Company v. Hopwood* (73 L. T. Rep. 258; 32 Ch. Div. 549). I think, therefore, that there was no such right of access at Joss Gap as the defendant sets up, and I only add that, if there were, this would not bring the case to *Blundell v. Catterall* (*ubi sup.*) again, where there was a public right of way along some part of the foreshore. The facts as to the boats are still weaker, and what I have said as to a possible right of access for the purpose of fishing is to be borne in mind. If such a right exists (I do not say it does) it will not help the defendant. The alleged right or claim of access to get seaweed seems to me even further from having any bearing upon the question for decision. The defendant sought at the outset to defend the case upon other two grounds upon which I will say a word. The first was that he endeavoured to set up against the lord a prescriptive right in Harmsworth of passing from Joss Gap over the foreshore, and a user by the defendant and his boys of that prescriptive right by the leave and licence of Harmsworth. This was ultimately abandoned at the Bar, for, as soon as it was shown that Harmsworth was a tenant of the manor and had been admitted tenant under service, it was, of course, impossible to contend that he could prescribe against the lord. Moreover, even if that had not been so, the considerations which I have suggested above as sufficient to defeat any claim of dedication to the public would, I think, defeat also any claim to prescription for an indefinite right to wander at will. The second was that it was attempted to set up a customary right in the inhabitants of the parish of St. Peter's to bathe at Joss Gap.

Upon this I find the facts to be as follows: That in this immediate neighbourhood there are several bays which are convenient for, and have for many years been used for bathing. Coming from the south they are Dumpton Bay, Louisa Bay, Broadstairs, Stone Bay, Joss Bay, Botany Bay, and there may be others. Resort has been made to these several bays for many years past, not by the inhabitants of St. Peter's or any other particular parish, but anyone who was minded to bathe. As a matter of date this has gone on from at least 1842. There are many boys' schools in St. Peter's, some of them existing at that date, and some of subsequent date. Boys from these schools, to the number of thirty or forty or more at a time, have gone down to bathe sometimes at one sometimes at another of these bathing places. Nobody has ever interfered with them till quite recently. The bathers have included people from Margate, which is not in St. Peter's parish; from Ramsgate, which is not in that parish; trippers from London and other distant places, and others. Nobody has ever heard of any claim set up by the inhabitants of St. Peter's, as distinguished from the general public, to bathe at all, or to bathe at any particular place. The custom alleged is unknown to anyone who has given evidence before me. There are plenty of witnesses who say that the bathing has taken place, but nobody has alleged any claims of right to do it. All they say is that they thought every member of the public had a right to bathe wherever he liked. Joss Bay was the better bay in the sense that the shore was more free from flints and rocks, and it was perhaps used more than the others. I will give one or two references to the evidence adduced by the defendant. Mr. Snowden, who established a school at St. Peter's some years ago—about 1890—chose St. Peter's for the erection of his school because on inquiry he found that the coast offered a safe bathing place. He made inquiries on the subject, and came to the neighbourhood because there was a good shore. He built in St. Peter's parish, but not because anyone told him that the inhabitants of that parish had any rights which others did not enjoy. As the result of his inquiries, he thought all the shore was equally open to him, and, if he had found Stone Bay preferable to Joss Bay, he would have gone there. He thought the whole sea was open to him, and that he could use any particular place at his own discretion. Nobody told him he had a right to bathe at Joss Gap or elsewhere, or that he could bathe at Joss Gap if he was an inhabitant of St. Peter's parish, and not otherwise. Mr. Byron, who has been chairman of the district council, and who has lived at St. Peter's forty-four years, and whose half-brother kept a school there, has never heard of any custom; he has never heard of any question raised as to whether people had a right to bathe or not, and thought that people generally were free to bathe at Joss Gap or Broadstairs or elsewhere as they liked. Mr. Skinner, who is clerk to the urban district council, and who went with a deputation to the steward of the manor when the corporation of Broadstairs was minded to buy this particular foreshore, says that the steward told that deputation that there were no rights against the lord as far as the steward knew, and that he (Skinner) did not say, because he did not think, that there

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was any right of bathing; he never heard of any right or custom in the inhabitants of St. Peter's; he never supposed there was any right, but thought that the public had a right to bathe when they pleased, and that was all. In other words, he thought there was a common-law right to bathe. The result is that I find that there is no such custom as alleged. There is no evidence of a customary right in the inhabitants of St. Peter's or of any other defined place, no identification of any spot to which the custom relates, and no evidence that anybody ever heard of any custom of any kind. The result of all this is that the defendant fails in establishing the right which he sets up. I have no reason to suppose that this judgment will produce any practical difficulty, or that these East-end boys, if they are taken again to this coast, will be prevented during their summer holidays from enjoying the healthful recreation of bathing in the sea. Mr. Saltwell, by his letter of the 25th July, offered to make an arrangement for that purpose. The tone of his letter is not that the lord has any desire churlishly to exclude anyone from a reasonable use of the foreshore; but, on the contrary, that his desire is to ensure, by proper regulations as to bathing, that other members of the public shall not, by reason of bathing on this large scale, be unable to resort to it. His object seems to be to control an extravagant user by some which tends to prevent a reasonable enjoyment by all. He desires to have control over his own property. All this, however, rests in the good sense and good feeling of the owner. What I have to decide is the question of right. The claim of right having been made and having failed, I must give judgment against the defendant. I declare that the plaintiffs, other than Turner, are entitled to the foreshore lying between ordinary high-water mark and ordinary low-water mark in Joss Bay, and I grant an injunction in the terms of par. 2 of the claim. The defendant must pay the costs of the action.

Solicitors for the plaintiffs, *Saltwell, Tryon, and Saltwell*.

Solicitors for the defendant, *Lewis and Lewis*.

Jan. 20 and 26.

(Before BUCKLEY, J.)

ATTORNEY-GENERAL v. ASHTON GAS COMPANY. (a)

Gas company—Standard rate of dividend fixed by statute—Payment of dividend free of income tax—Income Tax Act 1842 (5 & 6 Vict. c. 35), ss. 40, 54, 60, No. III. (3), and 102—Income Tax Act 1853 (16 & 17 Vict. c. 34), s. 40—Ashton Gas Act 1847 (10 & 11 Vict. c. 201)—Ashton Gas Act 1877 (40 & 41 Vict. c. 176), ss. 16, 17.

Sect. 16 of the Ashton Gas Act 1877 provides that the profits of the Ashton Gas Company to be divided among the shareholders in any one year shall not exceed the rate of 10 per cent. per annum (defined in the Act as the standard rate of dividend) on the ordinary share capital or stock of the company authorised by Parliament and paid up.

Sect. 17 of the same Act provided that a standard price is to be charged by the company for gas, and that the company may increase or diminish the standard dividend in a certain ratio, to be determined by reference to the price charged by them for gas.

The company for many years paid dividends exceeding the standard rate of dividend to their shareholders, diminishing the standard price of gas and increasing proportionally the standard rate of dividend. The company distributed all such dividends to their shareholders free of income tax.

Held, that by paying the maximum rate of dividend free of income tax the company were in effect paying a higher rate of interest than was authorised by sects. 16 and 17 of the Ashton Gas Act.

ACTION.

The Ashton-under-Lyne Gas Company is regulated by the provisions of the Ashton Gas Act 1847 (10 & 11 Vict. c. 201), as amended by the Ashton Gas Act 1877 (40 & 41 Vict. c. 176).

By sect. 16 of the latter Act it is provided that

The profits of the company to be divided among the shareholders in any year shall not exceed the rate of 10 per cent. per annum (which rate is in this Act referred to as "the standard rate of dividend") on the ordinary share capital or stock of the company authorised by Parliament and paid up.

This section is subject to sect. 17 of the same Act, which enacts that

The standard price to be charged by the company for gas supplied by them shall be three shillings and eightpence per thousand cubic feet: Provided that the company may increase or diminish such standard price subject to the decrease or increase in the standard rate of dividend as defined by this Act to be calculated as follows: For every penny charged in excess or diminution of such standard price in any year, the standard rate of dividend shall for such year be reduced or increased by five shillings in the hundred pounds per annum.

The Income Tax Act 1842 (5 & 6 Vict. c. 35) enacts:

Sect. 40. That all bodies politic, corporate, or collegiate, companies, fraternities, fellowships, or societies of persons, whether corporate or not corporate, shall be chargeable with such and the like duties as any person will under and by virtue of this Act be chargeable with; and that the chamberlain or other officer acting as treasurer, auditor, or receiver for the time being of every such corporation, company, fraternity, fellowship, or society shall be answerable for doing all such acts, matters, and things as shall be required to be done by virtue of this Act, in order to the assessing such bodies corporate, companies, fraternities, fellowships, or societies to the duties granted by this Act, and paying the same.

Sect. 54. That every such officer before described of any corporation, fraternity, fellowship, company, or society shall also within the like period prepare and deliver in like form and manner a true and correct statement of the profits and gains to be charged on such corporation, fraternity, fellowship, company, or society, computed according to the directions of this Act, together with such declaration of the manner of estimating the same as aforesaid; and such estimate shall be made on the amount of the annual profits and gains of such corporation, fraternity, fellowship, company, or society before any dividend shall have been made thereof to any other persons, corporations, or companies having any share, right, or title in or to such profits or

(a) Reported by W. HUNTER BOND, Esq., Barrister-at-Law.

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gains; and all such other persons and corporations or companies shall allow out of such dividends a proportionate reduction in respect of the duty so charged: Provided always, that nothing hereinbefore contained shall be construed to require in such a statement the inclusion of salaries, wages, or profits of any officer of such corporation, fraternity, fellowship, company, or society, otherwise chargeable under this Act.

In respect of gasworks, which are assessed under sched. A, sect. 60 of the Act provides:

No. III. (3). The duty in each of the last three rules to be charged on the person, corporation, company, or society of persons, whether corporate or not corporate, carrying on the concern, or on their respective agents, treasurers, or other officers having the direction or management thereof, or being in receipt of the profits thereof, on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or the value, either between the different persons or members of the corporation, company, or society engaged in the concern, or to the owner of the soil or property or to any creditor or other person whatever having a claim on or out of the said profits; and all such persons, corporations, companies, and societies respectively shall allow out of such produce or value a proportionate deduction of the duty so charged, and the said charge shall be made on the said profits exclusively of any lands used or occupied in or about the concern.

The company have for many years paid dividends exceeding the standard rate of dividend to their shareholders, diminishing the standard price of gas and increasing proportionally the standard rate of dividend as authorised by sect. 17 of the Act.

This was done in accordance with resolutions passed at the annual meetings of the company, and they distributed all such dividends to their shareholders free of income tax.

This action was brought by the Attorney-General and the mayor, aldermen, and burgesses of the borough of Aston-under-Lyne. The corporation (who were the relators) were large consumers of gas, and as such were interested in getting the price of gas reduced.

The question was whether the gas company had, by paying the income tax payable in respect of its dividends, in effect paid a higher dividend than was lawful having regard to the price from time to time charged for the gas.

The plaintiffs asked for the following declaration: "That according to the true construction of the Ashton Gas Acts 1847 and 1877, and in particular of sects. 16 and 17 of the Act of 1877, the profits divisible in any year among the shareholders of the company ought to be calculated as inclusive and not exclusive of the amount payable for that year in respect of income tax on the profits proposed to be divided."

Danckwerts, K.C. and *R. J. Parker*, for the informant and plaintiffs, contended that the proper course would be for the company to deduct the tax from the profits which they distribute to the shareholders. This company pays more than it is allowed; in effect it is paying more than the statutory dividend. The following cases were referred to:

Mason v. Ashton Gas Company, 54 L. T. Rep. 708;
Last v. London Assurance Corporation, 52 L. T. Rep. 604; 10 App. Cas. 438;
Gilbertson v. Ferguson, 46 L. T. Rep. 10; 7 Q. B. Div. 562.

Henry Terrell, K.C. and *W. M. Cann* for the defendants.—A company is bound to pay income tax on its profits; it does not matter how the profits are applied, and they have power to deduct from creditors (*Mersey Docks v. Lucas*, 49 L. T. Rep. 781; 8 App. Cas. 891) or shareholders, but are not compelled to do so. The first thing that is payable out of profits is income tax, and the company has nothing to distribute till that has been paid. Sect. 16 of the Ashton Gas Act provides that certain profits are to be divided among the shareholders. Sect. 18 defines profits as part of the gains of the company or otherwise clear profits. There is a difference between profits and clear profits; clear profits cannot exist until the income tax is paid. They referred to

London County Council v. Attorney-General, (1901) App. Cas. 26.

Danckwerts, K.C. replied.

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Jan. 26.—*BUCKLEY, J.*—By sects. 16 and 17 of their special Act of 1877 the defendant company are precluded from paying dividend in excess of a certain rate fixed by a sliding scale dependent upon the price charged for gas. Their practice has been and is to pay dividend at the maximum rate thus fixed, but free of income tax. The whole question in the case is whether this was a payment in excess of that allowed by the Act. The point is the simplest possible, and, but for the fact that some provisions of the Income Tax Acts have to be considered, and that these Acts are not always easy of construction, I should have thought it incapable of the amount of argument which it has received. The obvious solution seems to be that when the company pays, say, 10 per cent. free of income tax, it gives the shareholder 10 per cent. and relieves him from liability to make any payment to the Revenue or allowance to the company out of it. In other words, he receives 10 per cent. and an indemnity against a liability to pay part of it to the Revenue, or allow a deduction by the company of such part as the company has paid to the Revenue for income tax. He thus gets more than a 10 per cent. dividend. Further, if he be a person of limited income entitled to remission or abatement of income tax, he will in fact receive 10 per cent. and the income tax, or so much of the income tax as he reclaims from the Revenue authorities. The argument addressed to me has been that, inasmuch as under the machinery of the Income Tax Acts the corporation is assessed under sched. A, and pays income tax upon all its profits, the corporation has nothing out of which it can pay the corporator dividend beyond the balance which remains after the corporation has paid the income tax payable by the corporation; and that out of this fund it is entitled to give the shareholder not exceeding, say, 10 per cent. This argument, I think, rests upon a fallacy. The profits are not arrived at after deducting income tax. The income tax is a part of the profits—viz., such part as the Revenue is entitled to take out of the profits. A sum which is an expense that must be borne, whether profits are earned or not, must, no doubt, be deducted before arriving at profit. But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of, the profits themselves. I refer to Lord Blackburn's judgment in *Last v. London*

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Assurance Corporation (52 L. T. Rep. 604; 10 App. Cas. 445). Under the Income Tax Acts all income has to pay the tax, but not to pay it twice over. If it has already been paid under sched. A, it is not payable again under sched. D. But that does not prove that the person who receives a distributive share of the fund does not bear income tax in respect of his ownership of shares in the company. The Act provides that he shall. The relevant machinery is that under sect. 40 of the Income Tax Act 1842; the company is chargeable, and its officer has to do the necessary acts and make the necessary returns on its behalf. By sect. 54 he is to prepare a statement of the profits, and the estimate is to be made on the amount of the profits before any dividend shall have been made thereof to the member, and the member is to allow out of such dividend a proportionate deduction in respect of the duty so charged. The words which here command attention are that the member is to allow the duty out of the dividend. This particular company is governed by sect. 60, No. III. (3), of the Act of 1842. That section goes on to repeat or reproduce, but not very accurately, some part of the matter which had already been dealt with by sect. 54, and the words as to the allowance of the proportionate deduction of the duty are not identical with the words of sect. 54. For the words in sect. 54, "all such other persons and corporations or companies," sect. 60 substitutes the words "all such persons, corporations, companies, and societies," and for the words "out of such dividends" substitutes the words "out of such produce or value." An argument has been based upon this, the object of which is to show that the persons who are to make the allowance under sect. 60 are not the members of the corporation, but the corporation itself, and that the words are intended to provide that the corporation shall make the allowance to its treasurer. This may be so, but I do not think it is. It is true that the draftsman has used a collection of nouns substantive which reproduce those used in the earlier part of the clause with reference to the corporation whose profits are being considered, and not the collection of nouns substantive previously used as describing the members to whom distributive shares are to be paid. But, as matter of construction, I think the person to allow under sect. 60 is the same person as he who is to allow under sect. 54—viz., the member. But the question is not, I think, vital, for, even if the suggested construction of sect. 60 be right, the liability of the members to make the allowance would still, as it seems to me, be enforced by sect. 54. I refer also to sect. 102 of the Act of 1842 and sect. 40 of the Act of 1853. When this company declared and paid a dividend of 10 per cent., the member would be bound to allow the corporation to deduct the income tax upon his dividend, and he would receive a net sum of less than 10 per cent. When the corporation declared and paid a dividend of 10 per cent. free of income tax, the member received a sum larger by the amount of the income tax, which is not then to be deducted. The whole question is, Are the profits thus divided among the shareholders in excess of 10 per cent. on the capital? I think they are. It is exactly as if the company declared a dividend of 10 per cent. and the amount of the income tax, so that when the

statutory deduction of the income tax is made the shareholder shall have a clear 10 per cent. In my judgment the plaintiffs are right. I will therefore make the declaration asked for in the statement of claim, and the defendants must pay the costs of the action.

Solicitors for the plaintiffs, *Sharpe, Parker, Pritchards, Barham, and Lawford*, agents for *F. W. Bromley, Ashton-under-Lyne*.

Solicitors for the defendants, *Burgess, Cosens, and Co.*, agents for *Arthur Buckley, Manchester*.

KING'S BENCH DIVISION.

Tuesday, Dec. 15, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

ELLIS (app.) v. LONDON COUNTY COUNCIL (resps.) (a).

Metropolis — Drainage — Low-lying land — Dwelling-houses on—Houses capable of being drained by gravitation for greater part of year—Houses so situate "as not to admit of being drained by gravitation"—Permission of council for erection—Time for taking proceedings—London Building Act 1894 (57 & 58 Vict. c. ccciii.), ss. 122, 200 (9).

The appellant erected ten houses, intended to be used as dwelling-houses, on low-lying land, the surface of which was below the level of Trinity high-water mark. During the greater part of the year these houses admitted of being, and were in fact, drained by gravitation through an intermediate sewer into a main sewer, which was an existing sewer of the London County Council; but for some days in the year, in times of considerable rainfall, the main sewer became full of flood water, and so the water in the main sewer, by closing a hinged flap at the junction of the intermediate sewer, kept the sewage back in the intermediate sewer and prevented it from going into the main sewer, and on those days the houses could not be drained into the main sewer. There was no other existing sewer of the council into which they could be drained by gravitation.

Upon informations under sects. 122 and 200 (9) of the London Building Act 1894 against the appellant for erecting, without the permission of the council, upon such low-lying land dwelling-houses which were so situate "as not to admit of being drained by gravitation into an existing sewer of the council":

Held, that as the houses were capable of being drained by gravitation into an existing sewer of the council for the greater part of the year, the fact that for some days in the year they could not be so drained, owing to the flood water in the main sewer keeping back the sewage in the intermediate sewer, did not make them houses which were "so situate as not to admit of being drained by gravitation into an existing sewer of the council" within the meaning of sect. 122, and that therefore no offence under these sections had been committed by the appellant in erecting the houses without the permission of the council.

Held, further, that proceedings under these sec-

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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tions are in time if taken within six months from the erection of the buildings, though more than six months from the commencement of such erection.

CASE stated by the metropolitan police magistrate sitting at the Woolwich Police-court.

On the 28th Jan. 1903 ten several informations were laid before the magistrate on behalf of the London County Council (the respondents) for that the appellant in each of the ten cases between the 29th July and the 30th Nov. 1902, at the south side of Cedar-grove, Charlton, in the borough of Greenwich in the county of London, did unlawfully erect otherwise than in accordance with the provisions of Part II of the London Building Act 1894 a building to which Part II of that Act related—namely, did, without the permission of the London County Council, upon land of which the surface was below the level of Trinity high-water mark and which was so situate as not to admit of being drained by gravitation into an existing sewer of the council, erect a building to be used wholly or in part as a dwelling-house, whereby he became liable to the penalty prescribed by sect. 200 (9) of the London Building Act 1894. Upon each of these informations and in respect of each of the ten buildings a summons was served upon the appellant.

Upon the hearing of these ten summonses before the magistrate in Feb. and March 1903, the following facts were proved or admitted:—

The appellant was the owner of and the person who erected ten dwelling-houses situate on a piece of land at the south side of and running at right angles to Cedar-grove, Charlton. The position of these houses was shown on two plans, A and B, annexed to this case. Such houses constituted a terrace or row, and fronted on a length of roadway which had some time previously been constructed by the appellant in continuation of the line of Ransom-road, the ground upon which such houses were built being about 5ft. 6in. lower than the surface of such roadway.

The appellant commenced to erect such buildings as a whole on or about the 14th July 1902, and more than six calendar months before the informations were laid, and the buildings were covered in in the month of Nov. 1902. Prior to commencing the erection of such buildings the appellant gave notice in that behalf to the district surveyor of his intention so to do, but no permission of the respondents was obtained by the appellant. Before the buildings were commenced the appellant was told by the district surveyor that the land upon which such buildings were about to be erected was below Trinity high-water mark.

The row of ten houses had a continuous frontage of about 160ft. to the roadway, and the land on which they were built rose slightly from the north-west end of the row towards the south-east end.

The level of the lowest floor of the ten houses was 7ft. above Ordnance datum, and the land on which the houses were built was about 18in. or 2ft. below such lowest floor—that is, about 5ft. or 5ft. 6in. above Ordnance datum. Trinity high-water mark is 12½ft. above the Ordnance datum, so that such land was about 7ft. to 7ft. 6in. below Trinity high-water mark.

Provision was made by the appellant for draining the ten houses into a sewer of the borough of Greenwich (hereinafter referred to as the Ransom-road sewer), laid under Ransom-road, having a diameter of 15in., and falling towards and opening into the respondents' southern main outfall sewer, which ran underneath the Woolwich-road. The outfall sewer was of circular section, having an internal diameter of 11ft. 6in., the invert being 22ft. 6in. below the surface of the Woolwich-road. The inner or lower side of the arch at the top of this sewer was 5.53ft. above Ordnance datum, so that the appellant's land on which the houses were built was as nearly as might be on the same level as the inner or lower side of the arch of this sewer. The Ransom-road sewer was connected with the outfall sewer at a point about half-way up its side (that is, on its horizontal diameter), and the opening or junction was protected by a hinged flap which, when the outfall sewer became flooded, closed (or should close) automatically, and so prevented the metropolitan sewage flowing along the outfall sewer from passing up into the Ransom-road sewer.

At the point of inlet into the Ransom-road sewer of the drain provided as aforesaid by the appellant was a manhole marked B on the plan B, which manhole was situate 90ft. from the nearest and 250ft. from the farthest of the ten houses, and the length of the Ransom-road sewer from the manhole to its inlet into the outfall sewer in the Woolwich-road was about 350ft.

The Ransom-road sewer was constructed and connected with the outfall sewer in 1894 by the permission and sanction of and in accordance with the requirements of the respondents, pursuant to the Metropolis Local Management Acts. The outfall sewer was discharged and emptied by means of a pumping station at Crossness, on the south side of the Thames, erected for that purpose and under the control and management of the respondents.

The total length of the drain so provided by the appellant as aforesaid from the furthest off of the appellant's houses to the manhole was about 250ft., and the total fall of the drain in that distance from the level of the lowest floor of the houses to the bottom of the manhole was about 5½ft.—that is, 1in. in 4ft.

The drains of each of the appellant's houses were laid in the back gardens or yards in concrete at a depth, commencing from the furthestmost house, of 6in. below the surface, which depth increased with the fall of the drain towards the manhole.

The total fall of the Ransom-road sewer from the manhole to the outfall sewer, which was a distance of about 350ft., was 2ft. 7in.—that is, 1in. in 11ft.

The outfall sewer necessarily received much of the flood water of the metropolis, so that in times of flood, and even after moderate rainfall, it became full and surcharged. The effect of this condition of the outfall sewer upon the Ransom-road sewer was that at times of flood and moderate rainfall no sewage or drainage could pass away from the latter sewer at all, and it necessarily became more or less full. An instance of this was proved by a witness who laid the appellant's drain for him. This witness stated that in Oct. 1902 a flood took place, and the

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Ransom-road sewer became so full that water was standing in the drain at a point about 45ft. south of the manhole, with the consequence that the cementing of the drain had to be suspended.

The respondents' engineers kept records of the height, determined by means of gauges placed in the outfall sewer, of the level of the water in times of flood, and they proved that on certain dates in the years 1900 and 1901 the flood levels determined by such gauges placed near Church-lane, Charlton, rose to heights above the Ordnance datum varying from 7ft. to 11½ft. All these flood levels were substantially above the appellant's land on which the houses were built, and if such flood were free to reach a corresponding level at the appellant's land, the latter would be flooded. The flap aforesaid in the outfall sewer at the inlet into it of the Ransom-road sewer would, however, normally prevent the contents of the outfall sewer from escaping into the Ransom-road sewer.

There was no evidence before the magistrate, save in the one instance above stated, as to how far in times of flood the water in the Ransom-road sewer rose, or to what distance towards or past the manhole the flooding or surcharging of or in the Ransom-road sewer or the appellant's drain extended.

There is no land in the county of London lying so low as to be below the bottom of the outfall sewer. It was not suggested that the appellant's land could be drained into any existing sewer of the respondents other than the outfall sewer.

Upon the above facts the respondents contended that the appellant's land did not admit of being drained by gravitation into the outfall sewer as then existing, and that the offence charged had been proved.

The appellant contended that the offence charged had not been proved, and that it was not proved that his land was so situate as not to admit of being drained by gravitation into an existing sewer of the respondents; that the Ransom-road sewer was such a sewer; that in fact his land was drained by gravitation into the Ransom-road sewer, and also into the outfall sewer; that the respondents ought not to be heard to say that the drainage by gravitation was not proper and efficient by reason of the Ransom-road sewer being constructed and connected with the outfall sewer with the permission and sanction of the respondents as above stated in this case, or by reason of the use or management of the outfall sewer, and that the temporary non-escape in time of flood as aforesaid of the contents of the Ransom-road sewer into the outfall sewer did not prevent the land from being so situate as to admit of its being drained by gravitation within the meaning of the section.

The appellant further contended that the informations and proceedings were out of time, having been laid and commenced more than six calendar months after the commencement of the erection of the buildings.

Taking the facts as above set out, and considering all the circumstances of the case, the magistrate was of opinion and determined: (1) That the ten houses above mentioned were erected by the appellant upon land of which the surface was below the level of Trinity high-water mark,

and that the same were intended to be used as dwelling-houses. (2) That during the greater part of the year the houses admitted of being and were drained by gravitation into the Ransom-road sewer and through that into the southern outfall sewer; but that for a substantial number of days in the year the drainage of the land upon which such houses were erected could not pass into the outfall sewer. (3) That the Ransom-road sewer, being a sewer of the Greenwich Borough Council, was not, but that the southern outfall sewer was, an existing sewer of the respondents within the meaning of sect. 122 of the London Building Act 1894, and that there was no other existing sewer of the respondents into which it was possible to drain the land. (4) That it was immaterial whether the impossibility of draining the land into the outfall sewer at certain periods, as above mentioned, was or was not due to insufficient pumping arrangements provided at Crossness by the respondents, or whether it was or was not due to the insufficiency or incapacity of the sewer, and that for the purpose of the section the sewer and the appliances connected therewith must be taken as they existed at the time the buildings were erected. (5) That, in view of the facts and circumstances set out in the second finding of the magistrate, the land, not being and not admitting of being constantly and effectually drained by gravitation into the outfall sewer, did not admit of being drained by gravitation into an existing sewer of the respondents within the meaning of sect. 122 of the Act. (6) That the informations were laid and the proceedings commenced within six calendar months from the erection of the buildings, and therefore within the time prescribed.

He thereupon convicted the appellant in each of the ten and adjudged him to pay a penalty of 5*l.* on each of the ten summonses, with the further sum of 20*l.* for costs in respect of the first summons.

The question for the opinion of the court was whether upon the above statement of facts the magistrate came to a correct decision in point of law, and, if not, what should be done in the premises.

The London Building Act 1894 (57 & 58 Vict. c. cexiii.) provides (Part 11, Dwelling-houses on low-lying land):

Sect. 122. It shall not be lawful for any person upon land of which the surface is below the level of Trinity high-water mark and which is so situate as not to admit of being drained by gravitation into an existing sewer of the council to erect any building to be used wholly or in part as a dwelling-house, or to adapt any building to be used wholly or in part as a dwelling-house, except with the permission of the council and subject to and in accordance with such regulations as the council may from time to time prescribe with reference to the erection of buildings on such land. And the council may by such regulations (subject to appeal as hereinafter provided): (i.) Prohibit the erection of dwelling-houses or the adaptation of any buildings for use as dwelling-houses on such land or any defined area or areas of such land. (ii.) Regulate the erection of dwelling-houses or the adaptation of buildings for use as dwelling-houses on such land or any defined area or areas of such land. (iii.) Prescribe the level at which the under side of the lowest floor of any permitted building shall be placed on such land or any defined area or areas of such land, and as to the provision to be made and maintained by the owner for securing efficient

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and proper drainage of the buildings either directly or by means of a local sewer into a main sewer of the council. Any person seeking to erect any dwelling-house or any building any part of which is to be used as a dwelling-house, or to adapt any building or any part of a building for use as a dwelling-house, on any of such land shall make application to the council for a licence to erect the same, and the matter shall thereupon be referred to the chief engineer of the council, who shall decide whether and if so upon what conditions such erection or adaptation may be permitted.

Sect. 200 (9). Every person who erects or adapts or commences to erect or adapt otherwise than in accordance with the provisions of Part II of this Act any building to which Part II of this Act relates shall be liable to a penalty not exceeding one hundred pounds, and to a daily penalty not exceeding fifty pounds for every day after the conviction for the offence on which the building continues so erected or adapted without a licence, or on which default is made in observing or complying with any conditions of a licence under that part of this Act.

The appellant in person.

Avery, K.C. (Daldy with him) for the respondents.

The arguments are sufficiently indicated by the contentions in the case.

LORD ALVERSTONE, C.J.—Upon the point that has been taken that these proceedings were too late, I am clearly of opinion that there is no ground for interfering with the entertaining of the case by the learned police magistrate upon the ground that the proceedings were out of time. Sub-sect. 9 of sect. 200 says that the person "who erects," under this very section (namely, sect. 122), "or adapts or commences to erect or adapt otherwise than in accordance with the provisions of Part II of this Act any building to which Part II of this Act relates shall be liable to a penalty." It is contended that because the appellant commenced the ten houses more than six months before the laying of the informations, although they were not completed until well within the six months, the proceedings were too late as the six months ran from the commencement of the erection. In my opinion that would give no effect to the words "erect or adapt," as distinguished from "commence to erect or adapt." The object of what I may call the double provision is obvious: it may be necessary to wait until the houses are completed in order to see whether they fall within the section or not. On the other hand, there may be a case in which it is quite clear that what is going to be done may be an infraction of the section, and in that case power is given to take proceedings as soon as work of that character is commenced. On the other part of the case I think the learned magistrate has gone too far; that is to say, that he has applied a test which is not laid down by sect. 122 of the statute. Sect. 122 says that "It shall not be lawful for any person upon land of which the surface is below the level of Trinity high-water mark and which is so situate as not to admit of being drained by gravitation into an existing sewer of the council to erect any building to be used wholly or in part as a dwelling-house." The learned magistrate has found that the ten houses, which had been erected by the appellant, were on land of which the surface was below the level of Trinity high-water

mark, and that they were also intended to be used as dwelling-houses, and that therefore *prima facie* the section applies. He then finds facts which I need not go through in detail, showing that the houses were at a level which admitted of their being drained by gravitation; and it is not disputed that if there were no other sewer or no other special construction or special use of the main outfall sewer in the Woolwich-road, the houses could be drained by gravitation into that sewer. Then the magistrate says this: "During the greater part of the year the said houses admit of being and are drained by gravitation into the Ransom-road sewer, and through that into the southern outfall sewer." Therefore, that the condition of the houses is such that they admit of being drained by gravitation is obvious and is so found, because they could not admit of being drained by gravitation in the ordinary sense of the word for part of the year and not for the whole of the year, though the magistrate goes on to say that "for a substantial number of days in the year the drainage of the land could not pass into the outfall sewer." Then he goes on to say that he thinks that it is immaterial as to why it would not pass into the sewer. It is in that respect that I think he has applied a wrong construction of the law, because it turns out and the fact is that this outfall sewer being very heavily charged in times of flood, or in times of excessive or even moderate rainfall, so much water comes down the sewer that the flaps which are made to shut with the pressure of the water close the mouth of the Ransom-road sewer, so that the water cannot go out of the Ransom-road sewer owing to the greater pressure of the water in the main outfall sewer. That does not make the house one which is so situate as not to admit of being drained by gravitation. What it does come to and mean is that on those particular days the main sewer is so used by the London County Council that the water will not go out into that sewer from the Ransom-road sewer. In my opinion it never was intended that the particular houseowner or landowner, whose houses are within the terms of the section, should be prevented from draining, because on certain days of the year the sewer is so used that water will not go out into the sewer; and, as I clearly pointed out in the course of the argument, really the question of the level of the houses has nothing to do with the case. We have to see whether the houses fall within the section or not as being below the level of high-water mark, because, assuming the level of the houses was 10ft. higher, still the same objection applies—namely, that on those particular days of the year the water would not go out of the sewer because it would be headed back owing to the pressure of water in the main sewer. I desire to say that no point is raised as to any improper construction of the drains of the houses with the Ransom-road sewer. I deal with this case solely upon the point raised—namely, that it is objected by the London County Council that, because the water in the Ransom-road sewer was on a certain number of days in the year headed back by the water in the outfall sewer, therefore the house was not one that is capable of being drained by gravitation, or so situate as not to admit of being drained by gravitation, into the existing sewer. I think as to that the learned magistrate was

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wrong, and that therefore this appeal ought to be allowed.

LAWRANCE, J.—I quite agree.

KENNEDY, J.—I also entirely agree.

Appeal allowed.

Solicitor for the respondents, *W. A. Blaxland.*

House of Lords.

Feb. 15 and 16.

(Before the LORD CHANCELLOR (Halsbury),
Lords MACNAGHTEN and LINDLEY.)

MAYOR AND CORPORATION OF SHOREDITCH v.
BULL. (a).

ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

*Highway—Local authority—Road not safe for
traffic—Misfeasance—Liability.*

The appellants, who were both the sanitary and the highway authority, dug a trench along a road under their control for the purpose of laying a sewer. When the work was completed they filled in the trench and opened the road for traffic. About a week afterwards the respondent was driving along the road in a cab at night. The driver found that the part of the road where the trench had been opened was soft, and crossed on to the other side, and ran into a heap of rubbish, with the result that the cab was overturned and the respondent was injured. The rubbish had been wrongfully deposited in the road without the permission of the appellants, but they knew that it was there, and had not lighted or fenced it. The jury found that the part of the road where the trench had been opened had been properly filled in, but had been rendered soft by subsequent rain, and was dangerous to traffic at the time of the accident.

Held, that the appellants were liable for the injury. Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal, reported 67 J. P. 37, who had reversed a judgment of Phillimore J. upon further consideration. The action was brought in respect of personal injuries caused by the upsetting of a cab. The facts were as follows:—

The appellants were the sewer authority and also the highway authority for the borough of Shoreditch. Before and at the time of the accident to the respondent the appellants, as such sewer authority, were engaged in laying down a new sewer in Buttesland-street, which was within the borough, and under their jurisdiction. For the purpose of laying the sewer it was necessary to dig a trench 3ft. wide down the centre of Buttesland-street. The width of Buttesland-street was 24ft. from kerb to kerb, so that a space of 10ft. 6in. either side of the trench remained entirely undisturbed. Great Chart-street was a street which ran into Buttesland-street at right angles. At the date of the accident (April 1900) the condition of things in Buttesland-street was as follows—namely, to the west of Great Chart-street (or to the left hand of a person coming down Great Chart-street into Buttesland-street) the street was closed

as the work of laying the sewer was in progress. To the east of Great Chart-street (or to the right hand of a person coming down Great Chart-street into Buttesland-street) the street was open as the work of laying the sewer was finished, the trench having been filled in about fourteen days prior to the accident, and the road having been open to the public about six days before the accident. On the night of the accident there was in Buttesland-street on the south side (or off side of a person driving down Buttesland-street from Great Chart-street), and close to the kerb and about fifty yards from Great Chart-street, a heap of rubbish, which had been improperly shot there by a carman not in the employ of the appellants, over whom they had no control, who had shot the rubbish in the street without any permission from the appellants. On the night of the accident the respondent was being driven home in a hansom cab. The driver came down Great Chart-street and finding that portion of Buttesland-street which was to his left hand closed turned to his right, intending to proceed down that portion of Buttesland-street which was open. In order to do so he crossed the site of the trench which had been filled in, and so got on to his near side of Buttesland-street. Thinking that the off side of Buttesland-street might be better than the portion he was on, he recrossed the site of the trench and so got on to his off side of Buttesland-street, and shortly afterwards he drove over the heap of rubbish, which upset the cab and caused the injuries to the respondent in respect of which this action was brought. The action was heard before Darling, J. and a common jury on the 1st Aug. 1901. At the end of the plaintiff's evidence the learned judge held that there was no evidence of misfeasance to go to the jury, and entered judgment for the appellants. The respondent appealed, and on the 14th Dec. 1901 the Court of Appeal ordered a new trial. The new trial took place on the 16th, 17th, and 18th April 1902 before Phillimore, J. and a common jury. At the conclusion of the plaintiff's case the judge was asked to nonsuit, and stated that he should have done so had it not been for the decision of the Court of Appeal reversing the judgment of Darling, J., but that in view of that decision he should leave certain questions to the jury and take their answers. The following questions were put to the jury, who returned the following answers:

1. Was the left half of the road down Buttesland-street from Great Chart-street to Pittfield-street dangerous to traffic?—Yes, sufficiently to warrant the driver in crossing from the near to the off side.
2. Was it the part which had been excavated, or the part to the left hand of that which had been excavated?—Both, but chiefly the trench.
3. Was the work properly finished by defendants after the trench was completed?—Yes, it was properly finished at the time, but rain had spoiled it.
4. Did the cabman go over to the off-side owing to the work not being properly finished?—Yes. The foreman of the jury.—We do not intend to say that he went over to the off side because the road was not properly finished, but that he went to the off side on account of the state of the road.
5. Was the heap of rubbish put there by direction of the vestry or its servants?—No.
6. Was it put there by permission of the vestry or its servants?—No.

The jury added as a rider that the road was properly finished, but had become dangerous in the six or seven days since it was open to traffic.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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The learned judge, after argument upon these findings, entered judgment for the defendants with costs. From this judgment the respondent appealed, and the Court of Appeal (Collins, M.R. and Mathew, L.J.) upon the 1st Nov. 1902 (*Romer, L.J. dubitante*) allowed the appeal, and ordered judgment to be entered for the respondent.

J. Eldon Bankes, K.C. and R. V. Bankes, for the appellants, contended that there was no evidence to support the view which the Court of Appeal took of the effect of the findings of the jury. There was no duty on the appellants to light or remove the heap of rubbish, and the holes on the near side of the road, if any, were only a nonfeasance, not a misfeasance. There was no evidence of negligence in filling in the trench, and it was not in fact in a dangerous state, or, if it was, it did not contribute to the accident. They referred to

Tregellas v. London County Council, 14 Times L. Rep. 55;

Thompson v. Mayor of Brighton, 70 L. T. Rep. 206; (1894) 1 Q. B. 332;

Cowley v. Newmarket Local Board, 67 L. T. Rep. 486; (1892) A. C. 345;

Sanitary Commissioners of Gibraltar v. Orfila, 63 L. T. Rep. 58; 15 App. Cas. 400;

Pendlebury v. Greenhalgh, 33 L. T. Rep. 372; 1 Q. B. Div. 36;

Taylor v. Greenhalgh, 31 L. T. Rep. 184; L. Rep. 9 Q. B. 487;

Sharp v. Powell, 26 L. T. Rep. 436; L. Rep. 7 C. P. 253.

Montague Lush, K.C. and E. Lewis Thomas, who appeared for the respondent, were not called upon to address the House.

At the conclusion of the arguments for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: I should be much grieved if any of the facts in this case were left so uncertain as to render it necessary for your Lordships to send it down for a third trial, the damages having been only to the extent of 50*l.*, and the expenses, I should think, already incurred in the two trials before coming to this House, amounting to a very considerable sum indeed, thrown upon the ratepayers. But I do not think that necessary, because I think that there is enough in the findings of the jury here to render it proper to affirm the judgment which has been given by the majority of the Court of Appeal. I am desirous of not going beyond the facts and findings in this case for more reasons than one, and among them, conspicuously, is the reason that I think that some propositions in respect to the non-liability of the surveyor, or the local board now representing the surveyor of highways, may be pressed too far. At the same time I wish to express no difference of view from that which has been expressed before in this House. When the question is raised in a direct form it may be worth while to consider whether or not that which has been described as an act of nonfeasance in several of the cases in which that proposition has been applied, I think a little too widely, may not be considered misfeasance; but it is enough for the present case to say that according to the authorities there is enough here to show that the act

which was being done was an alteration of the normal condition of the road, and if there was anything wrong either in the mode of carrying out the work or in the period of time which was allowed to elapse between the opening of the road and its becoming firm, or if in any other way the thing that was being done was negligently done, or if there was evidence for the jury that it was negligently done within any of the decisions which have been cited to us, it was an act of misfeasance for which the local or road authority under whose authority the thing was done was responsible. I deprecate very much the notion that you can begin an operation which interferes with the ordinary and normal condition of the roads and then by reason of having different duties cast upon you you can treat that as a separate operation, so that at one point of time you may be responsible in one capacity or not responsible in one capacity and at another point of time you are, and you may hand over the completion of the operation to an authority which is not responsible at all. That would be a sort of metaphysical inquiry into which I am loth to enter. The person who alone could interfere with the structure of the road as it stood happens to be the person who is also responsible for the continuance of the road in a condition in which it shall not be permitted to be dangerous to the public; and in this case I absolutely decline to inquire at what particular point of time the liability as sewer authority ends and the liability as highway authority is supposed to begin. It is enough for me to say that the person sued was the person who interfered in the first instance with the ordinary structure and normal condition of the road and that was an act—not an omission to do an act but an act—and until the road was restored in its entirety to the proper and normal condition so that it could be properly and without undue risk traversed by the public at large, it seems to me that it would be idle to say that you could put your finger upon any particular point of time and say that the liability of the sewer authority began then and ended then, and then it was handed over to an authority which is not responsible for nonfeasance, and if that authority did nothing nobody is responsible at all. That is a process of reasoning to which I for one will not assent. The moment the structure of the road is interfered with, and it comes within the ambit of the operation commenced by the person who is entitled to interfere with the structure of the road, then, until that road is restored into the condition in which it was before that alteration of its structure began, it seems to me the person who interfered with it is responsible for a misfeasance. I do not deny that there is considerable difficulty in following the findings of the jury. For aught I know to the contrary the learned counsel who has last addressed us may be right in the conjecture which he has formed as to the influences which guided the jury in coming to their findings. I have nothing to do with that provided that the findings stand (and there is no application here and no desire, I should think, on either side for a new trial) and provided that the two learned judges in the Court of Appeal are right in construing the findings as they have done, and, although I think that a different view might be entertained, I certainly

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do not feel myself able to differ from their interpretation of those findings. Under those circumstances it becomes an ordinary case of interference with the road, the non-return of it into its normal condition, and an accident happening in the course of events, which but for that alteration in the normal condition of the road would not have happened. That seems to me, therefore, to be a sufficient chain of events to show that the person who interfered with the normal condition of the road is responsible for it until its return to a safe condition. It was not restored to the normal condition when the accident occurred, and therefore I think that the plaintiff is entitled to maintain his verdict. Under those circumstances I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN.—My Lords: I am of the same opinion. Notwithstanding the able argument which we have heard this morning, I think that what was done must be regarded as one operation and by one body. So regarding it, I think that there was more than nonfeasance; there was misfeasance. I agree that the judgment ought to be affirmed.

LORD LINDLEY.—My Lords: I am of the same opinion. I have no doubt myself if you look at it broadly and without those subtle distinctions which have been suggested to us, that this is a case of misfeasance and not of nonfeasance. There were three breaches of duty, so far as I can make out, or at all events there were three acts done—not merely omissions. There was breaking up the road and putting it into such a state that it was not fit for traffic; there was restoring the road and not restoring it so as to be fit for traffic; and there was leaving the cartload of rubbish there which it was the duty of someone on the part of the defendants to clear away (I do not say an actionable duty), and that was not done. Three wrongs do not make one right. It is more than omission. It is not as if they left the road alone; they did nothing of the sort. They first began by putting it out of a proper state of repair, and they never put it back into a proper state of repair.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *H. Mansfield Robinson*, Town Clerk.

Solicitor for the respondent, *Graham Gordon*.

Feb. 23 and March 10.

(Before the LORD CHANCELLOR (Halsbury),
Lords MACNAGHTEN and LINDLEY.)

LA COMPANIA DE LOS FERROCARRILES DE
ZARAGOZA v. COLLINGHAM AND OTHERS. (a)
ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

*Practice—Compromise—Distribution of fund
among bondholders—Limitations of times for
claims by absent parties.*

APPEAL from a decision of the Court of Appeal (Rigby and Stirling, L.J.J., Williams, L.J. dissenting), reported under the name of *Collingham v. Sloper* (84 L. T. Rep. 289; (1901) 1 Ch. 769),

refusing to alter the form of an order for a compromise made by the Court of Appeal (Lindley, Lopes, and Kay, L.J.J.), under Order XVI., r. 9a), as reported in 71 L. T. Rep. 456; (1894) 3 Ch. 716, reversing a decision of North J. (69 L. T. Rep. 39; (1893) 2 Ch. 96).

The Saragossa and Mediterranean Railway Company by a trust deed dated the 6th Oct. 1887 created a series of 75,000 mortgage debentures or obligations, payable to bearer, of the nominal value of 500 pesetas (20L.) each, and secured by a mortgage or hypothecation of the line of the railway company from Puebla de Hija to San Carlos de la Rapita in the kingdom of Spain. Of these obligations 13,450 were issued by the railway company shortly after the creation of the series; and by agreement dated the 15th June 1888 they agreed to issue to the contractors for the construction of the railway the balance of the obligations (61,550). The sum of 431,016L. 9s. 10d. came to the hands of the London commissioners, representing moneys subscribed in respect of the obligations and interest; and after allowing for sums appropriated for redemption of bonds already drawn, and giving credit for moneys owing to them, they had in hand at the date of the scheme hereinafter mentioned the sum of 218,734L. 0s. 11d. In 1892 the respondents to this appeal commenced an action in the Chancery Division (*Collingham v. Sloper*) on behalf of themselves and all other the holders of such obligations to have the trusts on which the commissioners held the proceeds of such issue performed and carried into execution. A similar action was commenced in the same year by the Foreign American and General Investment Trust Company Limited (*Foreign American and General Investment Trust Company Limited v. Sloper*), and the same company also commenced another action (*Foreign American and General Investment Trust Company Limited v. Sloper*) for the purpose of obtaining a declaration that the objects for which the money was subscribed by the public were no longer capable of being performed. The railway company was a defendant in each of such actions. On the 27th Jan. 1893 North, J. delivered judgment in the three actions (69 L. T. Rep. 39; (1893) 2 Ch. 96), declaring that the trusts in the deed of the 6th Oct. 1887 and other trusts constituted ought to be performed and directing certain inquiries. A scheme of arrangement or compromise was then prepared for the purpose of settling the rights of the various claimants to the funds in the hands of the commissioners, which then amounted to 218,734L. 0s. 11d. By this scheme it was provided (*inter alia*) that 153,457L. 10s. (part of the said sum in the hands of the commissioners) should be set aside for distribution in respect of the 61,383 (subsequently ascertained to be 61,275) outstanding obligations of the railway company when and so soon as the holders thereof should be thereby ascertained (being at the rate of 2L. 10s. per obligation) within fourteen days of the presentation of the same for payment upon such obligations being delivered up to be cancelled. A petition to sanction the scheme was refused by North, J.; but by an order of the Court of Appeal it was ordered that, the court being of opinion that the scheme was for the benefit of all the holders of the obligations who were not parties to the proceedings, the scheme should be

(a) Reported by C. E. MAIDEN, Esq., Barrister-at-Law.

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carried into effect so as to be binding on all the holders of the outstanding obligations of the railway company (other than three persons who dissented therefrom but subsequently consented thereto), and that all further proceedings in the actions should be stayed, and that the commissioners, in case within twelve months from the date of this order all the obligations of the railway company should not have been surrendered, should lodge in court the residue of all moneys in their hands: (71 L. T. Rep. 456; (1894) 3 Ch. 716). There were now outstanding 1097 of such obligations, and the balance of the funds in court available for the payment of 2l. 10s. on each of such obligations now amounted to 3399l. 15s. 5d. New Consols. On the 20th Feb. 1901 the railway company served an originating notice of motion in the Court of Appeal for an order that a period of three months, or such other time as the court might think fit, might be limited within which the holders of outstanding obligations must come in under the scheme and accept the sum of 2l. 10s. per obligation, or that the holders of the obligations who did not come in and accept such sum within such time should be deemed to have elected not to take the benefit of the scheme, but to rely on the charge on the railway property comprised in such obligations and the trust deed of the 6th Oct. 1887, and that such holders might be excluded from the benefit of the scheme. The Court of Appeal refused the application, and the present appeal was brought from this refusal. The obligations were all payable to bearer, and were largely held in France, Belgium, and Spain, and, generally speaking, in very small amounts. It was not known who were the holders of the obligations which were now outstanding.

Upjohn, K.C. and Martelli appeared for the appellants.

Butcher, K.C. and Peterson for the respondents.

At the conclusion of the arguments their Lordships expressed an opinion that the decision of the Court of Appeal could not be supported, and adjourned the case in order that the parties might come to some arrangement.

March 10.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case your Lordships thought it desirable that the parties should come to an agreement. They have now done so, and I will propose to your Lordships an order which will give effect substantially to that agreement: That the order appealed from be discharged, and that the cause be remitted back to the Chancery Division with directions (the railway company undertaking not to dispute the right of the holders of the outstanding debentures to a valid charge on the property of the railway) to make the order prayed for in the notice of motion substituting six months for three months, the order to be advertised forthwith in such form and in such papers as the master may approve, and that the costs of both parties as between solicitor and client be paid out of the fund in court.

Order appealed from discharged, and cause remitted to the Chancery Division.

Solicitors for the appellants, *Francis and Johnson*.

Solicitors for the respondents, *Petch and Co.*

Judicial Committee of the Privy Council.

Feb. 4, 5, and March 2.

(Present: The Right Hons. Lords MACNAGHTEN, ROBERTSON, and LINDLEY, and Sir ARTHUR WILSON.)

ATTORNEY-GENERAL FOR NEW SOUTH WALES v. DICKSON AND OTHERS. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Grant of land—Reservation to grantor—Omission from subsequent grant—Effect.

In 1829 the Crown granted land adjoining the sea to a corporation, reserving (inter alia) "all such part of the said piece or parcel of land hereinbefore described as may be within 100ft. of high-water mark on the sea coast, or in any creek, harbour, or inlet." In 1830 the corporation, in execution of a previous contract, sold the land to D., through whom the respondents claimed, and D. executed a mortgage to the corporation to secure part of the purchase money, which was then unpaid. The land was conveyed to D. "to hold the same subject to the reservation and conditions in the now recited grant" (meaning the grant of 1829 from the Crown) "contained."

In 1833 the corporation was dissolved by Order in Council, and its property thereupon reverted to the Crown, "subject to all mortgages and contracts for sale previously lawfully made."

In 1840 D. paid off the mortgage, and the Crown granted the land to him. This grant made no mention of the reservation above mentioned, and described the land as being bounded on one side "by the water of" the "harbour."

Held (affirming the judgment of the court below), that the effect of the grant of 1840 was to do away with the reservation contained in the earlier grant.

APPEAL from a judgment of the Supreme Court of New South Wales (Stephen, Owen, and Pring, JJ.), who had affirmed a judgment of the Chief Judge in Equity (A. H. Simpson, C.J.).

The facts appear from the headnote above and from the judgment of their Lordships.

Asquith, K.C. and Vaughan Hawkins, for the appellant, argued that the effect of the grant of 1840 was not to extinguish the title of the Crown to the land in dispute, which had been expressly reserved by the grant of 1829. The recitals in the deed of 1840 are inconsistent with the view taken in the courts below. As to the effect of a reservation in a Crown grant, see

Cooper v. Stuart, 60 L. T. Rep. 875; 14 App. Cas. 286;

Attorney-General for New South Wales v. Milson, 16 N. S. W. Law Rep. (Cases at Law) 145; affirmed on appeal to the Judicial Committee, 23rd Feb. 1895, not reported.

The Real Property Acts of the colony, under which titles are registered, are not binding on the Crown.

Warmington, K.C. and R. J. Parker, for the respondents *Dickson and Dodds*, argued that under the grant of 1840 the whole piece of land passed to *Dumaresq* without any reservation. It

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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has been decided in Victoria that the Land Registry Acts bind the Crown. See

Attorney-General v. Goldsbrough, 15 Vict. Law Rep. 638.

See also

Attorney-General for New South Wales v. Love, 78 L. T. Rep. 601; (1898) A. C. 679.

If it were not so, as the title to all the land in the colony comes ultimately from the Crown, the value of the Act would be destroyed.

F. Whinney, for Mr. G. H. Williams, the Registrar-General of the colony, who had been made a respondent, asked for his costs.

Vaughan Hawkins was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 2.—Their Lordships' judgment was delivered by

LORD LINDLEY.—The question raised by this appeal is whether a small strip of land, 100ft. wide, adjoining the sea in Port Jackson, near Sydney, is the property of the Crown or of the defendants. This depends on the true construction of a grant by the Crown to one Dumaresq, dated the 12th Aug. 1840. In order, however, to understand this grant it is necessary to explain the position of the parties to it at that date. In 1826 a charter was granted by the Crown incorporating a number of persons by the name of the Trustees of the Clergy and School Lands in the Colony of New South Wales, with power to cultivate, sell, lease, and mortgage any lands which might thereafter be granted to them by the Crown (arts. 15, 17, and 20), and by art. 33 it was granted and declared that all lands theretofore set apart within the colony for the support of the clergy of the Established Church and known by the name of the Glebe Lands or by whatever other name the same might be known should, from and immediately after the death or resignation of the clergyman then in the occupation or enjoyment thereof, pass to and become vested in the corporation upon the same trusts and for the same purposes as their other estates. By art. 36 the Crown reserved to itself power to dissolve the corporation and to resume all the lands previously granted to it, but subject to all mortgages and contracts for sale previously lawfully made. It is common ground that the strip of land in question formed part of some glebe lands called St. Philip's Glebe, and that before Feb. 1828 arrangements had been made with the clergyman who held them for his resignation. It does not, however, appear when his resignation was formally completed. It was contended that by virtue of art. 33 of the charter the glebe lands resigned became vested in the corporation by virtue of the charter and without any further grant from the Crown. Perhaps this is so; but there is nothing to show when on this assumption the lands did become so vested. It is obvious that a grant reciting and recognising the resignation and accurately defining the lands to which the corporation had acquired a title would be useful and prevent disputes; and it appears that such a grant was in fact usually obtained, and was applied for in this case as early as Oct. 1827. The Government officials promised that proper deeds should be completed upon the receipt from the trustees of some formal document which was required. But

no grant was in fact obtained before the sale which it is necessary now to notice. On the 14th Feb. 1828 part of St. Philip's Glebe was sold by auction by the corporation. The advertisements and conditions of sale stated that a transferable lease for twenty-one years with an option to purchase the fee would be granted to the highest bidder. The advertisements and conditions also contained the following words—viz.: "All clauses introduced in the grants to the trustees to be inserted in the leases and conveyances." It was also stated that lots 1 to 9 of the St. Philip's Glebe lands adjoined the sea. The strip of land in question formed part of lots 5, 6, and 7. Lots 5 and 6, containing about thirty-six acres, were bought by Mr. Dumaresq. No formal contract for this purchase is produced; but the relation of vendor and purchaser between the corporation and Mr. Dumaresq upon the above terms was then established, and a conveyance by the corporation to him was afterwards executed as will be stated presently. In the meantime the corporation obtained a grant of the glebe lands from the Crown. It is dated the 24th Nov. 1829. It recites that by certain instructions under the Royal Sign Manual the Government is empowered by the Crown to grant to the corporation certain lands in the colony and refers to the charter of incorporation, and a grant is made to the corporation of certain lands which are so described as to include the strip in question. But then came words which except it. The words are, "Excepting and reserving to His Majesty" lands for sites of towns or villages or other public purposes, and also reserving to His Majesty, his heirs and successors, all such part of the said piece or parcel of land hereinbefore described as may be within 100ft. of high-water mark on the sea coast, or in any creek, harbour, or inlet." Other reservations followed, but it is unnecessary to refer to them. The effect of this last reservation is not open to any serious controversy. If the strip in question belonged to the Crown at the date of the grant, the strip was excepted from the grant. The word "reserving" would operate as an exception. If, on the other hand, the strip belonged to the corporation under the charter, the reservation would operate by estoppel, and have the effect of a grant by the corporation to the Crown. After accepting this grant the corporation could not successfully claim the strip of land from the Crown. But Dumaresq was not a party to this grant, and any equitable title which he may have acquired was not affected by it. On the 1st July 1830 the corporation conveyed to Dumaresq the lands which he had purchased in 1828, and by the same deed he mortgaged them to the corporation for part of the purchase money. The conveyance recited the letters patent of 1826, and the grant by the Crown to the corporation of the 24th Nov. 1829, and the resolution to sell the lands comprised in that grant by public auction, and that, as the grant to the corporation had not then been made out, it had been proposed that the conveyances to the purchasers should be delayed until the grant to the corporation had been obtained, and that Dumaresq had become the purchaser of the piece or parcel of land hereinafter mentioned, "the same being parcel of the land comprised in the hereinbefore in part recited grant of the 24th Nov. 1829." The convey-

ance then went on to convey to Dumaresq thirty-six acres of land, "being parcel of the land comprised in the hereinbefore in part recited grant of the 24th Nov. 1829, and which said piece or parcel of land intended to be hereby granted and enfeoffed is bounded on the north-east by the water of Port Jackson Harbour." The rest of the conveyance and the remortgage contain nothing material. There is no reservation or exception in this deed, but the grant of 1829 is referred to not only in the description of the parcels, but in the recital, where the property granted by it is described as "bounded as in the said grant . . . mentioned to hold the same subject to the reservation and conditions in the now recited grant contained." This deed of 1830 is by no means so clear as it should have been. Its legal effect appears to their Lordships to have been that the purchaser only acquired so much of the land described as the corporation itself acquired by the grant of 1829. But the purchaser might very naturally think that the land which he agreed to buy extended to the water's edge, and that the land conveyed to him did the same. Both the particulars of sale and the conveyance of 1830 so describe it, and it is only by reference to the grant of 1829 that any doubt on this point arises. In 1833 the corporation was itself dissolved, and its property thereupon reverted to the Crown, as provided by art. 36 of the charter of 1826. On the 12th Aug. 1840 Dumaresq paid off his mortgage to the Crown, and the Crown made the grant which has given rise to this litigation. The grant is not a simple reconveyance of the property mortgaged which would be the ordinary form if all that was intended was to re-vest in the mortgagor what he had mortgaged to the corporation. The Crown not having been the mortgagee, recitals showing the title of the Crown to the mortgaged property and of the Crown Receiver to receive and give a good discharge for the mortgage money would be quite in ordinary course, and the grant in question contains recitals showing this. But there are passages in the grant which do more than this and require attention. In reciting the conveyance of 1830 the purchase by Dumaresq in 1828 is pointedly noticed, and the parcels conveyed by that deed are described as bounded by the water of Port Jackson, and the operative part of the grant runs thus:

Now know ye that in fulfilment and execution of the contract so made and entered into by the trustees of the clergy and school lands aforesaid for the sale and conveyance of the said lands to the said William Dumaresq, his heirs and assigns, as aforesaid and in consideration of the payment by the said William Dumaresq of the said several sums of 404*l.* and 32*s.* 12*s.* to the said Oswald Bloxsome as aforesaid on our behalf we do hereby grant and confirm unto the said William Dumaresq and his heirs all that said parcel of land estimated and accepted as aforesaid to contain thirty-six acres comprised in the hereinbefore in part recited indenture of the 1st July 1830 and hereinbefore particularly mentioned and described with the appurtenances thereto belonging to hold the said lands and other hereditaments with the appurtenances thereto belonging unto the said William Dumaresq, his heirs and assigns, to and for the end, intent, and purpose that the said term of 1000 years therein mentioned for the now residue thereof shall and may henceforth become merged and extinguished in the freehold reversion and inheritance of the said lands and hereditaments so by these presents

and the hereinbefore part recited indenture conveyed to or otherwise vested in the said William Dumaresq and his heirs as aforesaid and wholly cease, determine, and for ever become void to all intents and purposes whatsoever.

There is not a word here to show that the strip of land next the sea was excepted from the lands agreed to be purchased by Dumaresq in 1828 and conveyed to and mortgaged by him in 1830. So far is this from being the case, that those lands are described in this grant of 1840 as bounded by the waters of Port Jackson. Moreover, if a strip of 100ft. is deducted, thirty-six acres are a considerable over-estimate. The Chief Judge in Equity, before whom the case first came, decided that upon the true construction of this grant of 1840 the strip of land reserved to the Crown in the grant of 1829 was included in the land conveyed to Dumaresq by the Crown in 1840. The full court took the same view and affirmed his decision. From this decision the present appeal is brought. The respondents claim through Dumaresq. He sold to Gibson in 1841, who died shortly afterwards, and the respondents are the trustees of his will and purchasers from them. After Gibson's death—viz., in 1873—his widow applied to the Crown for permission to purchase and retain the mud flat in front of her land. This was refused. Later—viz., in 1880—being told that the land was not hers, she applied for a rescission of the reservation by the Crown, and ultimately a portion of it was acquired by her trustees from the Crown. In Oct. 1885 a certificate of title was obtained by Gibson's trustees, but with a note of the reservation of the 100ft. This led to much correspondence, and ultimately, in Nov. 1887, the note was removed, and Dickson and Dodds, the trustees, were registered as the owners of the land which Gibson bought, including the strip now claimed by the Crown. In June 1900 the Crown again claimed the strip of land notwithstanding the registration, and the present proceedings to enforce the claim were instituted on the 12th Dec. 1901. If their Lordships had come to the conclusion that the grant of 1840 had not included the sea frontage it would have become necessary to consider the very important question whether the registered title thus acquired was conclusive against the Crown. But their Lordships having arrived at the same conclusion as the colonial judges as to the effect of that grant, the question whether the Crown is bound by the registered title does not call for decision on the present occasion. Their Lordships have already stated that in their opinion the grant of 1829 did not convey to the corporation the strip of land in dispute or leave the ownership of it in the corporation if vested in them before. It remains to consider the other documents. Great reliance is placed by the Crown on the statement in the conditions of sale in 1828 that the leases and conveyances to the purchasers would contain "all clauses introduced in the grants to the trustees," and it is contended that the purchasers must have known from this that they would not obtain a sea frontage. Their counsel, on the other hand, contends that the statement that lots 1 to 9 adjoined the sea was misleading if the sea frontage of those lots was to be excepted; and that the words relied upon by the Crown, which were general words applicable to all the property, could not be applied to those lots or, if they could, should be confined to

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reservations for roads and mines and minerals and restrictions on user which the Crown might think proper to impose. Their Lordships feel considerable difficulty in deciding this controversy. If it was generally known in the colony in 1828 that Crown grants of land adjoining the sea always excepted a strip just above high-water mark, the purchaser could not reasonably complain that he was misled. But if there was not any such common knowledge, the purchaser would undoubtedly have great reason to complain if he did not obtain a sea frontage. The conveyance of 1830 is so worded as to be open to two constructions. The parcels conveyed by it are first of all described as comprised in the grant of 1829, but then they are said to be bounded by the water of Port Jackson. This is perfectly true in one sense—i.e., if the description of the parcels in the grant of 1829 is looked at—but the exception from them is disregarded. The legal effect of the conveyance of 1830, so far as the Crown was concerned, was only to pass the property which the corporation had power to grant; but as between the corporation and the purchaser it was so framed as to warrant him in supposing that he had got a grant of land coming down to the water's edge. Such was the doubtful state of the title to the sea frontage when the Crown made the grant of 1840. This grant is so worded as, in their Lordships' opinion, to remove the doubt to which they have referred, and the frame of the grant leads them to think it was intended to remove this doubt. The grant, in their opinion, conveys the land bought in 1828 down to the water's edge. It might, no doubt, have been made plainer, but their Lordships concur in the view taken of it by all the judges in the colony, and they will therefore humbly advise His Majesty to dismiss the appeal. The appellant must pay the costs of the respondents.

Solicitor for the appellant, *George M. Light*.

Solicitors for the respondents *Dickson and Dodds, Greenip, Snell, and Co.*

Solicitors for the respondent *Williams, Snow, Fox, and Higginson*.

Wednesday, March 2.

(Present: The LORD CHANCELLOR (Halsbury), Lords DAVEY, ROBERTSON, and LINDLEY, with the ARCHBISHOP OF CANTERBURY (Dr. Davidson), the BISHOP OF LINCOLN (Dr. King), and the BISHOP OF RIPON (Dr. Boyd Carpenter) as Ecclesiastical Assessors.)

FITZMAURICE v. HESKETH. (a).

ON APPEAL FROM THE CONSISTORY COURT OF MANCHESTER.

Ecclesiastical law—Jurisdiction—Clergy Discipline Act 1892 (55 & 56 Vict. c. 32)—Offence against morality—Fraud.

Fraud is an "immoral act" within sect. 2 of the Clergy Discipline Act 1892.

Judgment of the court below affirmed.

APPEAL from a judgment of the Consistory Court of the diocese of Manchester. The appellant, Fitzmaurice, a beneficed clergyman, was convicted at petty sessions of being a rogue and

a vagabond under 5 Geo. 4, c. 83, as a gatherer or collector of alms under false and fraudulent pretences, and was sentenced to three months' hard labour. The quarter sessions on appeal confirmed the conviction. Complaint was lodged in the Consistory Court of the diocese of Manchester, charging the appellant with having been guilty of immorality within the meaning of sect. 2 of the Clergy Discipline Act 1892. He was then inhibited from his living by the Bishop of Manchester, and at the subsequent hearing before the Consistory Court was found guilty and deprived of his preferment.

By the Act of 1892 (sect. 2) it is provided that: "If a clergyman either is convicted by a temporal court of having committed an act constituting an ecclesiastical offence and the foregoing section"—which refers to indictable offences and matrimonial offences—"does not apply to him, or is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality and not being a question of doctrine or ritual," he may be prosecuted in the Consistory Court by any parishioner, or by the bishop, or by any person approved by him. By the definition clause 12 the expressions "immoral act," "immoral conduct," and "immoral habit" are declared to include "such acts, conduct, and habits as are proscribed by the 75th and 109th Canons issued by the Convocation of the Province of Canterbury in the year 1603." The 75th Canon is as follows:

No ecclesiastical person shall at any time other than for their honest necessities resort to any taverns or ale-houses, neither shall they board or lodge at any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking or riot, spending their time idly by day or by night playing at dice, cards, or tables, or any unlawful game; but at all times convenient they shall hear or read somewhat of the Holy Scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty and endeavouring to profit the Church of God, having always in mind that they ought to excel all others in purity of life, and should be examples to the people to live well and Christianly under pain of ecclesiastical censures to be inflicted with severity according to the qualities of their offences.

Canon 109 says:

If any offend their brethren, either by adultery, whoredom, incest, or drunkenness, or by swearing, ribaldry, usury, and any other uncleanness and wickedness of life, the churchwardens or questmen and sidesmen, in their next presentments to the ordinaries, shall faithfully present all and every of the said offenders to the intent that they and every of them may be punished by the severity of the laws according to their deserts; and such notorious offenders shall not be admitted to the Holy Communion till they be reformed.

Bartley, for the appellant, contended that, though the conduct of the appellant was "immoral" in the general sense of the word, it was not an "immoral act" within the meaning of the Canons which are incorporated in the Act. See *A Beneficed Clerk v. Lee* (75 L. T. Rep. 461; (1897) A. C. 226), where the offence of simony and the making a false declaration under the Clerical Subscription Act 1865 were held not to be offences against morality within the Act of 1892. The Act draws a distinction between criminal offences, which are dealt with by sect. 1,

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

and immoral conduct, which is dealt with by sect. 2. The appellant was not convicted on indictment, and therefore is not within sect. 1, and his conduct was not of the description aimed at by sect. 2 as explained by the Canons.

Cripps, K.C. and *Hansell*, who appeared for the respondent, were not called upon to address their Lordships.

At the conclusion of the argument for the appellant their Lordships' judgment was delivered by

The LORD CHANCELLOR (Halsbury).—Their Lordships have no doubt, and they have the assent of the right reverend prelates to that view, that this was an immoral act within the meaning of the statute, and was properly held to be so. They will, therefore, advise His Majesty that the appeal should be dismissed.

Solicitor for the appellant, *C. Everett*.

Solicitors for the respondent, *Rowcliffes, Rawle, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 3 and 4.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

CHANDLER v. WEBSTER AND GIRLING. (a).

APPEAL FROM THE KING'S BENCH DIVISION.

Contract—Impossibility of performance—Money paid by one party—Right to recover back—Money due and payable before contract became impossible—Right to recover.

The defendants agreed to give the plaintiff the use of a room to view the intended Coronation procession on the 26th June 1902 for the sum of 141l., which was payable upon the making of the contract, and on the 20th June the plaintiff paid 100l. on account.

The intended procession being subsequently abandoned, the plaintiff claimed repayment of the 100l. as having been paid upon a consideration which had wholly failed, and the defendants claimed payment of the balance of 41l.

Held (reversing the judgment of Wright, J.), that the defendants were entitled to recover the unpaid balance which was payable before the procession was abandoned.

Held also (affirming the judgment of Wright, J.), that the plaintiff could not recover back the 100l. which he had paid.

APPEAL of the defendants from the judgment of Wright, J. at the trial of the action without a jury; and cross-appeal of the plaintiff.

The plaintiff brought this action to recover from the defendants the sum of 100l. which he had paid to them as part of the price for the use of a room to view the Coronation procession, which was intended to take place on the 26th June 1901.

The defendants counter-claimed the sum of 41l., being the balance of the price which the

plaintiff had agreed to pay them for the use of the room.

Early in June 1902 the plaintiff agreed with the defendants to take from them a room in Pall-mall for the purpose of viewing the Coronation procession, which was fixed for the 26th June. This agreement was partly verbal and partly contained in correspondence. There was no express agreement as to the time when the money was to be paid.

On the 20th June the plaintiff paid to the defendants the sum of 100l., part of the price of the room.

Subsequently it was announced that the Coronation procession was indefinitely postponed, owing to the illness of His Majesty the King.

The plaintiff thereupon brought this action to recover back the sum of 100l. as having been paid upon a consideration which had wholly failed, and the defendants counter-claimed to recover the sum of 41l., the unpaid balance of the agreed price of the room.

The action was tried before Wright, J. without a jury. The learned judge held that the plaintiff could not recover back the 100l. which he had paid, and he also held that under the contract the price was not payable until the day fixed for the procession, and that therefore the defendants could not recover the unpaid balance of the price.

The defendants appealed, and the plaintiff gave notice of a cross-appeal.

The Court of Appeal held that the proper inference was that, under the contract, the money became payable at or about the time of the making of the contract.

J. B. Matthews for the defendants.—The learned judge was wrong in holding that the defendants were not entitled to recover the balance of the agreed price. There was no express agreement as to the time when the price was to be paid, and therefore the proper inference is that it was to be paid at the time of the making of the contract. The correspondence shows that both parties considered that the money was payable at once. Inasmuch as the money was due and payable before the contract became impossible of performance—that is, before the procession was postponed—the defendants are entitled to recover the unpaid balance. The doctrine of *Taylor v. Caldwell* (8 L. T. Rep. 356; 3 B. & S. 826), that, when the performance of a contract has become impossible through no default of the parties, no further performance can be required, but rights already acquired are left untouched, applies and shows that the defendants are entitled to recover the money which had become due and payable to them before performance became impossible. In *Blakeley v. Muller and Co.* (88 L. T. Rep. 90; (1903) 2 K. B. 760n.) Channell, J. said: "If the money was payable on some day subsequent to the abandonment of the procession, I do not think it could have been sued for. If, however, it was payable prior to the abandonment of the procession, the position would be the same as if it had been actually paid, and could not be recovered back, and it could be sued for." That passage was quoted and adopted by Lord Halsbury, L.C. in *Civil Service Co-operative Society v. General Steam Navigation Company* (89 L. T. Rep. 429; (1903) 2 K. B. 756).

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.
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In *Krell v. Henry* (89 L. T. Rep. 328; (1903) 2 K. B. 740) it was held that it was a necessary inference from the circumstances of the case that the parties regarded the taking place of the procession as the foundation of the contract, and the balance of the price for which the plaintiff sued was not in fact payable until after the postponement was announced; and the decision was that the plaintiff could not recover the unpaid balance. In that case the defendant abandoned, in the Court of Appeal, his counter-claim to recover the deposit which he had paid. In *Clark v. Lindsay* (88 L. T. Rep. 198) the procession had in fact become impossible at the time when the contract was made and the money paid, though the parties did not know it. The defendants, therefore, are entitled to recover the unpaid balance of the agreed price, their right to payment having accrued before the procession became impossible; and the plaintiff cannot recover the money which he had paid before the procession was postponed.

Spencer Bower, K.C. and *F. H. Colam* for the plaintiff.—The learned judge was quite right in holding, upon the terms of the correspondence, that the agreed price was not to be payable until the procession took place. Payment of the price and the use of the room to view the procession were things to be performed at the same time. Therefore the unpaid balance clearly cannot be recovered, since the defendants' right to be paid had not accrued when the performance of the contract became impossible through the postponement of the procession. The plaintiff is entitled to recover back the money which he paid. He was not under any obligation to pay before the date of the procession, and he cannot be in any worse position because he has paid before he was bound to pay than if he had not paid. This is the simple and ordinary case of money paid upon a consideration which has wholly failed, and there is an implied contract to repay the money so paid. There is nothing in any of the cases which have been cited to show that the money which has been paid cannot be recovered back in this case as having been paid upon a consideration which has wholly failed. In *Civil Service Co-operative Society v. General Steam Navigation Company* (*ubi sup.*) and *Blakeley v. Muller and Co.* (*ubi sup.*) the party sued had incurred considerable expense in preparing to fulfil the contract, and it could not be said that the consideration had wholly failed. In the present case there was no evidence that the defendants incurred any expense at all or did anything at all towards performance of the contract. The rule is that where, before any benefit has been derived by the payer, or any part of the contract has been performed by the other party, the performance of the contract becomes impossible without any default of either party, the consideration wholly fails, and an action lies for money had and received upon an implied contract to repay:

Knowles v. Bovill, 22 L. T. Rep. 70;

Chitty on Contracts, p. 76.

In this case the parties were clearly contracting with reference to the use of the room for the specific purpose of viewing the intended procession and the use of the room for that purpose was the foundation of the contract. This case is, there-

fore, within the decision of *Krell v. Henry* (*ubi sup.*). There is no case to be found in which a party to a contract which has become impossible of performance has succeeded in recovering any money which was agreed to be paid, but had not been paid when performance became impossible.

J. B. Matthews in reply.—The question whether the party sued for the recovery of the money paid to him has done anything under the contract is immaterial; that appears clearly from the judgment in *Blakeley v. Muller and Co.* (*ubi sup.*) There was no total failure of consideration, for the room might have let to another person if the contract with the plaintiff had not been made.

COLLINS, M.R.—This case is somewhat complicated by the fact that there are cross-appeals. The plaintiff agreed with the defendants to take from them a room to view the intended Coronation procession in June 1902 for the price of 141l. The plaintiff paid 100l. before the postponement of the procession was announced, leaving a balance due of 41l. The procession did not take place, and thereupon the plaintiff said that he was entitled to recover the 100l. which he had paid, and brought this action, and the defendants have counter-claimed for the balance of 41l. The learned judge at the trial held that both parties were wrong, and that neither of them was entitled to recover. The defendants appealed, and the plaintiff gave notice of a cross-appeal. I will first deal with the defendants' appeal, in which they contend that they are entitled to recover the balance of 41l. This question has been dealt with in several recent cases. It seems to me to be clear that the principle of *Taylor v. Caldwell* (8 L. T. Rep. 356; 3 B. & S. 826) applies to this case. The rule is that where there is no stipulation that the money is to be repaid if the event does not take place, or such a condition cannot be implied as having been agreed to by the parties, then, if further performance of the contract becomes impossible, the person who has paid his money upon the footing of the contract being performed in full must abide by the loss of what he has paid, and the other party must bear the loss of not being paid if any money has not become due and has not been paid; that is, that no further performance of the contract can be enforced because it has become impossible to fully perform it without any default by either party. How is that rule of law to be applied in the present case? Was it part of the bargain that the money should be paid before the date of the procession? If it was, then on the authorities it seems to me that the price can now be recovered. The plaintiff can be in no better position, because he did not pay the money when he ought to have paid it, that is, before the date of the procession. Then, did the bargain bind the plaintiff to pay all the money before the date of the procession? In my opinion the contract did oblige the plaintiff to pay all the money before the date of the procession, and it was not a condition precedent to the obligation to pay any part of the money that the procession should take place. Upon the correspondence I think it clear that it was understood between the parties that the money should be paid immediately, or at any rate within a reasonable time before the date of the procession; it was no part of the bargain between the parties that the money should

not be paid until the procession took place. That is my view of the correspondence. If that is so, the law as established by the authorities which have been cited is that if the obligation to pay is by the contract made not to arise until after the event, then the obligation to pay is discharged if the event does not take place; but if by the bargain the money was to be paid at first, then the parties are left as they were and the person who was bound to pay before the event must pay though the event does not take place. In my opinion the plaintiff was bound to pay before the event, and, therefore, the defendants are right in their appeal. Wright, J. was of opinion upon the correspondence that it was a condition precedent to the obligation to pay that the procession should take place, and that therefore the balance of the price was not recoverable. For the reasons which I have given I think that is not the true view of the bargain between the parties. The rights of the parties are to be ascertained upon the footing that all the money was to be paid before the procession was abandoned, and therefore the defendants must succeed upon their counter-claim. As to the claim of the plaintiff to recover back the 100*l.* which he paid, I have already to some extent dealt with that question. The plaintiff contends that the money has been paid upon a consideration which has wholly failed; that is, that the condition upon which it was paid was that there should be a procession, and that therefore there has been a total failure of consideration. That raises a question of some difficulty, and one which has been dealt with in several cases. The principle of those cases is the principle for which *Taylor v. Caldwell* (*ubi sup.*) is the leading authority. That case decides that, if that which is the basis or central consideration of a contract becomes impossible of performance, from that time the contract need not be further performed by either party, but that the contract is left good up to that time; that it leaves as done all that has been done, but discharges the parties from any further performance. That is important in the present case, because if the contract was wiped out the money would have to be paid back, as upon a total failure of the consideration. That is not so in cases to which the doctrine of *Taylor v. Caldwell* (*ubi sup.*) applies; the contract is not annulled altogether, but the parties are only relieved from any further performance. The rule which does apply is that the parties must stand where they were at the time when the event became impossible. That is, no doubt, an arbitrary rule. It was adopted because it would be impossible to work out what the exact rights of the parties ought to be if the court tried to re-adjust them upon the footing of the contract having become impossible of performance. It being impossible to re-adjust the rights, the law says that all that has been done must be treated as done, but that nothing further need be done. I think that Wills, J. made some valuable observations on the point in *Blakeley v. Muller and Co.* (88 L. T. Rep. 90; (1903) 2 K. B. 760*n.*), where he said: "The decision in *Appleby v. Myers* (16 L. T. Rep. 669; L. Rep. 2 C. P. 651) is correctly summarised in Leake on Contracts, 4th edit., p. 494, thus: 'Where a contract was made for the erection of machinery upon the premises of one of the parties, to be paid for upon completion, and in the

course of the work the premises were destroyed by fire, it was held that both parties were excused from further performance, and no liability accrued on either side.' That decision is, in my opinion, distinctly in point. The argument for the plaintiffs must be that the contract was rescinded *ab initio*. There is no authority to warrant that contention, and I cannot think it well founded. The process of constructing a hypothetical contract by supposing what terms the parties would have arrived at if they had contemplated the possibility of what was going to happen is, to my mind, very unsatisfactory. It is very difficult to construct such a contract for them. Probably in the present case the defendants would have stipulated for compensation for their outlay, and the plaintiffs for a return of their money; but it is impossible to say with any certainty what the result of their bargaining would have been. In *Taylor v. Caldwell* (*ubi sup.*) there is some sort of suggestion that a contract might be constructed for the parties, and I do not say that, if the facts were clear enough, it could not be done; I only say that it is a very difficult thing to do." The learned judge there points out the reasons why the contract is obliged to stop at the actual position of the parties when further performance of the contract is prevented. That is clearly the principle adopted in that case, and also in the case in the Court of Appeal, *Civil Service Co-operative Society v. General Steam Navigation Company* (89 L. T. Rep. 429; (1903) 2 K. B. 756), where the Lord Chancellor adopted a passage from the judgment of Channell, J. in *Blakeley v. Muller and Co.* (*ubi sup.*), which clearly supports what I have said, that where the principle of *Taylor v. Caldwell* (*ubi sup.*) applies the line is to be drawn at the point of time when further performance becomes impossible, and that what has been done is not to be disturbed, but nothing further is to be done. For these reasons I think that the judgment of Wright, J. as to the claim of the plaintiff was correct, and that the cross-appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. Although it is a difficult task to attempt, I will venture to state in a comparatively brief form what seems to me to be the result of the authorities in this class of case. Where there is an agreement based upon the assumption of both parties that a particular event will take place, and that event is the foundation of the contract, then if there has been no default by either party, and owing to circumstances not in the contemplation of the parties when the agreement was made, it happens before the event that the event cannot take place as contemplated, the parties are both freed from all subsequent obligations under the agreement. Except in a case where the contract can be treated as rescinded *ab initio*, any previous payments made, or rights acquired, are not to be disturbed. Upon the facts the present case falls within that principle. The agreement was one of such a kind that, when it turned out that the procession could not take place, all parties were freed from any further obligations under it. In my opinion it was not a contract which could be treated as rescinded *ab initio*. Therefore any rights which had previously accrued to either party remained untouched. For the reasons given by the Master of the Rolls, it was a right of the defendants

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before the procession was postponed, to receive payment of 141*l.* from the plaintiff. Therefore the defendants are entitled to recover the unpaid balance of that sum, and their appeal must succeed; and the cross-appeal must accordingly fail.

MATHEW, L.J.—I am of the same opinion. It is clear that it was intended that the 141*l.* should be paid shortly after the making of the agreement. That is made quite clear by the correspondence which has been read. Therefore the decision of Wright, J. as to what was the contract was wrong. That being so, it follows that the defendants are right in their appeal. Then there is the cross-appeal of the plaintiff. He is endeavouring to get back from the defendants the money which he has paid to them. I see no ground whatever for saying that the money was paid upon any understanding that it was to be repaid if the procession did not take place. It is not to be adjudged that that money is to be paid back, unless there is satisfactory evidence of the intention of the parties that it should be payable back if there was no procession. I agree, therefore, that the defendants' appeal must succeed, and that the plaintiff's appeal must fail.

Appeal allowed; cross-appeal dismissed.

Solicitors for the plaintiff, *Phillips and Boyle*.

Solicitors for the defendants, *Russell and Arnholds*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 30 and Dec. 2, 1903.

(Before BYRNE, J.)

Re BROWN; INGALL v. BROWN. (a)

Will—Condition—Marriage against mother's wish—Consent given—Power of retraction.

*By a codicil made in 1891 the testator directed that, in the event of his youngest daughter marrying against her mother's wish, a legacy of 500*l.* and all her share of moneys from the estate were to be settled on her for life, with remainder to her children, and, failing children, were to be divided between her brother and sister. In May 1893 the daughter became engaged with the consent of her parents, their consent being given on condition that the marriage was put off for two years, as the intended husband was not at the time of the consent in a position, as the parents considered, to marry. The testator died in Feb. 1895. The engagement was still recognised by the widow, but she stipulated that the marriage should not take place until the following August, six months after the testator's death. To this the daughter agreed. Subsequently there were disputes between the daughter and the mother, mainly as to the form of the settlement. The daughter left her mother's house and was married in June. The day before the marriage the mother wrote withdrawing her consent.*

Held, that the consent to the marriage was given with full knowledge of all the circumstances, and nothing had occurred subsequently which justified its retraction; that the refusal of consent by the mother had reference to the date fixed for the

marriage and not to the marriage itself; that the daughter had not married against her mother's wish, and that she was absolutely entitled to the legacy and to her share in the testator's residuary estate.

Merry v. Ryves (1 Eden, 1) and Dashwood v. Lord Bulkeley (10 Ves. 230) discussed.

ADJOURNED SUMMONS.

By his will made in Aug. 1888 testator gave all his property, real and personal, to trustees, subject to the payment of his debts, funeral and testamentary expenses, upon trust for his wife for life, and after her decease he devised and bequeathed the same unto and to be equally divided between "all and every my children, sons and daughters, who shall be living at the time of the decease of my dear wife and the issue of them as shall be dead, such issue nevertheless taking only the share which their deceased parent would have been entitled to in the event of such parent surviving my dear wife to and for their own use and benefit absolutely." By a codicil, also made in 1888, testator gave several legacies, including one of 500*l.* to his daughter Lillias. In 1890 or 1891 the testator made a second codicil, in the following terms: "Since writing the above, my last will, I have to add that it is my wish that, in the event of my youngest daughter, Lillias, marrying against her mother's wish, she shall not be paid the above legacy of 500*l.*, but shall receive only the interest of the same half-yearly Government annuities, this also to apply to all her share of moneys from my estate, and at her death the same to be invested for her children; should she have no issue, then at her death her share of the estate to be divided equally between her brother Kenneth and her sister Mabel."

Some time prior to the date of this second codicil there was a possibility of the plaintiff becoming engaged to a gentleman other than her present husband, who was not considered desirable by the testator and his wife.

In May 1893 the plaintiff became engaged to her present husband, and the engagement was made known to the testator and his wife, and their consent was given to the same, provided that the wedding was put off for two years, as they did not consider that the intended husband's financial position was such as to enable him to marry. With the consent of the parents the engagement was made public, so that the young people were put in the position of an engaged couple, not only as between themselves, but also in the face of the world.

Some time prior to the testator's death his attention was directed to the fact that the intended husband, Mr. Ingall, who was on the Stock Exchange, had had some losses in business, and also that there was a possibility that circumstances of this kind might prevent the marriage from taking place as soon as had been originally anticipated; but up to the time of the testator's death nothing was said or done to cancel the engagement or to cause any withdrawal of the consent that had been given.

After the testator's death, which took place in Feb. 1895, the engagement was still recognised by his widow, but she stipulated that the marriage should not take place until the following August, and this was agreed to. Soon afterwards the mother became aware for the first

(a) Reported by E. L. HOPKINS, Esq., Barrister-at-Law.

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time of the amount of Mr. Ingall's liabilities, and disputes arose between the daughter and her mother mainly about the form of the settlement to be executed by the daughter on her marriage. Correspondence passed between the solicitors advising the daughter and her intended husband and the mother's solicitors as to the settlement, the main subject of dispute being whether the daughter should have a power by will, independently of her mother, to give her intended husband a protected life interest in the income of her property. The mother insisted on a settlement, and on the exclusion of the intended husband from any interest in her daughter's fortune. The intended husband was willing that everything should be settled upon the daughter and her children, but the daughter considered that her mother's contention was unreasonable, and eventually she left her mother's home to stay with a relation, and the marriage was arranged for the 22nd June 1895.

On the 21st June the plaintiff's solicitors wrote to the mother's solicitors as follows:

We repeat again the offer made in our letter of yesterday, that her property should be settled, and that she should have a power by will to give her husband a protected life interest. There is no time to prepare a marriage settlement, but marriage articles could easily be drawn by you and signed either to-day or even to-morrow morning.

The reply to this was:

We have seen our clients, and can only repeat what we said yesterday, that, having regard to all the circumstances and particularly to the fact that the wedding has been fixed for to-morrow, Mrs. Barclay Brown refuses her consent to the marriage, and that Miss Barclay Brown is therefore marrying against her mother's wish.

The daughter was told the contents of this letter, but nevertheless the marriage took place on the 22nd June 1895.

The trustees of the testator's will had invested the legacy of 500*l.* in Consols, and had paid the income of it to the plaintiff from the date of the marriage to the present time.

This originating summons was taken out by the plaintiff for the determination by the court of the questions whether, upon the true construction of the will and codicils and in the events that had happened, she was now absolutely entitled to the legacy of 500*l.* and to the share in the testator's residuary estate in the event of her surviving her mother.

The respondents to this summons were the present trustees of the will, the plaintiff's brother and sister, and the two infant children of the plaintiff's marriage, who had been added by amendment before the case came into court.

Rufus Isaacs, K.C. and *F. Cassel* for the plaintiff.—A consent to a marriage can only be withdrawn for just and exceptional reasons:

Lord Strange v. Smith, Amb. 263.

The testator gave his consent to the marriage, as did also his widow after his death. The court has always put a favourable construction on conditions in restraint of marriage in order to prevent a forfeiture:

Daley v. Desbouverie, 2 Atk. 261;

Campbell v. Lord Netherhill (referred to in *Berkley v. Ryder*, 2 Ves. Sen. 534).

The case of *Merry v. Ryves* (1 Eden, 1) is exactly

in point. It was there held that where consent to marriage was obtained without any fraud or misrepresentation such consent could not be withdrawn out of mere caprice. Consent was substantially given. The plaintiff's mother consented to the marriage, provided it did not take place within six months of the testator's death; her objection was not to the marriage, but to the time that was fixed for it. In *Dashwood v. Lord Bulkeley* (10 Ves. 230) a conditional assent was given and the condition was not performed. In this case the only condition of the consent to the marriage was that it should be deferred for two years, and that condition was carried out. The consent so given could not be retracted, and the marriage did not take place "against the wish" of the mother. The second codicil does not take effect, for since the codicil was executed the testator had himself consented to the marriage, so that the widow's consent became immaterial.

Parnell v. Lyon, 1 V. & B. 479; 12 R. R. 274.

The plaintiff is absolutely entitled to the legacy of 500*l.* and to her share of the residue if she survives her mother. They also referred to

Re Smith; Keeling v. Smith, 62 L. T. Rep. 181; 44 Ch. Div. 654;

Clarke v. Parker, 19 Ves. 1; 12 R. R. 124.

Levett, K.C. and *A. F. Peterson* for the defendant *Kenneth Barclay Brown*.—The marriage took place against the mother's wish, and the second codicil is therefore operative. The decisions in *Lord Strange v. Smith* (*ubi sup.*) and *Daley v. Desbouverie* (*ubi sup.*) seem to have been based on the ground that the consent was fraudulently withdrawn by the trustees. See

Clarke v. Parker (*ubi sup.*).

The testator left the codicil unrevoked in order that his widow might be able to protect his daughter should she make an improvident marriage. The mother was not satisfied with the terms of the proposed settlement and refused her consent, as she had a right to do. When the circumstances as to the husband's financial liabilities came to her knowledge, the mother had a perfect right to retract her consent even if she had originally consented:

Dashwood v. Lord Bulkeley (*ubi sup.*).

Sampson for the plaintiff's infant children.

Mark Romer for the trustees.

Cassel, in reply, stated that the plaintiff and her husband were willing that the plaintiff's share in the testator's residuary estate should be settled on the terms proposed at the time of the marriage.

BYRNE, J.—The marriage took place on the 22nd June, and then the question arose whether under this codicil the settlement which was made by the testator in the event of marriage against the mother's wish applied, or whether, having regard to all the circumstances, the marriage ought not to be deemed a marriage with consent. Now, in reference to this matter, several of the older authorities have been referred to in reference to clauses of forfeiture upon marriage without consent, and this much one gathers from the authorities without much difficulty. It is observed by *Stirling, J.* in *Re Smith* (*ubi sup.*) that from an early period the court, in dealing with cases of this kind, has treated the consent to be given to a marriage as a matter, not of form, but

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of substance; and where it has been found that substantially the consent has been given, it has not looked very minutely into the form in which the consent was given. Here there is no question about the original consent having been given, and having been given in the lifetime of the father. Before I mention the other cases, there are two points that have been referred to deserving of consideration. One is that the codicil operates as from the death of the testator. He had known for nearly two years before his death that there was a subsisting engagement between his daughter and Mr. Ingall, and, as Mr. Levett said, it is true that the testator, if he no longer desired that to have any operation, would have made a fresh codicil or revoked the existing one. You may also say that the testator may have had in mind that circumstances might arise under which the subsisting engagement would be broken off, and that the young lady might intend to contract a new marriage, which would be a proposed marriage similar to that which apparently he had objected to before any question of the engagement to Mr. Ingall came on; but after all, though it is right to see what the circumstances were at the time when the codicil was executed, what I have to do is to construe it as it stands, and, as the document is before me, to see what the operation of it was. The other observation was this, that this is not a forfeiture clause in the sense that all the interest conferred upon the young lady was to go over to somebody else upon the event happening, but in fact it is a provident disposal of his own property by way of settlement in case of an imprudent marriage being made. I may say that some of the cases that have been cited, in one at least (more I think), the clause of forfeiture was not one giving away the whole of the interest that had been originally given. One case particularly, I think, was giving the interest to the lady for her separate use independently of her husband; but it is a fair observation to make that this is not one of those strict clauses of forfeiture depriving the daughter of all interest under her father's will. With those remarks I will now consider how the authorities stand with reference to the withdrawal of the consent once given. The first case I refer to is *Merry v. Ryves* (*ubi sup.*). In that case there were trusts "to raise by sale or mortgage 1000*l.* each for the sisters of George Ryves (of whom the plaintiff's mother was one), to be paid them respectively, at and upon their respective days of marriage, so long as they respectively married with the consent of the said George Ryves, Ann Ryves, their mother, and Thomas Heysham, and the survivors or survivor of them; but in case any or either of them should marry without such consent, it was declared that she or them so marrying should not receive such 1000*l.*, neither should any money be raised for or paid to her or them so marrying without consent." From the evidence it appeared that the plaintiff's father was a man of fortune and had paid his addresses to a Miss Ryves. He wrote to Mr. George Ryves, her brother, asking for his consent, and George Ryves said: "The proposal he made, though late, he should not oppose; that his character and circumstances were extraordinarily good; that he should leave the management of the settlement to Mr. Brucer, and that he would abide by Mr. Brucer's agreement on the settlement." The

articles were prepared; the mother and trustee consented, the mother being a witness. Then: "Before the marriage some differences arising between Mr. Merry and the brother, the latter absolutely forbade the marriage; and it appeared that Mr. Merry, in a letter to the brother, gave up his addresses and wished the lady a better husband. Some time after, however, without any further application to the brother, the marriage was held, and now, the plaintiff's father and mother being dead, and the plaintiff the only child of the marriage, the question was whether he is entitled to have the 1000*l.* raised and paid to him." The Lord Keeper (Lord Henley), in giving judgment, says: "The court has always, in cases of this nature, considered the question of consent with great latitude, adhering to the spirit and not the letter. The maxim *Qui tacet satis loquitur* has therefore been respected, and constructive consents have been looked upon as entitled to as much regard as if conveyed in express terms." And then later he says: "I must consider what appears to have been done by Mr. George Ryves as a consent given by him to Mr. Merry's marriage. The question then will be whether such consent could be afterwards retracted; and I am of opinion that it could not, though I think that it might have done if it been obtained through any deceit or fraud; but nothing of that kind appears, or is even imputed, in the present case. Here is no *suppressio veri* or *suggestio falsi*, or any misrepresentation whatsoever. A plain constructive consent is given on a settlement being made, and this is referred to Mr. Brucer; and, though there was afterwards some altercation about the settlement, yet a reasonable one is made. Here is 3000*l.* settled for her 1000*l.*, and the whole is done with the approbation of Mr. Brucer, which makes the consent pure *ab initio*." That is to say, the condition that was imposed was fulfilled. Then in the next paragraph he says: "It must be taken, therefore, that there was a consent; and this consent being pure *ab initio*, not obtained by any fraud or misrepresentation, I am of opinion that it could not be retracted. It would otherwise be a most cruel thing to suffer young persons to contract and entertain affection, and then *ad libitum* withdraw the consent." Then, in *Dashwood v. Lord Bulkeley* (*ubi sup.*), Lord Eldon, L.C., says, in the course of his judgment, after referring to a certain passage in the case of *Farmer v. Compton* (1 Rep. Ch. 1): "These are very material words. for it would be very dangerous, as a general principle, notwithstanding all the colour there is for saying it has been acted upon, to hold that if at a particular time a person in *loco parentis* as a guardian, upon a conscientious sense of duty, thinks himself required to give consent and previously to the marriage is duly informed of circumstances that ought to have operated at first to make him withhold his consent, if he has once given it, he shall not afterwards alter his mind. The cases have gone this length, that, if consent is once given, it shall not be withdrawn by adding terms that do not go to the propriety of giving the consent"; and then he proceeds to deal with the case of *Lord Strange v. Smith* (*ubi sup.*). Now, what I understand to be the true meaning which underlies the observation which I have just read from these passages is this, that it must be justifiable for persons in *loco parentis* to change

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their minds if circumstances come to their knowledge in respect of the proposed husband which, if they had been within their knowledge at the time the consent was given, would have fairly and properly operated to induce them not to give their consent; and that then the rule about non-retractation would not be held to apply. On the other hand, I think this also is to be gathered—that a retractation of consent must not be, as was expressed in one case, *ad libitum*, or, as it was, I think, expressed in another case, a mere caprice; but in arguing this case the parties representing the mother were compelled to put their case as high as this—namely, that there was what I may term an absolute power on the part of the mother to express her wish against the marriage, notwithstanding the previous consent. Now, there was a consent given by the father and the mother. There is no suggestion of any want of moral character or the existence of any circumstance of that nature which would have prevented the parents giving their original consent. The one thing there could be said was that to the mother at least, and perhaps to the father, the amount of the indebtedness of the young man became known for the first time after the testator's death; and there is this one other thing to be said, that the young people had assented to what the mother told them she should make a condition—namely, that the marriage was not to take place until August. I must read this clause fairly, and I could not avoid seeing, looking at it as a matter of substance, that there was a consent given; that it was not against the mother's wish that the marriage should take place, but that it was against the mother's wish that the marriage should take place *modo et forma*, as it in fact did take place. There was also this, that she was determined, unless a settlement was made and in the form she required, that the marriage should not take place. In substance, therefore, so far as the marriage itself was concerned, it was in accordance with the consent and the wish of the mother that it should take place, and I think that in construing a clause of this description it would be too harsh to say that the marriage having taken place, in accordance with a wish that a marriage should take place, that the fact of its taking place at a time not long anterior to that which had been stipulated for should impose the forfeiture on the parties. Now, with reference to the question of the settlement, I am far from saying that it is not part of the duty of a parent to see that a proper settlement is made; how far I am at liberty to go into this question about the reasonableness or unreasonableness I am not sure, but, as the point has been gone into by both parties, I think, for the sake of showing that this was not a capricious thing, I should say that the conclusion I have come to is this—that, so far as the settlement part of the matter is concerned, the reasonableness when the ultimate offer came on the day before the marriage lay on the side of the daughter rather than of the mother. The true objection was at last that the marriage took place before the expiration of six months from the death of the young lady's father. I have nothing to do with the question of whether it would not have been in better taste for them to have waited the necessary time; I have simply to deal with the question of the legal result of

what has been done. I am bound to say this, having made this observation, that it does not appear upon the evidence that the unfortunate strained relationship between the parties had preyed upon the health of the daughter, and there was some reason for hastening the marriage and putting an end to that strain. On the whole, therefore, having regard to the principle that I think I can gather from the cases which have been cited before me, I think that no forfeiture has operated under this will. As I have said, I, of course, decide it in accordance with the legal rights of the parties; but I am glad to be able to think that, from the statement of counsel made to me, the husband is prepared to do that which I should have expected any honourable man would have been prepared to do—namely, now to make a settlement which would be substantially in accordance with that which was offered in the letter written by his solicitors on the day before the marriage.

Solicitors: *Morley, Shirreff, and Co.; Godden, Son, and Holme; Watkin-Williams and Gray; Lyne and Holman.*

Wednesday, Dec. 16, 1903.

(Before BYRNE, J.)

Re JORDAN; HAYWARD v. HAMILTON.

Practice—Administration action—Parties—Trustees—Representation of trust estate.

An action for breach of trust was brought by a beneficiary under a marriage settlement against the executors of one of the trustees, but not the surviving trustee of the settlement. The surviving trustee was also dead, and no new trustees of the settlement had been appointed by the person in whom the power was vested.

Held, that the representatives of the surviving trustee must be added as defendants, or that new trustees of the settlement must be appointed and added as defendants.

ACTION brought by a beneficiary under a marriage settlement dated the 11th Dec. 1869, and made between Louis Napoleon Hayward of the first part, Jane Jordan of the second part, and Charles Jordan and Daniel Ludlow of the third part, for replacement by the defendants out of the estate of Charles Jordan, deceased, of a sum equal to the value of the trust properties lost by the breaches of trust of Charles Jordan, deceased, and, if necessary, the administration of the real and personal estate of Charles Jordan.

The statement of claim alleged:

That Charles Jordan, in breach of his duty as trustee, allowed Louis Napoleon Hayward to become possessed of the trust properties and securities or the proceeds of sale thereof, amounting in value to 1600*l.* or thereabouts, and to realise and dispose of the same for his own purposes.

Charles Jordan died on the 29th April 1882.

The defendants were the executors of his will, dated the 13th Sept. 1880, and proved, with the codicil thereto dated the 7th Oct. 1881, by the defendants at Llandaff on the 29th Dec. 1882.

Daniel Ludlow died on the 8th June 1886, and no new trustees of the settlement had been appointed.

(a) Reported by E. L. HOPKINS, Esq., Barrister-at-Law.

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L. N. Hayward died on the 21st June 1885, leaving Jane Hayward surviving.

By deed of appointment dated the 28th Aug. 1901, Jane Hayward, by virtue of the power in that behalf contained in the marriage settlement, appointed the trust properties and securities and the proceeds thereof in favour of the plaintiff, subject to her own life interest.

The power to appoint new trustees of the settlement was vested in Mrs. Hayward, and she was prepared to exercise it. The plaintiff claimed: (1) a declaration that the defendants, as such executors as aforesaid, are liable to make good the settlement moneys lost by the said breach of trust of the said Charles Jordan; (2) that a sum equivalent to the said sum lost be ordered to be set aside and invested as this honourable court may direct to answer the said loss; (3) if necessary, an account of the sums so lost by the said breach of trust; (4) if necessary, the administration of the real and personal estate of the said Charles Jordan. Further and other relief and costs.

The only defendants to the action were the executors of Charles Jordan.

By their defence they submitted that Jane Hayward and the legal personal representatives of Daniel Ludlow were necessary parties to the action.

On the action coming on for trial, a preliminary objection was taken that the trustees of the settlement ought to be represented, and that for that purpose either the representatives of the surviving trustee should be added as defendants, or that new trustees should be appointed and added as defendants.

Norton, K.C. and Bailhache for the plaintiff.

Rowden, K.C. and T. L. Wilkinson for the defendants.—The relief asked by the statement of claim cannot be granted in the absence of the trustees of the marriage settlement or the representatives of the last surviving trustee. Ludlow's representatives are the trustees for the purposes of administration, although they may not have actually accepted the trusts. The plaintiff can only obtain this money by administration. The case nearest in point is *Re Harrison; Smith v. Allen* (64 L. T. Rep. 442; (1891) 2 Ch. 349); but the question there was whether the representatives of a trustee who was not the survivor ought to be parties. [BYRNE, J. referred to *McCleane v. Gyles* (86 L. T. Rep. 217; (1902) 1 Ch. 911) and Order XVI., r. 11.]

Norton, K.C. and Bailhache for the plaintiff.—We are only asking for a declaration that the defendants are liable to replace this money, so as to prevent them from distributing Jordan's estate without providing for our claim. The representatives of Ludlow have not consented to act as trustees, and there are no trustees of the settlement who can be joined. We are asking for payment of the money into court, and, when that has been done, new trustees can be appointed. It is not necessary to make Ludlow's representatives parties, for it is admitted that, if new trustees were appointed and joined, the action would be properly constituted.

BYRNE, J.—This action is brought by a beneficiary under a settlement dated in 1869, and asks for a declaration that the defendants, who are the executors of a deceased trustee, are liable

as such executors to make good a loss which has occurred to the settlement funds. [His Lordship read the claim.] The only parties who are defendants to this action are the representatives of a trustee who was not the last surviving trustee; and therefore there is no one before the court who represents the trust estate, if I may so express it. The person in whom the right to recover moneys belonging to the settlement is, if there be such a person in existence, the representative of the last surviving trustee. *Cestuis que trustent* can come into court to recover money which was lost, joining the person in whom the right to recover it is legally vested, by reason of the power of the court to execute trusts and to allow beneficiaries to sue in their own names, if a sufficient case be shown. Cases have been cited, of which *Re Harrison; Smith v. Allen* (*ubi sup.*) is the chief example, where it was held that, an action having been brought against a surviving executor and trustee, it was not necessary to make the representative of a deceased trustee a party. In that case, in an action for a general account against a surviving executor and trustee, it was held that it was not, in the absence of special circumstances, necessary for the plaintiff to make the representative of a deceased trustee or executor a party. If the defendant required such representative to be added, and the circumstances of the case rendered it advisable that he should be so added, the rules of the Supreme Court 1883 provided by Order XVI., rules 11 and 48, the machinery for that purpose. Chitty, J. gives his reasons for saying the action might be brought in that form, and he says: "Many judgments have been made without any opposition against a surviving executor and trustee, without joining the representatives of others who had died before the action was commenced, where there were no special circumstances in the case rendering it necessary that they should be parties. The order goes in the well-known form." No authority has been produced to me to show that judgment could be given in an action of this kind, which in fact involves something in the nature of a partial execution of the trusts, without having the persons representing the trust estate before the court. It may be that there is no present trustee, as there may be no representative of the last surviving trustee, or, if there be one, that he has refused to accept the trusts of this settlement; but in the present case there is a person entitled to appoint new trustees of the settlement, and if there be no trustees such an appointment ought to be made, and there is no reason why the existing trustees, if any, as such new trustees, should not be brought before the court. It is argued that this action is not asking for execution of the trusts, but is only brought for a declaration that the estate of the deceased trustee is liable for breaches of trust. The plaintiff is not really entitled to be paid any money found due, and it would be difficult to make such an order except in the presence of the parties entitled to be paid, though, of course, in a proper case possibly somebody might be appointed to represent the capital of the trust estate. But it does not rest there. The plaintiff wants an order founded on it—namely, the investment of a sum to answer the loss. The case is of some importance, for there is no authority which covers it, and I do not say

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that there may not be cases in which the court might entertain such an action as the present, where it was impossible to get representatives before the court; but, where it is possible to do so, some person should be appointed to represent the estate. The case must stand over to enable the present trustees to be joined, or, if there are none, to enable new trustees to be appointed and added as defendants.

Solicitors: *Frederick Kinch*, for *Lyndon Moore and Co.*, Newport, Monmouth; *W. R. Smith and Smyth*, for *Gardners*, Abergavenny.

KING'S BENCH DIVISION.

Monday, Dec. 21, 1903.

(Before Lord ALVERSTONE, C.J., LAWRENCE and KENNEDY, JJ.)

Ex parte WILES. (a)

Rating — Poor rate — Application for distress warrant — Tender of part of rate — Jurisdiction of justices to issue distress warrant for whole rate — Jurisdiction to issue warrant of commitment for whole rate — Distress for Rates Act 1849 (12 & 13 Vict. c. 14), ss. 1, 2.

Where upon a summons for a distress warrant for a poor rate the person liable to pay the same tenders a part of the rate in court before the justices, the justices have, notwithstanding such tender in court, jurisdiction to issue a distress warrant for the whole amount of the rate, and, in default of sufficient distress to satisfy the whole amount, to issue a warrant of commitment in respect of the whole amount, notwithstanding a subsequent tender of part.

Rex v. Gillespie and others (ante, p. 15; (1904) 1 K. B. 174) explained.

MOTION for a rule nisi for a writ of *certiorari* to bring up and quash an order of committal whereby the applicant, one Samuel Wiles, was committed to prison for the space of twenty-one days in default of payment of a certain poor rate, and in default of a sufficient distress to satisfy the same; and also for a writ of *habeas corpus* to bring up the applicant from Wandsworth Prison, where he was imprisoned.

The affidavit of the applicant for the rules—Samuel Wiles, a tailor and outfitter residing at New Malden, Surrey—set out the following facts upon which the application was made:—

A poor rate of 35s. was duly made upon the appellant, and demanded of him. On the ground of religious conviction he refused to pay that part of the poor rate—namely, 5s.—which would be appropriated to sectarian religious instruction under the Education Act 1903. On three distinct occasions he had tendered the whole of the rate, except the 5s., which, as he believed, represented the education rate, and when the demand note was delivered he tendered 30s. (being the whole amount, less the 5s.) to the rate collector in cash, and this tender was refused, and he said that there were more than sufficient goods of his at his house to answer the rate and costs.

On the 22nd Sept. 1903 he appeared before the justices at Kingston-on-Thames to answer a summons for nonpayment of the rate, together with 3s. 6d. for costs. He then told the justices that

he was willing to pay the rate, except the 5s., which he declined to pay, as it represented that part of the rate which would be applied to sectarian religious teaching. He had the 30s. in his hand and tendered the same in court, but this tender was refused, and the justices issued a distress warrant for the whole amount and costs.

The warrant officer called several times subsequent to this and asked him to pay the rate. He told the officer that he was willing to pay what he had already offered, and that if the officer was not satisfied with that he must levy for the amount. The officer looked round the premises, and the applicant informed him that he could take certain articles which he pointed out, and which he valued at about 10l.

When the bailiffs went to distrain, the applicant again tendered the 30s., which they refused; and in their return to the distress warrant they reported to the justices that there was no sufficient distress to satisfy the whole amount of the rate and costs.

An application was then made to the justices under the Distress for Rates Act 1849 (12 & 13 Vict. c. 14), s. 2, alleging that the applicant had not paid the rate or any part thereof, and had refused so to do, and the justices thereupon made an order of commitment whereby the applicant was to be committed to prison for the space of twenty-one days, unless the above sum and all costs and charges should be sooner paid.

Under this warrant of commitment the applicant was arrested on the 17th Dec. and was conveyed to Wandsworth Prison, and he was still in prison at the date of this application.

There was no question that there was ample distress for the 5s., though there was a question as to whether there was sufficient distress for the whole 35s.

J. A. Compston for the applicant.—The present motion is for a writ of *certiorari* to test the legality of the action of the justices in issuing a committal warrant by which the applicant was sent to prison for twenty-one days for nonpayment of the poor rate of 35s., he having tendered 30s., part thereof, on several occasions prior to the issue of the committal warrant, including a tender to the justices in court when the distress warrant was issued. The justices had no jurisdiction to issue the distress warrant for the whole amount of the rate. The justices are only empowered to issue a warrant of distress for the full amount if the whole rate is in arrear and is unpaid, and there has been a refusal to pay any part thereof. Here the applicant tendered the greater part of the rate in cash before the justices in court, and it is in evidence that the applicant had sufficient goods on his premises to meet the distress, and unquestionably to meet the distress after taking into account the 30s. tendered. According to the recent decision of this court in *Rex v. Gillespie and others* (ante, p. 15; (1904) 1 K. B. 174), the justices ought not to have issued a distress warrant for the whole amount of the rate, but ought to have issued it for the balance only. But even if the justices were right in issuing the distress warrant for the full amount, they were not justified in issuing the warrant of commitment for the full amount. The warrant of commitment is therefore bad. The applicant is also entitled to a writ of *habeas corpus*. If

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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the rules are granted, they ought to be made returnable before the Vacation judge.

LORD ALVERSTONE, C.J. — We are clearly of opinion that there ought to be no rule in this case. The present application has no doubt arisen from a misunderstanding of the decision of this court in the recent case of *Rex v. Gillespie and others* (*ubi sup.*). In that case a part of the rate had been tendered in court before the magistrate, and this court held that the magistrate had a discretion to issue the distress warrant for the balance only, and that where a part of the rate had been tendered before him in court this court could not by *mandamus* compel him to issue a distress warrant for the whole amount. In this case the magistrates had issued, first, a distress warrant for the full amount and then a commitment order for the full amount, and in so doing they had acted within their jurisdiction and within their rights. We are now asked to say that, because the applicant had tendered part of the rate in court before the magistrates, the magistrates had no jurisdiction to issue a warrant for the full amount. We think that is not so, and that the magistrates had jurisdiction to issue the distress warrant for the whole amount. We are of opinion that the magistrates had jurisdiction to do what they did, and that there should be no rule.

LAWRANCE and KENNEDY, JJ. concurred.

Rule refused.

Solicitors for the applicant, C. and E. Woodroffe.

Friday, Jan. 15.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

KNUCKEY v. REDRUTH RURAL DISTRICT COUNCIL. (a)

Mine—Owner—Duty to fence—Public well in shaft of abandoned mine—Vesting of well in local authority—Liability of local authority to fence—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 64—Metalliferous Mines Regulation Act 1872 (35 & 36 Vict. c. 77), ss. 13, 41.

Where the shaft of an abandoned mine contains water and is used by the inhabitants of the district as a well and as being a public well becomes vested in the local authority under sect. 64 of the Public Health Act 1875, the local authority are not the "owners" of the mine, or the persons "interested in minerals of the mine," within the meaning of sect. 13 of the Metalliferous Mines Regulation Act 1872, and are not bound under that section to fence the shaft, and consequently, in the absence of negligence on their part, they are not liable for injuries caused by the shaft not having been fenced.

APPEAL by the plaintiff from the County Court of Cornwall, held at Redruth.

The action was brought by the plaintiff, who was a farmer near Redruth, to recover 33l. for the loss of his horse, which had strayed and fallen into a well which, as the plaintiff alleged, the defendants, as the local authority, were under a statutory obligation to fence.

The well was the shaft of an old disused mine,

and was in depth some 36ft. to the top of the water and about 5ft. of water. It was situate in a field on another farm and was a public well, the evidence showing that the people of the district all got water from it, though they had to open and pass through a gate belonging to the plaintiff to get to the well. Each person provided his own rope for raising the water.

The well was unfenced, and the plaintiff's horse strayed and fell into it, and it appeared that in the year 1887 a dog fell into it, and that the sanitary inspector of the local authority attended to the matter by having the dog removed from the well, and by having notices printed and distributed that a decomposed dog had been found there, and that the water was not fit to be drunk, and it appeared that the horse was taken out of the well by the sanitary inspector.

For the defendants it was contended before the County Court judge that there was no duty on the defendants to fence the shaft; that the horse was trespassing and so fell into the well, and that all the things the council had done they were entitled to do under sects. 3 and 7 of the Public Health (Water) Act 1878 (41 & 42 Vict. c. 25).

For the plaintiff it was contended (1) that the well became vested in the defendants' predecessors by virtue of sect. 64 of the Public Health Act 1875; (2) that it was an old pit shaft; and (3) that the defendants were bound to fence it under sect. 13 of the Metalliferous Mines Regulation Act 1872 (35 & 36 Vict. c. 77), as being the owners of the mine or persons interested in the minerals of the mine, within the meaning of that section: (*Evans v. Mostyn*, 36 L. T. Rep. 856; 2 C. P. Div. 547).

The learned County Court judge held that the well became vested in the defendant council or their predecessors by virtue of sect. 64 of the Public Health Act 1875; that it was an old pit shaft; and that the defendant council were not, by the vesting of the well, owners or persons interested in the minerals, so as to compel them to fence it under sect. 13 of the Metalliferous Mines Regulation Act 1872, and he gave judgment for the defendants.

The plaintiff appealed.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 64. All existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants of the district of any local authority, shall vest in and be under the control of such authority, and such authority may cause the same to be maintained and plentifully supplied with pure and wholesome water or may substitute, maintain, and plentifully supply with pure and wholesome water other such works equally convenient; they may also (subject to the provisions of this Act) construct any other such works for supplying water for the gratuitous use of any inhabitants who choose to carry the same away, not for sale, but for their own private use.

The Metalliferous Mines Regulation Act 1872 (35 & 36 Vict. c. 77) provides:

Sect. 13. Where any mine to which this Act applies is abandoned or the working thereof discontinued, at whatever time such abandonment or discontinuance occurred, the owner thereof, and every other person interested in the minerals of the mine, shall cause the top of the shaft and any side entrance from the surface to be kept securely fenced for the prevention of accidents. Provided

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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that—(1) Subject to any contract to the contrary, the owner of the mine shall, as between him and any other person interested in the minerals of the mine, be liable to carry into effect this section, and to pay any costs incurred by any other person interested in the minerals of the mine in carrying this section into effect.

(3) Nothing in this section shall exempt any person from any liability under any other Act or otherwise. If any person fail to act in conformity with this section he shall be guilty of an offence against this Act. Any shaft or side entrance which is not fenced as required by this section, and is within fifty yards of any highway, road, footpath, or place of public resort, or is in open or uninclosed land, or is required by an inspector as aforesaid to be fenced, shall be deemed to be a nuisance within the meaning of section eight of the Nuisances Removal Act for England 1855 as amended and extended by the Sanitary Act 1866.

Sect. 41. In this Act, unless the context otherwise requires: The term "mine" includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven for commencing or opening any mine, or for searching for or proving minerals, and all the shafts, levels, planes, works, machinery, tramways, and sidings, both below ground and above ground in and adjacent to a mine, and any such shaft, level, and inclined plane, and belonging to the mine. The term "shaft" includes pit. The term "owner" when used in relation to any mine means any person or body corporate who is the immediate proprietor, or lessee, or occupier of any mine, or of any part thereof, and does not include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mines.

Bethune (R. C. Glen with him) for the plaintiff.—The question turns upon sect. 64 of the Public Health Act 1875 and sect. 13 of the Metalliferous Mines Regulation Act 1872. Under sect. 64 of the Act of 1875 the well became vested in the local authority, and the judge has found that it was so vested in the defendant council. The definition of "owner" is given in sect. 41 of the Act of 1872, and the judge has held that the defendant council did not become the "owners" within the meaning of that section. The definition of "mine" is given in sect. 41, and it shows that you can have an abandoned mine in which there are no minerals. The well vested in the defendants under sect. 64, and they were owners of it; it was a mine within the meaning of the Metalliferous Mines Regulation Act 1872, and it was an abandoned or discontinued mine, and therefore it came within the terms of sect. 13 of that Act. The defendants are therefore liable under sect. 13 to fence it, and, as they did not do so, they are liable in damages to the plaintiff for the loss of his horse. Anyone who comes within the definition of "owner" in sect. 41 is liable, although there may be many owners. If this well had been closed, the defendants, as the local authority, would have had a right to get it opened. If the well was vested in the defendants under sect. 64 they were liable, under sect. 13 of the Act of 1872, to fence it, as being the owners of it:

Evans v. Mostyn, 36 L. T. Rep. 856; 2 C. P. Div. 547.

In *Dublin United Tramways Company v. Fitzgerald* (87 L. T. Rep. 532; (1903) A. C. 99) it was held that a tramway company, in whom the roadway between the rails of their line had vested under the Tramways Act 1870, were liable in

damages to a person who had sustained injuries by reason of such roadway being out of repair; and upon the same principle, where a well is vested in a public authority by virtue of a statute, they ought to be equally liable for injury caused by their not fencing the well. [He also referred to *Coverdale v. Charlton* (40 L. T. Rep. 88; 4 Q. B. Div. 104) as to the vesting of the well in the defendants; and *Kennedy, J.* referred to *Foster v. Owen* (67 L. T. Rep. 712).]

Schiller for the defendants (the local authority).

—The learned judge was right in holding that there was no obligation upon the defendants under sect. 13 to fence the well. I assume that this was a public well, and that under sect. 64 it vested in the defendants as the local authority, yet even then sect. 13 does not impose any obligation upon the local authority to fence it. Sect. 13 points to a different state of circumstances altogether. If the contention for the plaintiff is right, then, if a person sank a shaft and water sprang up in it, the local authority would be the persons who would be entitled to get the minerals; but it would be a strong proposition to say that the owner who had sunk the shaft should not get the minerals through that shaft. When the words of sect. 13 are looked at, it is clear that the word "owner" means the person who has the right to get the minerals out of the mine. Sects. 13 and 41 contemplate two different sets of circumstances with regard to the word "owner." [Lord ALVERSTONE, C.J.—If the well is vested in the defendants as owners, why may they not be bound to fence it, apart altogether from this section?] They would not be so bound to fence it, because they would have no right to go on the land except under and by virtue of this section. Even under sect. 64 the local authority are not bound to maintain the well; their duties in that respect are wholly discretionary, indicated by the word "may." Although for the general purposes of the Act the word "owner" is defined widely in sect. 41, yet, when we come to sect. 13, only those who are entitled to or interested in the minerals in the mine are deemed to be owners; and under that section it is only those who have got the beneficial interest in the minerals of the mine who, as owners, are to fence off the mine. There was really no evidence on which the judge could find that this was a public well. [He was stopped upon the question as to sect. 13.]

Bethune, in reply, referred to the judgment of Lord Macnaghten in *Mayor, &c., of Tunbridge Wells v. Baird* (74 L. T. Rep., at p. 388; (1896) A. C., at p. 442).

Lord ALVERSTONE, C.J.—In this case the learned County Court judge has found that the well was a public well and became vested in the defendants by virtue of sect. 64 of the Public Health Act 1875. I have no doubt there was evidence on which he might come to that finding. That being so, of course we do not sit in review upon his judgment with regard to that matter. But it seems to me that that is by no means conclusive of the case, and in fact goes a very little way to decide it. I agree that the vesting of the well under sect. 64 of the Public Health Act will, according to ordinary principles applicable to such vestings under such Acts in public bodies, vest in the public authority certain rights of property in the well and in so much of the land as is

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necessary for them to perform their duties. I have very little doubt that the public authority, in taking steps to prevent nuisances, will have the right, and very likely the duty, to protect the well from danger, if in order to discharge their duty and make the well properly efficient for its purpose they might think it right so to do. That, however, is not the question we have to decide in this case. It is not alleged against the defendants that because they were the owners of the well they kept the well in a dangerous condition whereby the horse fell into the well. It is not alleged that they had a nuisance near a highway or anything of that kind, and counsel for the plaintiff very frankly said at the opening of his argument that he had no case except that based on sect. 13 of the Metalliferous Mines Regulation Act 1872. Therefore we have not got to consider what might be the liability of the defendants if this were the ordinary case of nuisance and, the well being vested in the district council, we had to consider whether the local authority had been guilty of a breach of a statutory obligation imposed upon somebody by sect. 13. Sect. 13 says: "Where any mine to which this Act applies is abandoned the owner thereof and every other person interested in the minerals of the mine shall cause the top of the shaft to be securely fenced." If those words stood there by themselves without the interpretation clause, I think it could scarcely be disputed that "thereof" there means "of the mine," and that meaning is accentuated by the provision extending not only to the owner of the mine, but to "every other person interested in the minerals of the mine." Therefore the duty of seeing to the fencing is put upon persons who are either owners of the mine or are connected with the mine—that is to say, with the minerals underground. Then came sect. 41, which extends "mine" so as to include all the shafts both below ground and above ground in or adjacent to the mine. Therefore I agree that the same person who owns the mine also owns the shafts, and it is the owner of the shafts in connection with that mine who is under the obligation imposed by sect. 13. Lastly, it seems to me that the section was pointing to the owner of the mine and the minerals or the persons interested in the minerals of the mine, as distinguished from the mere owners of the soil for other purposes, and that the exclusion from the word "owner" of certain persons is made abundantly plain. The term "owner" is defined, and "owner" when used in relation to any mine shall include bodies corporate, immediate proprietor, or lessee or occupier of any mine, but does not include a person who is merely the owner of the soil and who is not interested in the minerals of the mines. That being so, it seems to me that whether we look at sect. 13 by itself, or whether we read it with sect. 41, the word "owner" does not mean or refer to the mere legal ownership of the soil which surrounds the shaft, but it does refer to the person who is either owner of the mines, or is so interested in the minerals of the mines as to come within the language of sect. 13. That being the case, what is the position of these defendants? They have the well. It is on private property to a certain extent, and it is approached, we are told, by a lane which is not a public highway. I think, considering the language of that section and sect. 64 of the Public

Health Act 1875, it would seem to indicate that the County Court judge might come to the conclusion, to which he has come in this case, that the well was, for the purposes of sect. 64 of the Act of 1875, vested in the defendants. Therefore that is why I commenced my judgment by saying that I accept that position for the purposes of this case. In my opinion the defendant council were not owners of the mine or the shaft within the meaning of sect. 13 of the Act of 1872. They were certainly not persons interested in the minerals, and therefore the County Court judge was right in saying that the action against them is founded solely upon sect. 13, and there being, apart from the statute, no case against them of negligence in keeping their well, I think the learned judge was right, and that this appeal must be dismissed.

WILLS, J.—I am entirely of the same opinion. I think that the keynote of sect. 13 is that the liability is cast upon either the owner, or the person having an interest akin to ownership in the minerals of the mine, and nobody else. I think that that is accentuated by the consideration of the definition of "owner" in sect. 41, which for certain purposes excludes persons who are not interested in the minerals of the mines. Therefore I think there is no pretence for saying that the defendants in this case, the local authority, are at all interested in the minerals of the mine, whatever that may mean, which either was an abandoned mine, or which then was said to have been an abandoned mine, but which had once been a mine containing minerals. I think, therefore, that the defendants are not liable, and the only case which was made against them, as I understand, at the trial was that they were liable by virtue of sect. 64 of the Public Health Act 1875 and sect. 13 of the Metalliferous Mines Regulation Act 1872.

KENNEDY, J.—I am of the same opinion. It seems to me that when we consider this question it is impossible to say that the public body, in whom, under sect. 64, the well became vested and to whom control of the well passed, are the owners merely by virtue of that statutory provision in sect. 13 of the Metalliferous Mines Regulation Act 1872.

Appeal dismissed. Leave to appeal refused.

Solicitors for the plaintiff, *Robbins, Billing, and Co., for Paige and Grylls, Redruth.*

Solicitors for the defendants, *Coode, Kingdon, and Cotton, for Walters, Camborne.*

Jan. 25 and 26.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

TOWER DIVISION LICENSING JUSTICES (apps.) v. CHAMBERS AND OTHERS (resps.). (a)

Licensing—Beerhouse licensed before 1869—Conviction of licence-holder for selling spirits—Disqualification of licence-holder—Application by owner to special sessions for licence—Discretion of justices—Limitation to the four specified grounds—Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27), ss. 8, 19—Licensing Act 1874 (37 & 38 Vict. c. 49), s. 15.

The holder of the licence of a beerhouse which had

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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been licensed for the sale of beer and wine to be consumed on or off the premises, prior to and continuously since the 1st May 1869, was for the first time convicted of the offence of selling spirits without a licence, and the beerhouse was thereupon closed. At the next special sessions the owner of the beerhouse applied under sect. 15 of the Licensing Act 1874 for the grant of a licence for the sale of beer and wine by retail in respect of the premises to a person who was then the resident occupier of the premises. The licence was refused by the special sessions upon grounds other than one of the four grounds specified in sect. 8 of the Wine and Beerhouse Act 1869.

Held, upon the authority of *Ex parte Flinn and Sons* (No. 2) (81 L. T. Rep. 221; (1899) 2 Q. B. 607)—the distinction between the application, as in that case, to a court of summary jurisdiction for an authority to carry on the business in the meantime, and the application to the special sessions for the grant of a licence, being for this purpose immaterial—that sect. 19 of the Wine and Beerhouse Act 1869 applied, and that consequently the special sessions had not a general discretion to refuse the licence, but could only refuse the same upon one or other of the four grounds specified in sect. 8 of that Act.

CASE stated by the Court of Quarter Sessions for the county of London, upon an appeal heard and determined at the general quarter sessions of the peace held at Clerkenwell for the county, on the 16th Oct. 1903, against the refusal of the appellants (the licensing justices for the Tower division) to grant to the respondent Coburn a certificate authorising the grant to him of a licence to sell by retail beer and wine to be consumed on or off the premises, at a house known as the Coach and Horses, situate in the parish of St. George-in-the-East, in the Tower division.

The appeal was allowed by the quarter sessions subject to this case.

The Coach and Horses beerhouse was licensed for the sale of beer and wine to be consumed on or off the premises prior to the 1st May 1869, and the licence had been renewed from time to time, the last renewal thereof having been made to one Joseph Arch, the then tenant, at the general annual licensing meeting of the division on the 13th Feb. 1903.

In the month of July 1903 proceedings were instituted by the Excise authorities against Joseph Arch, under the Beerhouse Act 1834 (4 & 5 Will. 4, c. 85), s. 20, to recover penalties under the Excise Licences Act 1825 (6 Geo. 4, c. 81), and Joseph Arch was on the 30th July 1903 for the first time convicted of the offence of selling spirits without a licence, a copy of the conviction being annexed to this case.

The beerhouse was thereupon closed for the sale of beer and wine, and was not again opened for such sale until after the hearing of the above-mentioned appeal on the 16th Oct.

On the 18th Sept. 1903 an application was made to a metropolitan police magistrate, sitting at the Thames Police-court, on behalf of the respondents Chambers, Sichel, and Coombes (trading as Chambers Brothers and Co.), who were the owners of the beerhouse, pursuant to sect. 15 of the Licensing Act 1874, for authority to the respondent Coburn to carry on the same business upon the

same premises until the then next special sessions for licensing purposes. This application was, at the suggestion of the magistrate, treated as withdrawn.

On the 28th Sept. 1903 (being the then next special sessions of the Tower division for licensing purposes) a further application was made on behalf of the owners to such special sessions for the grant of a licence for the sale of beer and wine by retail in respect of such premises to the respondent Coburn, pursuant to sect. 15 of the Licensing Act 1874. The respondent Coburn was then the real resident holder and occupier of the beerhouse. The grant of such licence was refused at the special sessions upon grounds other than one or more of the four grounds specified in sect. 8 of the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27). There was no evidence before the licensing justices which would bring the case within any one of those four grounds.

Against this refusal the respondents duly appealed to the Court of Quarter Sessions, when it was contended on behalf of the appellants that the licensing justices had jurisdiction to refuse the grant of the licence to the respondent Coburn upon grounds other than one or more of the four grounds specified in sect. 8 of the Wine and Beerhouse Act 1869, and on behalf of the respondents it was contended that the jurisdiction of the licensing justices to refuse the grant was limited to one or more of the four grounds.

The Court of Quarter Sessions found for the respondents, and allowed the appeal.

The question for the opinion of the court was whether upon the facts above stated the licensing justices for the Tower division aforesaid had jurisdiction to refuse the grant to the respondent Coburn upon any ground other than one or more of the four grounds specified in sect. 8 of the Wine and Beerhouse Act 1869.

If the court should answer the question in the negative, the order of the sessions was to stand; but otherwise the order of sessions was to be quashed and the appeal sent back to the Court of Quarter Sessions to be heard on the merits, or such other order was to be made as to the court seemed just.

The Licensing Act 1874 (37 & 38 Vict. c. 49) provides:

Sect. 15. Where any licensed person is convicted for the first time of any one of the following offences . . . (3) Selling spirits without a spirit licence . . . and in consequence either becomes personally disqualified or has his licence forfeited, there may be made by or on behalf of the owner of the premises an application to a court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions for licensing purposes, and a further application to such next special sessions for the grant of a licence in respect of such premises, and for this purpose the provisions contained in the Intoxicating Liquor Licensing Act 1828 with respect to the grant of a temporary authority and to the grant of licences at special sessions shall apply as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee.

The Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27) provides:

Sect. 19. Where, on the first of May, one thousand eight hundred and sixty-nine, a licence under any of the

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said recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine, not to be consumed on the premises, may be refused in accordance with this Act.

Sect. 19 was amended by sect. 7 of the Wine and Beerhouse Act Amendment Act 1870 (33 & 34 Vict. c. 29) as follows:

Sect. 7. The nineteenth section of the principal Act [that is, of the Act of 1869] shall extend to licences granted by way of renewal from time to time of licences in force on the 1st day of May 1869, whether such licences continue to be held by the same person or have been or may be transferred to any other person or persons.

The four grounds upon which the justices can act in refusing the renewal are specified in sect. 8 of the Act of 1869, and the grounds upon which the grant of the licence was refused in the present case were not one or other of those four grounds.

Macmorran, K.C. (R. D. Muir and W. H. Leicester with him) for the appellant justices.—The real question is whether the conviction of Arch did away with the licence. If it did, then the licensing justices in special sessions had general jurisdiction to refuse the grant of the licence upon the usual grounds and were not limited to the four grounds specified in sect. 8 of the Wine and Beerhouse Act 1869. Upon the conviction of Arch the licence became void. In *Reg v. West Riding Justices* (21 Q. B. Div. 258), where a licence existing on the 1st May 1869 for the sale of beer to be consumed on the premises was forfeited by a conviction under sect. 15 of the Licensing Act 1872, for permitting the premises to be used as a brothel, it was held that the licence was no longer "in force" within sect. 19 of the Wine and Beerhouse Act 1869, and that the licensing justices in special sessions had a general discretion to refuse the application of the owner for a grant of the licence, and that they were not limited to the four grounds. So in *Traynor v. Jones* (69 L. T. Rep. 862; (1894) 1 Q. B. 83), where the beerhouse was about to be pulled down for a public purpose, and the holder of the licence applied to the special sessions for the grant of a corresponding licence to sell beer at another house, it was held that the justices were not limited to the four grounds, but had a general discretion to refuse the application. In *Freer v. Murray* (71 L. T. Rep. 444; (1894) A. C. 576), it was held by the House of Lords, affirming the decision of the Court of Appeal, that where a beer licence which had been held continuously since 1869 had expired, the tenant's application for a renewal having been refused, and where a new tenant subsequently applied under sect. 14 of 9 Geo. 4, c. 61, to the special sessions for a transfer of the licence, under sect. 19 of the Act of 1869 the justices were not limited to the four grounds of refusal, but had a general discretion. In the two cases of *Ex parte Flinn and Sons* (81 L. T. Rep. 27, 221; (1899) 2 Q. B. 154, 607), the justices did not appear, so that the question was not argued from the point of view of the justices, and the case of *Reg.*

v. West Riding Justices (*ubi sup.*) was not cited to the court. There is also the distinction between the second of those two cases and the present case that in that case the application was to a magistrate for a temporary authority, whereas, in this case the application was one to the special sessions for a grant of the licence. Further, the decision in *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*) was inconsistent with the decision in *Reg. v. West Riding Justices* (*ubi sup.*), and the latter case ought now to be followed. Sect. 15 no doubt gives the owner the right to apply, but it leaves the discretion of the justices unfettered.

Footle, K.C. (Bruce Williamson with him) for the respondents.—The decision of quarter sessions was right. *Ex parte Flinn and Sons* (No. 2) (81 L. T. Rep. 221; (1899) 2 Q. B. 607), is a clear authority in favour of the respondents and ought to be followed. The cases of *Reg. v. West Riding Justices* (*ubi sup.*) and *Freer v. Murray* (*ubi sup.*) are distinguishable. In *Reg. v. West Riding Justices* (*ubi sup.*) the licence-holder was convicted under sect. 15 of the Licensing Act 1872 for permitting his premises to be used as a brothel, and by that section itself if the licensed person is convicted of that offence, he "shall forfeit his licence"; so that the licence in that case was absolutely forfeited and had expired, and the forfeiture of the licence upon that conviction destroyed the privilege and reduced the premises to the condition of unlicensed premises. That case is distinguishable in this, that the conviction was not for one of the four offences specified in sect. 15 of the Act of 1874, but was under a different section altogether, which did not give the owner a special right to apply, as the section applicable in the present case does. So in *Freer v. Murray* (*ubi sup.*) the licence had expired, and, as stated by Lord Herschell, L.C., it was not in a state of suspended animation, but was dead, and all that could be granted was a new licence, not one technically so called, but a transfer within the language of the Licensing Acts, nevertheless not a licence which revived the old licence. In that case, therefore, the licence had expired when application was made to the special sessions, and as the licence had not continued in existence down to the date of the application, it was held that the statutory limitation imposed upon the discretion of the justices by sect. 19 of the Act of 1869 had no application as the licence was not "in force," and that therefore the special sessions were not limited to the four grounds, but had a general jurisdiction. In the present case the respondents applied to the special sessions under sect. 15 of the Act of 1874 for the grant of a licence. The section itself gave the owner the right to apply, so that the principle of *Reg. v. West Riding Justices* (*ubi sup.*) and *Freer v. Murray* (*ubi sup.*) does not apply to this case. The case of *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*) covers this case. The cases are identical, with this slight distinction, which does not affect the principle—namely, that in *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*) the application was to a magistrate for authority to carry on the business until the next special sessions, whereas in the present case the application was to the special sessions for the grant of the licence, the application which was made to the magistrate having been withdrawn as the special sessions

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were so near at hand. [Lord ALVERSTONE, C.J.—We are inclined to think that your contention is right, that *Reg. v. West Riding Justices* (*ubi sup.*) and *Freer v. Murray* (*ubi sup.*) are not authorities against you, and that *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*) is an authority in your favour, and we are also inclined to think that the special sessions had power to deal with the application, although no authority had been obtained from a magistrate in the meantime to carry on the business.] [He did not further argue.]

Macmorran, K.C. in reply.

Lord ALVERSTONE, C.J.—As this case has not been fully argued on the part of the respondents, and as I think that we are bound by the case of *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*), and that the principle of that case is an authority in favour of the respondents, I do not propose to discuss the matter at any length. I only wish to make some observations to indicate why I think we are bound by that case of *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*). The present case illustrates the difficulty the courts have in construing and applying the licensing laws. On the other hand, one must not forget that this is a very thorny subject, and an extremely difficult one for the Legislature to deal with, and therefore while we have to discharge our duty in construing them we cannot, and ought not, to blame anybody for the way in which these Acts are drawn. In my opinion it is quite plain that from one point of view the argument of counsel for the appellants may be said to go a little too far, because I think he does not give sufficient effect to the consequences of allowing a person to apply after a conviction. It is quite plain that if the conviction has forfeited the licence there must in that case be a break, and therefore it would seem to me that the section—sect. 15—contemplates, under some circumstances, a state of things in which the principle of the case of *Reg. v. West Riding Justices* (*ubi sup.*) could not apply, because there must be a suspension of the licence in cases in which the licence has been absolutely forfeited. But in this case counsel for the appellants says with regard to that that the section gives the right to apply, but leaves unfettered the discretion of the court—whether the magistrate or the special sessions—to whom the application is made, as to the grounds upon which they will refuse or continue the grant of the licence. On the other hand, it is said that the effect of allowing the owner to apply in such a case in respect of an old beerhouse is to give him the privileges which the person applying for a transfer under sect. 19 of the Wine and Beerhouse Act of 1869 would have through the tribunal being limited to the four grounds specified in sect. 8 of that Act. That being the question to be dealt with, I think we could not accede to the argument of counsel for the appellants without overruling, at any rate, the principle, and as I think myself the authority, of the case of *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*). It may be for the reasons that have been mentioned by my brother Kennedy amongst others that the case of *Reg. v. West Riding Justices* (*ubi sup.*) can be distinguished as dealing with a different section; but I must say that in any case, in my opinion, *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*) is so much an authority that we really

could not deal with the present case contrary to the principle of that case without practically overruling it, and of course we do not do that in a case where there is an appeal. I prefer to say that I think we are bound by the principle of the decision in *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*), and therefore we must affirm the decision of the quarter sessions. It is a case, as it seems to me, of sufficient importance to be, and obviously ought to be, further discussed, and if there is to be an appeal in this case this is the ground upon which we put our decision, that we are bound by the decision in that case and that we do not overrule the decision of a court of co-ordinate jurisdiction. I should like to say that if this case goes further, I think the first case of *Ex parte Flinn and Sons* (81 L. T. Rep. 27; (1899) 2 Q. B. 154), which has some little bearing on this question, may require to be further considered as to whether these words “for the first time” do cover the whole section or the first part of the section only.

WILLS, J.—I am entirely of the same opinion. I think in respect to the case of *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*) we are bound by it, and that it is so exactly in point in all its circumstances that it really must be followed in the present case. The only distinction between that case of *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*) and this case, that I can see, is that in that case the application was an application in the first instance to a court of summary jurisdiction, whereas this is an application to the special sessions. I cannot for myself think that the Act of Parliament meant to make any distinction whatever between the rights of the parties on those two occasions, and therefore it seems to me that *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*) is really exactly in point, and must be followed. I must say, speaking for myself, that the case of *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*) is very difficult to reconcile with the case of *Reg. v. West Riding Justices* (*ubi sup.*). I have appreciated what counsel for the respondents has said about it, but, after all is said, it seems to me that in the one case the court held that, under circumstances which are very closely analogous to the circumstances in the present case, the expression “in force” in sect. 19 of the Wine and Beerhouse Act 1869 was not satisfied, and that in *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*) they held that it was satisfied. It seems to me, therefore, extremely difficult to reconcile those two decisions. I merely say that, after having spent a couple of hours in going through these sections besides listening to the arguments in this case, it seems to me to be a matter of extreme difficulty and perplexity, and I am glad to take refuge in the fact that I am bound by the case of *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*).

KENNEDY, J.—I am of the same opinion, and I in no way differ from anything that my Lord has said. But after what has been said by the other members of the court, I think it right to point out that, while saying that we are bound by the case of *Ex parte Flinn and Sons* (No. 2) (*ubi sup.*), I see no reason to intimate that I feel any reason to dissent from it. Although there may be no difference between that case and the present case—and I do not think that in substance there is any difference—it seems to me

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that this is merely carrying out what the Act of Parliament, to my mind, authorised when these Acts are read together—namely, that in a case of this kind up to the time of the next special sessions the licence may be treated as alive, and there is a power given by the section to allow the owner to carry on the business in the meantime, and it was upon an application of that kind by the owner in the case of *Ex parte Flinn and Sons (No. 2)* (*ubi sup.*), that the matter arose. I think there is no essential difference between the application in that case and the application in this case. The question which there arose was a question which to my mind was rather more difficult, if I may say so, than the question which arises in this case. The time for applying in a case of this kind appears to me to be at the special sessions, at which the application in this case was made and refused, that decision being reversed by the Court of Quarter Sessions. In the case of *Ex parte Flinn and Sons (No. 2)* (*ubi sup.*), it seems to me that a more difficult question arose, because the application there was an application to the magistrate in the meantime by the owner to carry on the business. Whether that is granted or refused there is a licence to be dealt with, and on the principle of *Ex parte Flinn and Sons (No. 2)* (*ubi sup.*), to be dealt with as the Court of Quarter Sessions have held in the decision which we have now affirmed.

Appeal dismissed. Order of quarter sessions to stand. Leave to appeal.

Solicitor for the appellants, *E. W. Beal.*

Solicitors for the respondents, *Maitlands, Peckham, and Co.*

Wednesday, Jan. 27.

(Before WILLS and KENNEDY, JJ.)

WARD v. HADDRILL. (a)

County Court — Cross-judgments — Separate actions—Payment of judgment debt into court—Right to set off smaller judgment debt—Solicitor's lien for costs—Right to enforce lien against whole sum in court—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 150.

By sect. 150 of the County Courts Act 1888 it is provided: "If there shall be cross-judgments between the parties, execution shall be taken out by that party only who shall have obtained judgment for the larger sum, and for so much only as shall remain after deducting the smaller sum, and satisfaction for the remainder shall be entered, as well as satisfaction on the judgment for the smaller sum; and if both sums shall be equal, satisfaction shall be entered upon both judgments."

Held, that this section applies where cross-judgments are obtained by the parties in separate actions, and not merely where the cross-judgment are obtained in a claim and counter-claim in the same action; and also where the party against whom judgment has been obtained for the larger sum has paid that sum into court without waiting for execution to be taken out, but the party against whom judgment has been obtained for the smaller sum has not paid that sum into court; and that before the party in whose favour the larger sum has been paid into

court can have that sum paid out to him, the other party is entitled to have deducted from it the smaller sum for which he has obtained judgment, although that sum has not been paid into court, notwithstanding that the solicitor of the party in whose favour the judgment for the larger sum has been obtained has a lien for his costs upon the whole sum in court, as in such case the solicitor's lien for his costs extends not to the whole sum in court, but to the balance only.

APPEAL by the plaintiff from the decision of the judge of the Wandsworth County Court.

The plaintiff had brought two actions in the County Court against the defendant. In the first of these actions judgment was given for the plaintiff against the defendant for 21*l.*, and in the second action judgment was given for the defendant with costs, which were taxed at 5*l.* The defendant had paid into court in the first action the 21*l.* which the plaintiff had recovered against him in that action, and before the defendant had so paid the 21*l.* into court he applied to the judge that the money should not be paid out to the plaintiff pending a motion he was about to make as to the payment out of that sum of his costs in the second action—namely, the 5*l.* The plaintiff did not pay into court the amount of the defendant's taxed costs (the 5*l.*) in the second action.

The defendant then applied to the County Court judge for an order that the sum of 21*l.* paid into court in the first action by the defendant should not be paid out of court to the plaintiff or her solicitor, unless and until the plaintiff had paid into court the sum of 5*l.*, being the defendant's taxed costs in the second action; or, in the alternative, for an order that there should be paid out of the sum of 21*l.* in court, to the defendant or his solicitors, the sum of 5*l.* in respect of those taxed costs, and he relied on sect. 150 of the County Courts Act 1888.

Objection was taken on behalf of the plaintiff that her solicitor had a lien for his costs upon the 21*l.* in court; that those costs amounted to more than the sum in court, and that therefore the judge had no power to order that any less sum than the whole amount in court should be paid out of court to the plaintiff or her solicitor.

The County Court judge made the order as applied for by the defendant, whereby he ordered that the amount (21*l.*) paid into court as due from the defendant to the plaintiff under the judgment in the first action should be subject to a set-off for the 5*l.* due to the defendant under the judgment in the second action; that the balance only should be paid out to the plaintiff, and that 5*l.* should be paid out of the 21*l.* in court to the plaintiff.

From this order the plaintiff appealed.

Douglas Hogg (H. Dobb with him) for the appellant.—The County Court judge was wrong in making the order; he had no jurisdiction to make such an order. The 21*l.* paid into court by the defendant in the first action was subject to the lien of the plaintiff's solicitor for costs which exceeded that amount. It is said that under sects. 113 and 150 of the County Courts Act 1888 the judge had power to make the order, but those sections have not that effect. Sect. 113 only gives the judge a discretion to deal with costs "not herein otherwise provided for"—that is, not

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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otherwise provided for in the Act. That provision cannot refer to, and does not affect, a solicitor's lien for his costs on money which is in court. So, sect. 150 does not justify the order which has been made. The section provides that where there are cross-judgments between the parties, execution shall only issue for the balance of the larger over the smaller sum. That must be read as being subject to the solicitor's lien for costs; and to take that lien away there must be express words in the section to that effect, but there are no express words taking away the right of the solicitor to a lien for his costs on the sum in court. Again, sect. 150 does not apply here, as it is limited to the issue of execution, and does not apply where the money has been paid into court, and where consequently no execution can be taken out. So, the section does not apply to cross-judgments in two different actions; it only applies in the case of cross-judgments in a claim and counter-claim in the same action.

Thorn Drury for the respondent.—The learned judge had jurisdiction to make the order, and was right in making it. Sect. 150 clearly gives him power to make the order. It says that where there are cross-judgments between the parties for different amounts, execution shall only be issued for the balance. The smaller sum for which judgment has been given has to be deducted from the larger sum, and the balance only is payable to the party who has obtained the judgment for the larger sum. It is to this balance only that the solicitor's lien extends; it does not extend to the whole sum. The intention of this enactment clearly was that the person who had got a judgment for the smaller sum should not be compelled to wait until the other party who had judgment for the larger sum issued execution for the larger sum before he got the benefit given by the section. It was clearly intended that he should have the right of set-off after the judgments were given. The defendant has not lost his right by paying the 21*l.* into court. He cannot be in a worse position by having paid the money into court than if he had waited for execution to be issued by the plaintiff, thereby incurring more costs. Therefore the fact that the defendant had paid the 21*l.* into court, instead of waiting for execution, does not deprive him of the right which he would have had if he had waited for execution, of setting off the 5*l.* Lastly, it is said that the section only applies to cross-judgments in a claim and counter-claim in the same action. That cannot be so, as there is the same provision in sect. 93 of the first County Courts Act, the County Courts Act 1846 (9 & 10 Vict. c. 95), when counter-claims were not known.

Douglas Hogg in reply.

WILLS, J.—I am of opinion that this appeal should be dismissed. The point raised is a short one, and it has been well argued on each side. I do not hesitate to say that the effect of what the Legislature has done in this statute is to establish for County Courts a different system with regard to a solicitor's lien for costs from that which prevails in the High Court. If that is the case, then it can only be because this Act provides that it should be the case. If the Act says so, then the Act must be followed. Sect. 150 says in very clear terms that where there are cross-judgments

between the parties in the County Court, if the party who has got judgment for the smaller sum chooses to wait for execution, thereby, no doubt, incurring further costs, he can set off the smaller sum for which he has got judgment against the larger sum for which the other party has obtained judgment against him. If that right to set off the smaller sum against the larger sum exists, then it is quite clear that the only sum for which execution can issue is the balance, because the section says that not only shall the execution be "for so much only as shall remain after deducting the smaller sum," but also that "satisfaction for the remainder shall be entered, as well as satisfaction on the judgment for the smaller sum," and if both sums are equal, then "satisfaction shall be entered upon both judgments." Having regard to those provisions, how can it be said that the solicitor's lien for costs is preserved? Then the question arises: Are we to look at the substance of what the Legislature intended in this section—namely, that there should be no enforceable judgment except for the balance against the person who has recovered the smaller sum—or are we to look only at the words which deal with execution, and to say that, if the person who has obtained judgment for the smaller sum, but against whom judgment has been obtained for the larger sum, pays into court the larger sum for which judgment has been obtained against him, he has lost his right to set off the smaller sum against the larger? I cannot think that the Legislature could have intended that before the person who has paid the larger sum into court can get the benefit of this enactment he must incur considerably more costs in respect of having execution issued against him than he has already incurred. If he cannot have an enforceable judgment for the smaller sum which has been given in his favour, I do not think that the statute ever intended that he should have an enforceable judgment against him except for the balance between that smaller sum and the larger sum he has paid into court. I therefore think that the judgment of the County Court judge was right. Although sect. 150 of the Act may not in precise terms cover this case, still I think its meaning clearly is that there shall be no available process except for the balance between the larger and smaller sum. It was said during the argument that if that were the true construction to be put upon the section, it must be so *per incuriam*. I can hardly think that that is so, as we find the same provision contained in the first County Courts Act of 1846, under which County Courts were created. That was an Act very carefully drawn and considered, and at the time it was passed the jurisdiction of the County Courts was much more limited than it is now. It was passed for the purpose of securing a cheap and speedy administration of the law for the benefit of the poorer classes, and was frequently called "the poor man's court." It may be that the Legislature intended to prevent the multiplication of costs, even though they might be properly incurred. However that may be, when we bear in mind the fact that the provisions in sect. 150 of the Act of 1888 were contained in the Act of 1846, when there was no right of counter-claim, it seems to me abundantly clear that "cross-judgments" in sect. 150 must mean cross-judgments in different actions, and not

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merely cross-judgments where there is a claim and counter-claim in the same action.

KENNEDY, J.—I am of the same opinion. Sect. 150 would clearly have applied if the defendant, instead of paying the 21l. into court, had waited until execution were issued, in which case the 5l., for which the defendant got judgment, would have had to be deducted, and the balance only would have been paid over to the plaintiff. I entirely concur in what has been said by my brother Wills as to the effect of sect. 150, and it seems to me that the object of that section would be entirely defeated if we were to give to that section the effect which has been contended for by the appellant. I am therefore of opinion that this appeal should be dismissed.

Appeal dismissed. Leave to appeal.

Solicitor for the appellant, *A. E. Cubison.*

Solicitors for the respondent, *Corsellie, Mossop, and Berney.*

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 15 and 18.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

HOOPER v. BROMET; RAPHAEL (Third Party). (a)

APPEAL FROM THE CHANCERY DIVISION.

Restrictive covenants—Loss of deeds—Defective copy—Indemnity—Deed found—Breach of covenant contained in lost deed—Action—Costs—Liability under indemnity—Natural and proximate result of difference in deeds.

Certain lands were subject to a building scheme, the provisions of which were contained in a deed of 1854. The purchaser of a plot was informed by the vendor in good faith that the original deed was lost or destroyed, and what purported to be a true copy was produced. This copy subsequently proved to be defective. An action was brought by an adjoining owner to restrain the purchaser from erecting or allowing to remain upon his land certain buildings which contravened the provision as to a building line in the deed of 1854. The property in respect of which he was entitled to sue had certain erections upon it contravening another building stipulation, which provided that no erection should be built within 4ft. of a boundary fence.

At the trial of the action it was held that the defendant was affected with notice of the building stipulations, and that the plaintiff had only committed a trivial breach of a trivial covenant, and that such a breach did not disentitle the plaintiff from having the building stipulations strictly enforced, and judgment was given for the plaintiff with costs, the defendant being directed to remove certain buildings erected by him on the land.

The third party to the action had sold the property to the defendant, and upon such sale had written

a letter agreeing to indemnify the defendant, as purchaser, against all "costs, damages, and expenses" which the defendant might suffer or incur "by reason of the building stipulations and conditions being other than those set out in the copy."

Held, that the third party was liable to pay the defendant the difference in the value of the plot in consequence of the amount of land available for building under the provisions of the deed of 1854 being less than under the supposed copy; and also of the defence that the plaintiff was disentitled to sue in consequence of his having broken one of the covenants.

Held, also, that the defendant, having had actual notice of the provisions of the deed of 1854 before he commenced to build, the third party was not liable for the cost of building or removing the buildings.

Held, also, that the defendant was not entitled to recover from the third party the costs of the plaintiff incurred in the action and paid by the defendant, or the defendant's own costs so far as they related to the following defences set up by the defendant—viz., a denial that the provisions of the deed of 1854 applied to the plot purchased by him or that he had notice of such provisions; that the liquidator of the company formerly owning the land to which the deed of 1854 applied, had, under a power given by that deed to the "vendors, their heirs or assigns," by an agreement in writing, approved of by the court, released or waived the covenant which it was alleged had been broken; that no building scheme was contained in the deed of 1854, and if there was it had come to an end by mutual consent of the various purchasers of the land comprised in it.

Decision of Farwell, J. (89 L. T. Rep. 37) varied as to the costs payable by the third party under the indemnity.

THE plaintiff and defendant were owners of adjoining houses upon a building estate at St. Margarets-on-Thames, Middlesex.

The estate belonged originally to the Conservative Building Society, and in 1854 was vested in two trustees of the society.

The provisions as to the class of house to be erected, the building lines to be followed, and other matters were embodied in a deed of covenant of the 31st Aug. 1854.

The deed was entered into between the trustees of the society and various purchasers of plots, and in the schedule the terms and conditions with respect to building and otherwise were set forth by reference to an accompanying plan.

So far as material, they were as follows:

4. *Building Lines*—The purchasers of the lot coloured blue are to erect the external face of the front walls of all buildings on all plots and flank walls of buildings on the corner plots agreeably to the front or flank building line shown.

5. *Spaces for Building*.—The space between the front and back building line is appropriated for all building purposes, and no erection or building, or portion of any erection or building other than boundary fences and architectural dressings, shall be built upon, project, or hang over, any other ground than that within the said lines except leave be first obtained in writing of the vendors, their heirs or assigns, nor shall any building other than a boundary fence be erected on any lot within 4ft. of any lot belonging to any other person, but

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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nevertheless an owner or owners of adjoining lots may build or unite in building thereon semi-detached houses of uniform exterior, but so that no detached house or pair of semi-detached houses shall approach within 8ft. of any other house.

11. In case the lot of ground coloured yellow on the said map, and planned for the site of a church, shall not be granted for that purpose, but shall at any time be sold for building purposes, then the same shall be held on the same terms as are herein mentioned as to lot 60, except that there shall be deemed to have been marked thereon on the said map a dotted building line 40ft. distant from the front and flank roadways.

In July 1899 the defendant Bromet purchased the lot originally intended for the site of a church, and referred to in clause 11, from Ralph Raphael, the third party to the action. During the investigation of title, prior to such purchase, it appeared to the defendant's solicitor that the property was a plot of land subject to a building scheme, and he called for the production of the deed containing any restrictive covenants affecting the land. It was at the time believed by the vendor that the original deed no longer existed, and he produced what purported to be a copy of the restrictive covenants. The defendant subsequently purchased the land, but obtained an indemnity, dated the 16th Aug. 1899, from the vendor.

This indemnity was given by a letter written by the vendor to the defendant, and was in the following terms:

In consideration of your completing the purchase of the above property from me, I hereby state that the document purporting to be a copy of the building stipulations and conditions of sale of the Conservative Land Society annexed hereto and identified by my signature in the margin thereof is to the best of my knowledge, information, and belief, a true and complete copy of the original building stipulations and conditions affecting the property, and I hereby agree to indemnify you, your heirs, executors, administrators, and assigns, against all costs, damages, and expenses which you may suffer or incur by reason of the building stipulations and conditions affecting the property being other than those set out in the said copy. —Yours faithfully, RALPH RAPHAEL.

The defendant proceeded to build upon the lot four houses, which infringed the provision as to the building line imposed by clause 11. This provision did not appear in the copy which had been furnished by Raphael to the defendant, although the defendant was in fact aware of it, as prior to the commencement of building operations the defendant had ascertained that the original deed of 1854 was still in existence, and had obtained from it knowledge of the true provisions affecting his land. He had thereupon entered into negotiations with the liquidator of the Conservative Land Society to obtain his consent to the proposed new buildings, believing that power to consent to any variation in the scheme had been retained by the vendors under clause 5, and that the liquidator fell within the description of "the vendors, their heirs or assigns."

On the 29th Jan. 1902 the liquidator entered into an agreement giving such consent, and this agreement was duly confirmed by the court.

The action was brought by the plaintiff, as the owner of adjoining property on the estate, claiming an injunction restraining the defendant "from building or erecting or allowing to remain" upon his land any erection or building other than

boundary fences within 40ft. of the Avenue and Ailsa-roads respectively.

At the trial it was held by the judge, after a lengthy argument, that upon the construction of clauses 4 and 5 the vendors had reserved no right to themselves to vary the building line.

There was evidence to show that the plaintiff or his predecessor in title had committed a breach of the building stipulations by erecting on the plaintiff's land a low building between the house and one of the boundary fences, which building went up to the boundary fence, and therefore contravened the end of clause 5.

Farwell, J. gave judgment for the plaintiff, holding that the breach of the covenant by the plaintiff was trivial, and did not disentitle him from having the building stipulations strictly enforced, and ordered so much of the houses as had been built and came within 40ft. of the two roads to be pulled down, and directed Bromet to pay Hooper the costs of the action.

On the question of the indemnity given by Raphael to Bromet, the following order was made:

"Upon the said question of indemnity this court doth declare that by virtue of the agreement dated the 16th Aug. 1899 in the pleadings mentioned the said third party, Ralph Raphael, is liable to indemnify the defendant against the costs directed to be paid by him to the plaintiff by the said judgment dated 18th June 1903 made in this action, and the costs as between solicitor and client incurred by him in defending such action, and that he is also liable to indemnify the said defendant against all costs, damages, and expenses incurred or to be incurred by reason of the defendant having built on land in the pleadings in the said action mentioned so far as he has built thereon in contravention of the covenants contained in the said indenture of the 31st Aug. 1854 in the said pleadings mentioned, and by having to remove such buildings pursuant to the said judgment; and for being unable in the future to build on the land sold by the said third party to the said defendant in accordance with the document purporting to be a copy of the building stipulations and conditions of sale of the Conservative Land Society annexed to the agreement dated the 16th Aug. 1899 in the said third party notice mentioned. And this court doth order that the said third party, Ralph Raphael, do pay to the said defendant, Mark Bromet, the amount paid by him for the plaintiff's costs and his own costs of this action, and of the third party proceedings, to be taxed by the taxing master, those of the said action as between solicitor and client. And it is ordered that the following inquiry be made (that is to say): An inquiry what damages the defendant has sustained by reason of his having built on the said land so far as he has built, and by having to remove such buildings pursuant to the said order, and for being unable in the future to build on the said land in accordance with the said document annexed to the said agreement dated the 16th day of August 1899. And it is ordered that the third party, Ralph Raphael, do pay to the defendant, Mark Bromet, the amount which shall be certified to be due for such damages as aforesaid."

From this order Raphael, the third party, appealed on the ground that he was not liable for the costs caused by several of the points raised in his defence by Bromet, which are particularly

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referred to in the judgments of the Court of Appeal.

The following clauses of the copy of the deed referred to in the indemnity were considered in the judgments of the Court of Appeal:

4. Building Lines.—The purchasers of lots coloured blue bind themselves to erect the external face of the front walls of all buildings on all plots and the flank walls of all buildings on the corner plots agreeably to the front and flank building lines shown.

10. Deed of Covenant.—Each purchaser on completing his purchase is to execute a proper deed of covenant for regulating the building and fencing upon his land and the repair of roads and drains, and keeping all the conditions herein contained, and powers for enforcing the performance of these covenants.

20. Site for a Church.—The vendors reserve for five years the portion of land coloured yellow planned for the site of a church with the power of granting it for that purpose, but should no grant be made within that time they reserve to themselves the power of selling it for building purposes subject to the same restrictions as lot No. 60.

23. The vendors reserve to themselves the power of allowing a variation of these plans and conditions except as to the building of a hotel, tavern, public-house, or beer-house on the portion of the estate now offered for allotment.

24. Any portion of the estate not disposed of may be dealt with by the vendors without reference to and totally independent of these conditions.

Upjohn, K.C. and Kenyon Parker for the appellant.—The differences in the copy and the deed of 1854 are so small that Bromet is only entitled at the most to nominal damages. But if that is not so the order gives him too much. The appellant is not liable for the costs of putting up and pulling down the house built on that land, as Bromet put it up notwithstanding he knew that Hooper objected to it, and after the deed of 1854 had been found and he was aware of its provisions. Bromet is not entitled to the costs of the action of the plaintiff and himself, as he did not conduct it in a reasonable way. He raised several defences which were untenable and ought not to have been raised. He ought to have admitted that the deed of 1854 was binding on him. Then there would have been no action, and Raphael could not have resisted his claim for compensation for the building ground he had lost in consequence of the building line fixed in it. But he relied on the permission given him by the liquidator of the Conservative Building Land Society, and fought the action on that ground. He is therefore only entitled to the difference between the value of the land he purchased without the restrictive covenant as to the building line contained in the deed of 1854, and the value of that land with that restriction:

Turner v. Moon, 85 L. T. Rep. 90; (1901) 2 Ch. 825;

Joyner v. Weeks, 65 L. T. Rep. 16; (1891) 2 Q. B. 31.

[*WILLIAMS, L.J.* referred to *Bazendale v. London, Chatham, and Dover Railway Company* (32 L. T. Rep. 330; L. Rep. 10 Ex. 35).]

Jenkins, K.C. and Edward Clayton for Bromet.—The provisions of the deed of 1854 do not constitute a building scheme, so there was good reason for considering that the liquidator came within the words "the vendors, their heirs and assigns" in clause 5 of the deed of 1854, and that

his permission not to observe the covenant, which was confirmed by the court, was sufficient. The copy deed did not show any building scheme. Considering clauses 23 and 24, if the court holds there is any building scheme here, it will be going further than

Collins v. Castle, 57 L. T. Rep. 764; 36 Ch. Div. 243.

Where the vendor reserves the right to alter the conditions of sale there cannot be a building scheme:

Osborne v. Bradley, 89 L. T. Rep. 11; (1903) 2 Ch. 446;

Renals v. Cowlishaw, 41 L. T. Rep. 116; 11 Ch. Div. 866;

Spicer v. Martin, 60 L. T. Rep. 546; 14 App. Cas. 12;

Keates v. Lyon, 20 L. T. Rep. 255; 4 Ch. App. 218;

Nottingham Patent Brick and Tile Company v. Butler, 54 L. T. Rep. 444; 16 Q. B. Div. 778, 791.

Bromet is entitled to the whole of the costs of the action and of building and pulling down the house. If as between Hooper and Bromet the defence was reasonable, Raphael is liable. Notice of the restrictive covenant ought not to be imputed to Bromet, as he honestly thought the copy was correct, though Farwell, J. held the case was within *Jared v. Clements* (88 L. T. Rep. 97 (1903) 1 Ch. 428). But as between Hooper and Bromet the defence was not improper, and the costs of it come within the indemnity:

Bazendale v. London, Chatham, and Dover Railway Company (*ubi sup.*).

If Bromet considered that the original building scheme had become void and did not affect the land, he was bound to maintain that point in order to know his position under it, otherwise he could not know his position under the copy. If he had been successful on that point the plaintiff's whole case must have failed. Raphael never raised any objection to the way Bromet was conducting his defence to the action, and he therefore cannot now say he was acting unreasonably. Bromet had a right to have his legal liabilities ascertained, and Raphael was also interested. There being two sets of conditions, those in the original deed and those in the copy, it was to the interest of Raphael as well as of Bromet to find out by which they were bound.

Upjohn, K.C. in reply.

WILLIAMS, L.J.—This is an appeal against a decision of Farwell, J. So far as the action of *Hooper v. Bromet* is concerned there is no appeal but that action was an action for an injunction brought by the plaintiff, as one of the purchasers bound by and having the benefit of a building scheme, against Bromet as successor in title to a person who was bound by and had the benefit of this scheme, and Bromet contends that if he is responsible to Hooper in that action, he has, at all events to a certain extent, a remedy against Raphael, because Raphael gave him a letter of indemnity; and consequently he issued a third party notice, and the result was that Raphael had to come in as third party. He put in his defence as third party, and this appeal is really concerned only with the question whether Farwell, J. was right in holding, to the extent to which he did so hold, that Raphael was liable to indemnify Bromet. Certain land was vested in

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Lord Ranelagh and another person as trustees for the Conservative Land Society, and the object of that society was to distribute this land among its members. The conveyances were conveyances by Lord Ranelagh and his co-trustee as vendors to various members of the society. When the scheme of the society is looked at, I do not think there is any doubt but that there was a building scheme, and clause 19 of that scheme provided for a deed being entered into by each purchaser for the purpose of working out the scheme, and for conveyancing purposes that deed of covenant has always been treated as governing the relations of the parties one to another. One of the plots of land was originally intended to be the church plot, but there were provisions for dealing with this land if it should not be used as a church plot. This plot became vested in Raphael. [His Lordship then referred to the negotiations for the sale of the plot by Raphael to Bromet, and to the indemnity, and continued:] The deed of 1854 has now been produced, and it is plain that that deed, which really it must be taken for the purposes of the letter of indemnity does contain the original building stipulations and conditions affecting the property, differs in some material respect from this document to which that indemnity is attached. Now, it really is not in dispute here that if there is a material difference between the stipulations of the deed of 1854 and the terms and conditions of this document, and that difference has resulted in damage or injury to Bromet, then Raphael is liable under his letter of indemnity to make good that damage to Bromet. I now propose to consider what really are the differences in these two documents. I will begin by dealing with the difference which is made by the existence in the document to which the letter of indemnity is attached of clauses 23 and 24, which are clauses which do not exist in the deed of 1854. Speaking generally and shortly, those are clauses which give powers of varying the conditions at the will of the vendors, and it is contended that the power given to the vendors under those circumstances is such as to negative there being any building scheme binding upon the purchasers *inter se*. It is said that in order to bind the purchasers *inter se* you must have the conditions that are absolutely invariable at the will of the vendor or anybody else; and that if they are variable there is no building scheme. I think that is stating the case as a whole a good deal too widely. I quite agree that the presence of a clause permitting the variation of the conditions, or the want of stability in the conditions, may be a circumstance to which great weight ought to be given in determining whether or not the intention was that the purchasers should be bound *inter se*, and I can quite imagine a case in which it would be held that the uncertainty and the want of definiteness were such as to negative the intention, and that, as I understand it, was the ground really of the decision of Farwell, J. in *Osborne v. Bradley* (*ubi sup.*). I am not saying a word against the correctness of that decision, but dealing with this document, notwithstanding the presence of those clauses, I should have held if the rights of the parties had depended upon this document—which of course they do not by reason of the deed of 1854 being the governing document—in other words, if I had had nothing but the scheme as originally entered

into between the members of the Conservative Land Society and the purchasers of the various plots, that this particular document did properly lead to the inference that there was a scheme in which the purchasers were to be bound *inter se*, notwithstanding the presence of these clauses. In fact I do not think that anybody reading this document and giving due weight to its heading and to the matters set forth in it could hesitate to come to the conclusion that this document did involve such a scheme as necessarily led to the conclusion that the intention was that the parties should be bound *inter se*. Having said that, I do not propose to say any more about the difference between the deed and the terms and conditions in so far as that difference is constituted by these clauses 23 and 24, because the only use which was attempted to be made by counsel for Bromet of that difference was to say that properly construed, the terms and conditions in this document did not include a scheme at all. Now, that being so, what is the other difference which there is here? The other difference is really this: In the terms and conditions the site of a church is dealt with in clause 20. [His Lordship read it.] Then, when one turns back to see what are the restrictions which affect lot 60, it appears they are the restrictions contained in clause 4. [His Lordship read it.] I now call attention to the deed of 1854. The clause in that deed which applies to this plot is clause 11. Now, I do not think it necessary to go into the matter very closely, because the question of damage is one which we do not propose to decide here. It will be decided on the inquiry by the master to whom the inquiry has been referred. It is enough to say that it is perfectly plain the building capacity of the land under those two documents is very different. To mention one matter only, under the terms and conditions of the later deed there is nothing whatever which limits the power of the building owner excepting that he must do what building he has to do between really the back and the front building line; and to take as a concrete illustration of a building the church which appears upon the plan, his obligation would be under the terms and conditions carefully to keep the two ends of the building between those building lines; but there would have been no obligation on the building owner as to the extension of what, in the concrete example I have taken, would be the aisles of the church, whereas under this deed of 1854, if you take either road, taking the covenant in this deed, the building line is such that the building owner may not place any building within 40ft. of either of those two roads. It seems to me that that is a very material difference. Now, having got so far, it is right that I should deal in terms with the order of Farwell, J., because, with all deference to Farwell, J., I think that in some respects his order for inquiries goes too far. Having dealt with the action, it then proceeds: [His Lordship then referred to the order and the inquiry thereby directed, and continued:] It seems to me that those damages in respect of the building and the removal of the building ought not to be paid by Raphael, because Bromet ought not to have built, as at the time when he built he had full knowledge that in fact the terms and conditions of sale contained in the document to which the letter of indemnity was attached

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did not coincide with the covenant in the deed of 1854; and he knew perfectly well that the covenant in the deed of 1854 must be observed by the purchasers; and under those circumstances it seems to me that the damage which has arisen to him by reason of his having been at the cost of building, and his having under the order of the court being at the cost of pulling down, is not damage against which Raphael ought to indemnify Bromet; but that Bromet must bear that damage himself. So far as the residue of the damage is concerned—that is to say, so far as the land available for building under the covenant in the deed of 1854 is less than the land which would have been available for building under the later document. I will now proceed to deal with the other matters—that is to say, the costs which have been incurred by Bromet in respect of the action which was brought by Hooper, and in respect of his defence of it; and, secondly, in respect of the costs of the third party proceedings. Now, with reference to the costs which Bromet has been ordered to pay to Hooper, although Farwell, J. might have dealt with the costs as such, in my judgment in this order, and in the observations in his judgment which precede the formal order, he has dealt with those costs as damages. Now, the question is whether it is right that Raphael ought to indemnify Bromet against all such costs. It seems to me clear under the rule laid down in *Bazendale v. London, Chatham, and Dover Railway Company* (ubi sup.) that Bromet can only recover against Raphael such damages as have been incurred by Bromet as the natural and proximate result of the defendant's position. Now, under those circumstances, one has to consider whether that can possibly be said of the whole of the costs which Bromet has incurred. It seems to me clear that it cannot. It is not disputed, I think, in this action by Raphael that there are some costs incurred in the action of *Hooper v. Bromet* against which Raphael is bound to indemnify Bromet; but it seems to me plain that he is not bound to indemnify him against all the costs incurred by Bromet in the matter of that action. Really, one has to ascertain how far the costs incurred by Bromet in that action are the natural and proximate result of the document which Raphael had warranted as accurate proving to be inaccurate. There must, it seems to me, necessarily have been an assessment of damages and so far as the writ and pleadings are concerned I do not think anyone will dispute but that those must be paid by Raphael. One has to see what was a reasonable course for Bromet to have pursued, having regard only to the state of things arising out of the breach of warranty, I will call it for convenience, that arises in the present case. I do not think that any of the costs which have resulted from Bromet having wrongfully built ought to be borne by Raphael, but I think that if one treats this case in the same way as one would have done if, instead of there being an actual building by Bromet there had been either a formal commencement or a threat to commence such as would have justified an action by Hooper, then I think one ought with regard to these costs to consider what would have been the reasonable and proper course for Bromet to have pursued. Now, it seems to me that what Bromet ought to have done under those circumstances

would be to take care that he did not omit in his defence any defence which, if Raphael had had the conduct of the defence himself, he, Raphael, would have set up. Now, it is said that several of these defences—I am not sure that Mr. Jenkins did not contend all of them—were reasonable defences for Bromet to set up in respect of his relation to Raphael, but I cannot agree to that. I do not know really how far costs and expenses were incurred (the taxing master will be able to ascertain that) in respect of a denial that the deed of 1854 was, at all events in the first instance, the governing deed, but if expense was incurred it was a very unreasonable expense to incur. Then it is said that with regard to the defence based upon the licence that was obtained from the liquidator, who was treated as if he had been one of the vendors, that those costs ought to be paid by Raphael. I do not think they ought. It seems to me that such a defence was a hopeless defence. Then it is said that the building scheme which was set up had gone as a whole because the various purchasers upon the estates had all given up observance of the scheme by mutual consent. As to that the learned judge had not the slightest doubt, and said it was a perfectly hopeless matter and unarguable. That again, I think, is part of the expense against which Raphael is not bound to indemnify Bromet. Then it was said that Hooper, this particular plaintiff, by his own conduct had disentitled himself to sue. As to that matter the learned judge seems to have had some doubt. I think, therefore, that that is a reasonable defence against which Raphael ought to indemnify Bromet. The outcome, therefore, of my decision is: first, that there was a binding scheme; secondly, that under that scheme Hooper had a right to sue Bromet; thirdly, that there was a material difference between the deed of 1854 and the later document attached to the letter of indemnity; fourthly, that the one respect in which really Bromet has suffered damage by reason of that difference is in respect of the matters that I have already alluded to as to building lines, and the difference between the obligations of the building owners under the one document and under the other. With regard to the damages I entirely agree with Farwell, J. that in so far as the quantum of available building land has been diminished Raphael must bear the damage; but not in respect of the building or pulling down of the buildings. But in respect of the costs that Bromet has incurred towards Hooper or on his own account in the action of *Hooper v. Bromet*. I do not think that the whole of those costs can be treated as damages resulting from this breach of warranty. I have been through the various heads I hope sufficiently to enable the taxing master to ascertain the quantum of the liability of Raphael to Bromet. I speak of the taxing master, but the fact that the hand which ascertains the amount is the hand of the taxing master does not make these costs for the purposes of the claim in the third party proceedings any less damages—they are damages. Raphael must have the costs of this appeal.

STIRLING, L.J.—This appeal relates to that portion of the judgment of Farwell, J. which relates to the question of indemnity as between the defendant, Bromet, and the third party Raphael. The indemnity was given upon the

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occasion of the purchase by the defendant from Raphael of certain real estate which was described and known to be subject to certain building restrictions which were stated to be contained in deed of 1854. That deed was not forthcoming, but what was alleged to be a copy of these building conditions was produced by Raphael, and he entered into an agreement to indemnify Bromet, the purchaser, against all costs, damages, and expenses which he might suffer or incur by reason of the building stipulations and conditions affecting the property being other than those set out in the copy. Now, Bromet, the defendant, was minded to build upon his property, and he was brought, in the course of his proceeding to do that, upon referring to the document, to which the indemnity referred, in contact with the liquidator of the company called the Conservative Land Society, who appeared from the copy of the document, which was furnished by Raphael, to have been concerned (it is not necessary to say in what capacity) in the original disposition of the land upon the occasion on which these conditions arose; and, upon communicating with the liquidator, Bromet, the defendant, discovered, at any rate before the 21st Dec. 1901, what were the true building conditions to which the estate was subject, and not only did he do so, but he obtained from the liquidator of the company, which I have treated as being the vendor for the purpose of the building stipulations, a document which purported to release him from adherence to the stipulations contained in the deed of 1854. Having obtained that he proceeded, in Sept. 1902, to build in non-compliance with the actual building stipulations, and also in non-compliance with the stipulations contained in the document furnished by Raphael. Thereupon, a purchaser who was entitled under the building scheme, which is contained in the deed of 1854, brought an action, and that action has succeeded. In his judgment Farwell, J. has held and declared that the defendant Bromet is entitled to an indemnity against Raphael in respect of certain specific matters which I shall mention presently, and also with respect to an indemnity by reason of the defendant being unable to build on the land he bought in accordance with the agreement of the 16th April 1899, which is the indemnity agreement. Now, it is really admitted that if there was a substantial difference between the building stipulations as they appear in the document which was furnished by Raphael and those to which the property is actually subject, that portion of the declaration of Farwell, J. and of the inquiry which is directed in pursuance of it is well founded, and, in my judgment, there is a substantial difference in at least one respect between the conditions as they exist and the conditions which appear in the document referred to by Raphael. That difference is this, that according to the true building conditions as they are now established, and according to the judgment of Farwell, J., the defendant Bromet is precluded from building within 40ft. of the Avenue-road, whereas according to the copy of the document furnished by Raphael the defendant would not have been so precluded. That is quite enough, in my judgment, to entitle the defendant to an inquiry as between him and Raphael as to the damages which have been caused to him by reason of that inability to build, and I say no

more on that subject as I agree with the other members of the court in thinking that we ought not to go into a discussion of all the possible questions that may be raised hereafter upon that inquiry. Now, I will say just a few words upon the specific matters as to which Farwell, J. has held that the defendant is entitled to indemnity. First of all he has held that he is entitled to indemnity with respect to the loss or damage which he has sustained by reason of his having built on the land so far as he has built, and by having to remove the buildings pursuant to the order which he has granted. Now, I, with the utmost respect, differ from the learned judge in regard to that inquiry. I do not think that those damages were incurred as the natural and proximate result of the difference which does exist between the actual building conditions and those which are shown in the document furnished by Raphael. It seems to me that the facts show that the defendant, while knowing what the conditions were, went on to build because he thought that the document which he had procured from the liquidator of the Conservative Land Society was an answer to any action which might be brought against him. Therefore for that short reason I think that these damages ought not to have been given to Bromet by Farwell, J., and ought not to be the subject of the inquiry. Then, secondly, Farwell, J. has declared that by virtue of the indemnity Raphael is bound to indemnify the defendant against the costs directed to be paid by him to the plaintiff by the judgment which he has given in the action. I agree with my Lord in thinking that these costs also are not the natural and proximate result of the difference between the two documents which we have to consider, but they are the result of the defendant Bromet proceeding to build in reliance on the document which he obtained from the liquidator of the land society, and in proceeding to build with full knowledge of the true conditions which affected it. Under the circumstances I think the order which is proposed by my Lord is right, and, therefore, the appeal ought to be allowed to this extent.

COZENS HARDY, L.J.—A great point was made by counsel for the respondent that the so-called terms and conditions, or what was called here the warranted copy, did not show any building scheme in the sense of a scheme containing any rights among purchasers *inter se*. I cannot doubt that purchasers buying under that scheme, apart from anything else, undertook a liability not merely to the vendor, but to the purchasers of other lots. The contrary view would, I think, be attended with great danger to the persons who buy building estates on the faith of a plan with stipulations of this kind. It is said that that doctrine has no application here for two reasons, one is the provisions of clause 23. I do not think that such a clause determines a building scheme. With reference to clause 24, I adopt the view which was thrown out by Stirling, L.J. that that only applies to the unsold portion of the estate and is spent and done with, and has ceased to have any application the moment there has been a sale of any plot to a purchaser. That being so, I think it is clear that there is some liability on the part of Raphael to indemnify the

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respondent Bromet—a liability in damages. Whether this was a case for the application of the third party order I have very great doubt. I do not think it was, but that really is not open now; that objection was not taken below, and we are bound to consider that the case is properly brought before us under that third party order. Then it sought to make Raphael liable under this peculiar and limited indemnity for the costs of building contrary to the covenant and pulling down the buildings erected by Bromet. I confess I can see no ground for so doing. Nor can I think it would be reasonable to hold that he is liable for the costs of this extremely protracted and expensive litigation, in which, as appears by the order itself, no less than thirteen witnesses were called in a trial extending over three or four days. It cannot be right that the costs of all those issues should be thrown upon Raphael as the indemnifying party; and in giving Bromet the costs proposed by my Lord, we are giving him as much as he is entitled to, and certainly more than he would have obtained in an indemnity action.

Solicitors: *Ralph Raphael and Co.; James Morley.*

Tuesday, Feb. 3.

(Before COLLINS, M.R., ROMER and
MATHEW, L.JJ.)

SMITH v. LEIGH UNION ASSESSMENT
COMMITTEE. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Rating—Poor rate—Appeal against assessment—Appearance of assessment committee as respondents—Consent of guardians—Notice to guardians—Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39), s. 2—Divided Parishes and Poor Law Amendment Act 1882 (45 & 46 Vict. c. 58), s. 12.

Sect. 2 of the Union Assessment Committee Amendment Act 1864 provides that the assessment committee of a union may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to an appeal to quarter sessions against a poor rate.

Sect. 12 of the Divided Parishes and Poor Law Amendment Act 1882 provides that where under the Poor Law Amendment Act 1834, or any of the Acts amending the same, the consent in writing of a majority of the guardians of a union is required, a fourteen days' notice shall be given to each guardian of the meeting at which the resolution giving the consent is passed.

Held, affirming the decision of the King's Bench Division (89 L. T. Rep 607), that sect. 12 of the Act of 1882 does not have reference to sect. 2 of the Act of 1864, and therefore it is not a condition precedent to the power of the guardians to give their consent under sect. 2 of the Act of 1864 that a fourteen days' notice should be given of the meeting at which such consent is given.

APPEAL from the decision of the Divisional Court (Lord Alverstone, C.J., Lawrance and Kennedy, JJ.) upon a special case stated for the opinion of the court, by the Court of Quarter Sessions for the County Palatine of Lancaster, upon an appeal against a certain poor rate.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

The special case is set out in the report of the judgment of the Divisional Court (89 L. T. Rep. 607).

The facts were, shortly, as follows:—

When the appeal was called on for hearing, counsel claimed to appear and be heard on behalf of the assessment committee of the Leigh Union appearing as respondents to the appeal in the name of the guardians of the union.

Counsel appearing on behalf of the appellant called upon the counsel appearing on behalf of the assessment committee to prove that the committee had duly obtained the consent of the guardians to their appearance as respondents to the appeal.

It was then proved or admitted that on the 20th March 1903 the clerk of the committee had sent to each of the guardians a notice that the consent of the guardians to the appearance of the committee as respondents to the appeal would be proposed at the next meeting of the board of guardians; and that at a meeting of the board of guardians on the 25th March following a resolution was passed consenting to the committee appearing as respondents to the appeal.

Counsel for the appellant then contended that under sect. 12 of the Divided Parishes and Poor Law Amendment Act 1882 the notice given by the clerk of the committee to the guardians ought to have been given fourteen days before the meeting of the board, and that, as a fourteen days' notice had not been given, the committee had not fulfilled a condition precedent to their obtaining the consent of the guardians.

Counsel for the assessment committee contended that sect. 12 of the Act of 1882 had no application to a consent of the guardians given under sect. 2 of the Act of 1864.

The Court of Quarter Sessions held that the objection raised on behalf of the appellant must be sustained, and refused to hear counsel for the assessment committee on the merits of the appeal, but agreed to state a case for the opinion of the High Court on the question whether the assessment committee were entitled to be heard.

The Divisional Court (Lord Alverstone, C.J., Lawrance and Kennedy, JJ.) held that the preliminary objection was a bad one, and sent the case back to the quarter sessions that the appeal might be heard: (89 L. T. Rep. 607).

The appellant appealed.

The Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39), with reference to an appeal heard by quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act 1862 applies, provides as follows:

Sect. 2. The assessment committee of such union may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to such appeal, but in the name of the guardians of such union, in like manner and with the same incidents, and subject to the same liabilities, and entitled to the same remedies and rights, as in the case of persons other than the overseers to whom notice of appeal may be given.

The Divided Parishes and Poor Law Amendment Act 1882 (45 & 46 Vict. c. 58) provides as follows:

Sect. 12. Where, under the Poor Law Amendment Act 1834, or any of the Acts amending the same, the consent

in writing of a majority of the guardians of a union, or the managers of a school district, is required, it shall be deemed a sufficient compliance with such requirements if a resolution giving consent is passed at a meeting of the guardians or managers, of which meeting and of the business to be transacted thereat, not less than fourteen days' notice shall be given to each guardian or manager.

A. T. Lawrence, K.C. (Boyle, K.C. and W. Mackenzie with him) for the appellant.—Under sect. 2 of the Union Assessment Committee Act 1864 the assessment committee could not appear as respondents to the appeal without first obtaining the consent of the guardians of the union. Under sect. 12 of the Divided Parishes Act 1882 that consent could not be obtained unless a fourteen days' notice were given to each guardian before the meeting at which the consent was asked for. In fact, the only notice given was a four days' notice, and the assessment committee have therefore failed to comply with the condition precedent to their power of appearing as respondents. It is true that sect. 2 only refers to "the consent of the guardians," whereas sect. 12 refers to "the consent in writing of a majority of the guardians." Two points arise there. First, every consent of the guardians must be in writing. Sect. 15 of the Poor Law Amendment Act 1834 (4 & 5 Will. 4, c. 76) empowers the poor law commissioners to make rules, orders, and regulations for the guardians, and under the rules and orders that have been made the guardians are bound to keep a clerk, whose duty it is to keep minutes of all resolutions passed at a meeting of the guardians and to enter them in a book, and these minutes are to be signed by the chairman of the next meeting. Secondly, by the proviso of sect. 38 of the Poor Law Amendment Act 1834 no guardian can act as such except as a member and at a meeting of the board. So that the consent of the guardians cannot be given except by a resolution of the majority at a meeting of the board, and such resolution must be reduced into writing. Therefore every "consent of the guardians" must be a "consent in writing of a majority of the guardians." That is the ordinary way in which the guardians must do their business, although there are certain special things as to which the Legislature has made special requirements, as, for instance, with regard to the matters mentioned in sect. 32 of the Poor Law Amendment Act 1834. If sect. 2 of the Act of 1864 is not to be construed as referring to a consent given by the guardians in the ordinary way in which they do their business, it must be construed as referring to a consent given by all the guardians. The difficulties of getting such a consent would be such that that construction cannot be the right one. On behalf of the assessment committee it is suggested that sect. 12 of the Act of 1882 has reference only to cases where there is a special legislative enactment that a "consent in writing of a majority of the guardians" must be obtained. As to that, it is to be observed that sect. 12 begins: "Where under the Poor Law Amendment Act 1834 or any of the Acts amending the same." It deals with the effect of several Acts taken as a whole, not with any definite section of any particular Act, and only one section—viz., sect. 23 of the Poor Law Amendment Act 1834—can be pointed out in which the Legislature specifically requires a "consent in writing of a majority of the guardians." Sect. 12 of the Act of 1882 was surely

intended to refer to something more than sect. 23. If the Legislature only intended to refer to that section, it would have been simple to have said so. The form of sect. 12 shows that it must be held to apply to something more than sect. 23.

Ryde for the assessment committee.—Sect. 12 of the Act of 1882 has no application to sect. 2 of the Act of 1864, and therefore a fourteen days' notice of the meeting was not necessary here. Sect. 2 does not in terms require the guardians' consent to be in writing. It is true that the guardians are directed to have a clerk whose duty it is to keep minutes of what is done at a meeting of the guardians, and to enter them in a minute-book. Such an entry is evidence of what was in a resolution passed at a meeting, but the consent of the guardians would be given by their passing a resolution. A resolution of the guardians does not become void if the clerk fails to record it. He has no power to annul a resolution of the guardians. Art. 202, which deals with his duties, does not contain negative words, and is therefore not mandatory, but merely directory in character:

R. v. Leicester Justices, 7 B. & C. 6.

Formerly there were several statutory provisions requiring the consent of the guardians in certain cases to be in writing. These were repealed one by one, and then in 1882 the Divided Parishes Act was passed, the object of sect. 12 being to provide one comprehensive enactment applicable to all sections of Acts which require the guardians' consent in writing, instead of dealing with such sections one by one. The object of that section is to remove restrictions. The appellant is seeking to use it to impose restrictions. Further, by making sect. 12 applicable to a consent sought under sect. 2, the assessment committee would have to get the consent of a majority of guardians. This would in effect alter the provisions of sect. 2, which only requires "the consent of the guardians."

A. T. Lawrence, K.C. in reply.

COLLINS, M.R.—I have come to the conclusion that this appeal fails. The question arises in this way. The assessment committee of the union appeared as respondents in an appeal to quarter sessions by a ratepayer against an assessment to poor rate. The question is whether they were empowered to do so. Their right to do so depends upon sect. 2 of the Union Assessment Committee Amendment Act 1864. [His Lordship read the section.] The ratepayer contends that the conditions required by sect. 2 have not been complied with, because, he says, they did not obtain "the consent of the guardians" of the union such as the section requires. To show what is the meaning of the "consent of the guardians," the ratepayer referred to sect. 12 of the Divided Parishes Act 1882, which is as follows: [His Lordship read it.] Under that section he says that a fourteen days' notice should have been given to each guardian before they could give their consent to the application of the assessment committee. Now, that section has reference to cases where the consent "in writing" of a majority of the guardians was necessary, and it substitutes new provisions for the provisions that were formerly applicable in such cases. Therefore, in order to make sect. 12 applicable to the present case, it is necessary to show that "the consent of the

guardians" required by sect. 2 of the Act of 1864 is a "consent in writing." As the appellant is the person who is setting up an alleged failure by the assessment committee to see that the conditions precedent to their right to appear have been performed, it lies on him to show that the consent of the guardians can only be given "in writing." Now, sect. 2 itself does not say anything as to the consent being in writing. It only requires the consent to be given, and it is not denied that the guardians did in fact give their consent at one of their meetings. The only question, therefore, is whether it is right to read into sect. 2 a requirement that the consent must be in writing. As I have said, sect. 12 of the Act of 1882 deals only with cases where it was necessary that the consent of the guardians should be in writing, and in those cases it provides new machinery in the place of what has been in existence. It was contended on behalf of the appellant that it is clear, upon a consideration of the older Acts, that under the Poor Law Amendment Act 1834 the guardians could not (except in two or three specified cases) act as guardians otherwise than at a meeting which was always subject to the rule that any resolution passed by them must be put into writing and entered by their clerk in a minute-book, so that whatever might be done by them, as guardians, was always done with written evidence of what they had agreed to. It is said, therefore, that, because in every case there is written evidence of what the guardians may have agreed to, it follows that a resolution of the guardians must be in writing, and that when sect. 2 mentions the consent of the guardians it must mean their consent in writing. It seems to me that it would be a very extraordinary thing to introduce a limitation of that sort into an Act of Parliament, not by any express enactment, but by machinery. It would seem to me to be a strained construction, and one not in accordance with the history of the legislation on this matter. Sect. 23 of the Poor Law Amendment Act 1834 provided that it should be lawful for the Poor Law Commissioners, "by any writing under their hands and seal, by and with the consent in writing of a majority of the guardians of any union," to direct the guardians to build a workhouse or to do certain other things. That is a specific enactment that "the consent in writing" of a majority of the guardians is a necessary condition for the doing of the things named in the section. It is imposed as a special condition and not indirectly, by virtue of any rules or regulations or other machinery. That shows that there is a specific class of legislation which for certain things specially requires the consent of the guardians to be given in writing, which is a very different thing from trying to introduce the machinery by which the guardians' consent is ordered to be recorded. But the matter does not stop there. There were formerly other sections in the Poor Law Amendment Act 1834 which required the guardians' consent in writing to be given for certain purposes. Those sections were repealed one by one, until at last it was thought that, instead of repealing those provisions in that way, it would be better to sweep away at once any provisions of that kind that might still be left, and to replace them by one uniform procedure. That was the object of sect. 12 of the Divided Parishes Act 1882. That section pro-

vides that in cases where the consent in writing of a majority of the guardians had been necessary, it shall in future be sufficient if the procedure there provided is observed. The section refers to cases where the consent in writing was specifically required, not to cases where there was no such requirement. It is also to be noticed that, instead of the consent of a majority of guardians, the consent is to be given by the majority at a meeting. It was argued on behalf of the appellant that sect. 2 of the Act of 1864 provides for "the consent of the guardians" being first obtained, and it is said that the consent of the majority of guardians at one of their meetings is not the same thing as "the consent of the guardians." I do not agree with that view, but I prefer to base my judgment on broader grounds. Sect. 12 of the Act of 1882 is directed to special enactments which imposed as a condition precedent in certain cases the obtaining of the consent of the guardians in writing, and therefore does not have reference to sect. 2 of the Act of 1864. The appellant has therefore failed to show that under sect. 2 it is a condition precedent to the right of the assessment committee to appear as respondents to the appeal that they should have obtained the guardians' consent in writing. The appeal must be dismissed.

ROMER, L.J.—I agree. The appellant's suggestion is that the "consent in writing of a majority of the guardians" mentioned in sect. 12 of the Divided Parishes Act 1882 includes the "consent of the guardians" mentioned in sect. 2 of the Union Assessment Committee Act 1864. I cannot agree with that suggestion. It seems to me that the Legislature intended to limit the effect of sect. 12 to the cases expressly mentioned there—i.e., to cases where there were statutory provisions to the effect that the consent of the guardians which had to be obtained must be in writing, and must be the consent of the majority of the guardians. One can see the reasons why the Legislature should have considered that special provisions ought to be made for the cases expressly referred to by sect. 12, because in many cases there would probably be great difficulty in obtaining the consent in writing of a majority of the guardians, and in proving that the consent had been obtained. It was to meet those difficulties that sect. 12 was passed. The section does not deal with the ordinary cases in which nothing more than the consent of the guardians is necessary. Under the Act of 1864 the consent would be one given by the majority of the guardians present and voting at a meeting, and perhaps it would not be absolutely necessary to obtain a majority of the guardians present, because in case of an equal division the chairman might have a casting vote and so make a majority of votes, though there was no majority of persons. If a consent were obtained by such a resolution as that, I doubt if it could fairly be described as a consent in writing by a majority of the guardians, though it were properly entered in the minutes of the meeting. Compare the words in the first part of sect. 12 of the Act of 1882 with the words in the latter part of the section. The first part speaks of "the consent in writing of a majority of the guardians," and the latter part says, "if a resolution giving consent is passed at a meeting of the guardians." Those expressions seem to be contrasted with each other, not used as equiva-

lents. That view is corroborated by the words "it shall be deemed a sufficient compliance." Moreover, if sect. 12 were intended to include and apply to all consents of guardians, why should not the Legislature have said so clearly? I agree that the appeal fails.

MATHEW, L.J.—I am of the same opinion. It is contended by the appellant that sect. 12 of the Act of 1882 applies to every consent which has to be obtained from guardians. But it applies in terms to cases where the consent must be in writing, and we know that there was a time when for certain purposes such a consent was required by Act of Parliament. It was to get rid of the inconveniences caused by those requirements that sect. 12 was passed; and it only refers to cases of that kind. I think, therefore, that the appellant's contention fails, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *Frederick Kinch*, agent for *A. H. Hayward*, Leigh.

Solicitors for the respondents, *Robbins, Billing, and Co.*, agents for *Marsh, Son, and Calvert*, Leigh.

Thursday, Feb. 11.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

SANDERSON v. COLLINS. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Bailment—Duty of bailee—Loan of chattel for consideration—Injury to chattel by negligence of bailee's servant—Act of servant outside the scope of his employment—Liability of bailee.

The plaintiff, who was a coachbuilder, lent a carriage to the defendant while the defendant's carriage was being repaired by the plaintiff.

The defendant's coachman, without the knowledge or permission of the defendant, took out the carriage and went for a drive with some friends. In the course of the drive he negligently drove into a tramcar, and the carriage was damaged.

In an action by the plaintiff to recover damages for the injury done to his carriage:

Held, reversing the decision of the Divisional Court (89 L. T. Rep. 42), that, as the defendant had not personally been guilty of any negligence and as his coachman in taking out the carriage had acted outside the scope of his employment, the defendant was not liable to the plaintiff for the damage done to the carriage.

Coupé Company v. Maddick (65 L. T. Rep. 489; (1891) 2 Q. B. 413) distinguished.

APPEAL by the defendant from the judgment of the Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.) reversing the decision of the judge of the County Court of Newcastle-upon-Tyne.

The plaintiff was a coachbuilder and brought this action in the County Court to recover the sum of 22l. 18s. 6d. for damage done to a four-wheeled dogcart which he had lent to the defendant.

In June 1902 the defendant had sent his dogcart to the plaintiff to be repaired, and the plaintiff had lent a dogcart of his own to the defendant

for his use during the time that the defendant's dogcart was being repaired.

On the 30th June 1902 the defendant was out driving in the dogcart that had been lent to him.

On his return home at five o'clock in the afternoon, it was the duty of his coachman to put the dogcart into the coach-house and lock it up. The key of the coach-house was kept in the hall of the defendant's house.

It did not appear clearly whether or not the dogcart was in fact locked up in the coach-house, but that night the defendant's coachman, without the defendant's knowledge or permission, took out the dogcart, put in the horse, and went out for a drive with some friends to see the bonfires that were being lit in honour of the King's Coronation.

Between eleven and twelve o'clock that night the coachman and his friends were all the worse for drink, and he negligently drove into a tramcar and damaged the dogcart.

At the trial of the action the County Court judge in giving judgment said that the case arose out of the wrongful act of the defendant's coachman in taking out the horse and carriage. The carriage belonged to the plaintiff, and had been temporarily lent to the defendant while his own was being mended, and the plaintiff said the defendant ought to pay for the damage. The defendant resisted the claim on the ground that what the servant did was not in the course of his employment, and that there was no negligence on his part. There was no question that the defendant could not be made liable were it not for the decision of the Divisional Court in *Coupé Company v. Maddick* (65 L. T. Rep. 489; (1891) 2 Q. B. 413). However, he thought he was justified in distinguishing between the two cases, and he did so upon the ground that the defendant's servant, in wrongfully taking the carriage out of his master's stable and damaging it, appeared to him to be doing a tortious act, in respect of which both the plaintiff and the master had a right of action for damages. He therefore gave judgment for the defendant.

Upon the plaintiff's appeal the Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.) held that the case of *Coupé Company v. Maddick* (*ubisup.*) was indistinguishable, and they therefore reversed the decision of the County Court judge and gave judgment for the plaintiff.

The case is reported 89 L. T. Rep. 42.

The defendant appealed.

Manisty, K.C. (*Meynell* with him) for the defendant.—The County Court judge was right in holding that the defendant was not liable. The case of *Coupé Company v. Maddick* (65 L. T. Rep. 489; (1891) 2 Q. B. 413) is distinguishable, or, if it be not distinguishable, I submit that it is wrong and should be overruled. There was no special contract here between the plaintiff and the defendant with regard to the dogcart, and the defendant's liability is therefore that which is ordinarily implied by the law as the liability of a bailee for consideration. It is well established that a bailee such as the defendant is only bound to take reasonable care of the chattel. The County Court judge has found that the defendant was not personally guilty of any negligence, so that the only ground upon which the defendant can here be held liable is the responsibility which a master is under for the

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

acts of his servant. A master is not universally liable for the misdeeds of his servants; he is not responsible for any wilful or malicious injury done by his servant without his knowledge or consent; but only for injuries which are done by the servant in the master's service in the course of his employment:

Sir William Jones on Bailments, p. 89, note 43 to edit. of 1833.

The County Court judge has found that the defendant's coachman was acting tortiously in taking out the dogcart. That is to say, the coachman was not acting in the course of his employment, and his acts, so far as the liability of his master was concerned, were the acts of one who was an entire stranger to his master. The coachman in taking out the dogcart was guilty of conversion, because he took it out of the possession of the defendant. A bailee of goods on hire is not liable for their loss through their being stolen by his servants if he has not been personally guilty of any negligence:

Finucane v. Small, 1 Esp. 315.

The coachman took out the dogcart "on a frolic of his own," as Parke, B. said in *Joel v. Morison* (6 C. & P. 501), wholly unconnected with his master's business, and his master is not liable for his negligence:

Mitchell v. Crassweller, 20 L. T. Rep. O. S. 237; 13 C. B. 237.

That case was followed in

Storey v. Ashton, L. Rep. 4 Q. B. 476.

[COLLINS, M.R.—That case and *Whatman v. Pearson* (18 L. T. Rep. 290; L. Rep. 3 C. P. 422) are on opposite sides of the dividing line.] In *Coupe Company v. Maddick* (*ubi sup.*), although the servant was driving for his own purposes at the time when his negligence caused the damage, yet he had been put in control of the carriage by his master and had been told to drive it to a certain place. Here the defendant's servant acted wrongfully in getting control of the carriage. His acts were entirely severable from his employment. He referred also to

Mears v. London and South-Western Railway Company, 8 L. T. Rep. 190; 11 C. B. N. S. 850.

Robert Wallace, K.C. and Mundahl for the plaintiff.—The defendant is liable on his contract of bailment for the damage done to the dogcart. He intrusted it to the care of his servant. His servant was not guilty of a conversion of the dogcart. The servant did nothing to deprive the plaintiff of the possession of it. He was merely guilty of a breach of discipline. He was the custodian of the cart for his master. The scope of the coachman's employment was a matter agreed on between the defendant and the coachman, and cannot affect the construction of the contract of bailment made between the plaintiff and the defendant. The construction of that contract is the real point on which this case turns. Decisions on cases of tort are inapplicable to a case of the construction of a contract. A bailee's liability under his contract cannot be lessened by instructions which he may afterwards give to his servant. By his contract he is responsible for injury done to the chattel by negligence—i.e., his own negligence or the negligence of anyone into whose hands he allows the chattel to come. Different considerations apply to the duty of returning

a chattel in the condition in which it was handed over and the duty of keeping it with proper care.

COLLINS, M.R.—This is a case of some interest, but it seems to me to be a clear one as soon as one gets to the principles which govern the law of bailment. The defendant was the owner of a carriage which he intrusted to the plaintiff for repair, and during the time occupied by the repairs the plaintiff, as is very commonly done, lent to the defendant a carriage for use in the meantime. That was not an involuntary nor a gratuitous bailment, but a bailment for mutual consideration. Now, the duty of a bailee under such circumstances is well settled, and the law, as laid down by Sir William Jones in his book on Bailments, has had the sanction of many learned writers and judges. The bailee's duty is to take reasonable care—i.e., ordinary care—of the chattel which is the subject of the contract. That is the first principle, and there is no doubt about it. Now, what happened in the case now before us? The defendant had had the dogcart out at three o'clock in the afternoon, and he used it till five o'clock. When he came back it was the duty of the servant to put the dogcart back in the coach-house, the key of which was usually kept in the hall of the defendant's house. Whether or not the dogcart was in fact put inside the coach-house on the afternoon in question is not quite clear. It may perhaps have been left outside. Then later on in the evening the defendant's servant took it out, contrary to orders and purely and solely for his own purposes, and went off "on a frolic of his own" to see the Coronation bonfires. He and some friends he invited to come with him got drunk, and he negligently drove into a tram-car and damaged the dogcart. The dogcart was returned damaged to the plaintiff, who has consequently brought this action against the master of the servant. The County Court judge held that the act of the defendant's servant was not within the scope of his authority, and therefore could not be considered as the act of the defendant. He thus disconnected the defendant from the act of his servant, and, as he found that the defendant was not personally guilty of negligence, he held that the defendant was not liable to the plaintiff for the damage done to the dogcart. That decision was reversed by the Divisional Court chiefly on the authority of *Coupe Company v. Maddick* (*ubi sup.*), although Channell, J. said that if the carriage got into the possession of somebody for whose driving the defendant was not responsible, *prima facie* the carriage would not then be used for purposes contrary to the terms of the bailment, and he instanced the case of a burglar breaking into a stable and stealing the carriage as a case in which the bailee would not be liable unless he had been guilty of negligence in letting the burglar in. The defendant has appealed from the decision of the Divisional Court. Now, it seems to me that the first thing is to clear one's mind as to the facts of the relations existing between the defendant and his servant. The obligation of the defendant as bailee was only to take reasonable care of the thing bailed, and he is bound in that respect for an act of his servant if done in the course of his employment. But his obligation does not extend so as to cover the acts of a person who is not his servant, or the

acts of his servant beyond the scope of his authority. If a burglar, or someone who was a stranger to the defendant, had taken the dogcart, and brought it back damaged, the defendant would not be liable, if he was not guilty of negligence, because the act of the stranger was not the defendant's act. There would be no nexus between the defendant and the burglar. If the defendant's coach-house had been negligently left open so as to bring about the taking of the dogcart by the burglar, the defendant might be responsible on the ground of there having been a failure of due care on the part of his servant in leaving the coach house open for which the defendant would be responsible. In the present case the dogcart was not taken out by a burglar, but, so far as the defendant was concerned, the act of the servant was, on the findings of the County Court judge, the same as if it had been the act of a burglar—that is to say, it was the act of a person for whom the defendant was not responsible. The defendant had employed a competent servant and directed him to lock up the dogcart in the coach-house and give back the key. The defendant was not guilty of any negligence. The hypothetical case of a burglar taking out the dogcart is only an instance of something being done with the dogcart not under the mandate of the defendant, and, so far as concerns the defendant's liability here, is just the same as the case of an act done by the defendant's servant outside the scope of his authority. His servant was not a burglar, but he committed an act which broke the nexus between him and his master. The act therefore cannot be considered as an act done by the master—that is, it was not done by a person for whom he was responsible. Therefore, as there was no want of due care on the part of the defendant, I think that he is not liable in this action. That seems to me to be in accordance with the law as laid down in the old cases. With regard to the opinion expressed by the learned judges in the Divisional Court, I think that there is no necessity for us to say whether we think that *Coupe Company v. Maddick* (ubi sup.) was rightly decided or not. The case seems to me to be clearly distinguishable from the present case. The fact which distinguishes it is a slight one, but it makes all the difference between the two cases. There the act of the servant was within the scope of his authority. His master after driving home in his carriage had told him to take it to his stable, which was 200 yards off. The coachman drove off, but, instead of going directly to the stable, he drove in another direction with a friend whom he picked up. He disobeyed the orders of his master in so doing, but he was driving the carriage under the express mandate of his master. That fact goes to the root of the decision in that case. I do not say whether the decision was a good one in law, but the case is distinguishable from the present case on those grounds. For these reasons I cannot agree with the decision of the court below, and I think that the appeal must be allowed.

ROMER, L.J.—I am of the same opinion. I agree with all that my Lord has said, and I desire to add only a few words. It is admitted that no special agreement was entered into as to the defendant's obligations with regard to the dogcart when it was lent to him by the plaintiff. Therefore the question is, What obligation is implied?

In my opinion there was no implied obligation on the defendant to insure the safety of the dogcart. The bailment was an ordinary one made for the mutual benefit of the parties, and the obligation of the bailee in such a case is now well settled to be an obligation to take reasonable care of the chattel. The defendant is not liable unless the damage was caused by his own negligence or by the negligence of his servant in the course of his employment. It is clear that he was not personally guilty of any negligence, and that his servant was not acting in the course of his employment when he took out the dogcart and damaged it. That being so, the defendant is not liable in this action. As regards the authorities, my view is that *Coupe Company v. Maddick* (ubi sup.) is only supportable on the fact that there the servant was acting in the course of his employment. In so far as the court in that case may have been of opinion that a bailee is liable for damage done to the chattel through the negligence of his servant when acting outside the scope of his employment, I can only say that I think that they were wrong.

MATHEW, L.J.—I am of the same opinion. In the absence of want of reasonable care there was no liability on the defendant for what might happen to the dogcart. The cart was placed by the defendant for certain purposes in charge of his servant, and the defendant was responsible for the servant's negligence within the scope of his employment. No act of conversion of the dogcart, whether by a servant or by anyone else, was contemplated by the parties to the contract of bailment. The servant was guilty of a conversion of the dogcart, and, as there was no negligence on the part of the defendant, he is not responsible to the plaintiff. As to the authorities referred to, I agree with what my Lord has said.

Appeal allowed.

Solicitor for the plaintiff, *Ernest A. Fuller*, for *Dickinson, Miller, and Dickinson*, Newcastle-upon-Tyne.

Solicitors for the defendant, *Cree and Son*, for *Hugh Burns*, Newcastle-upon-Tyne.

Friday, Feb. 19.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

HARSE v. PEARL LIFE ASSURANCE COMPANY. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (life) — Want of insurable interest — Void policy — Innocent misrepresentations of insurance agent as to validity of policy — Ignorance of assured — Mistake of law — Recovery back of premiums paid by assured.

The plaintiff was induced to insure his mother's life with the defendant insurance company by the representations of the company's agent that the policy would be a valid one. These representations were made by the agent innocently, and without any fraudulent intent.

In an action by the plaintiff to recover back from the company the premiums he had paid, alleging that the policy was void for want of insurable interest :

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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Held, reversing the judgment of the Divisional Court (89 L. T. Rep. 94; (1903) 2 K. B. 92), that, assuming the policy to be void under the Life Insurance Act 1774, yet the misrepresentation of the agent would be a misrepresentation of law, and, the parties being in pari delicto, the plaintiff could not recover in the action.

APPEAL by the defendant company from the judgment of the Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.) reversing the judgment of the deputy judge of the Oxford County Court.

The action was brought to recover a sum of 43l. 8s. from the defendants, an insurance company, being the amount of the premiums which the plaintiff had paid to the defendants upon two policies of insurance, the ground of the action being that the policies were void and that there was therefore a total failure of consideration.

The first policy was dated the 29th April 1889, and was a policy for the sum of 10l. 4s. at a weekly premium of 6d., and purported to be granted by the defendants to the plaintiff on the life of the plaintiff's mother Ann Harse.

Under this policy the plaintiff had paid to the defendants premiums which amounted in all to the sum of 12l. 16s.

The plaintiff effected this policy at the suggestion of an agent of the defendant company who had pressed him to insure his mother's life, and in the proposal form the pecuniary interest of the plaintiff in the life insured was stated to be "son for funeral expenses."

The plaintiff's mother had no money of her own, and was living with him and kept house for him.

The second policy was dated the 18th May 1891, and was a policy for the sum of 18l. 12s. at a weekly premium of 1s. It was made out in the name of Ann Harse, the plaintiff's name not being mentioned in it, but it was effected on the suggestion of an agent of the defendant company to the plaintiff, and the plaintiff paid the premiums due under it. Though it was taken out in the name of Ann Harse the plaintiff alleged that it was understood to be for his benefit.

When these policies were taken out the plaintiff knew nothing as to the necessity of his having an insurable interest in his mother's life, and he was induced to take them out on the direct assurance of the defendant company's agents that the policies were valid.

In 1902 the plaintiff was told that the policies were void for want of insurable interest and, his mother being still alive, he brought this action in the Oxford County Court to recover 43l. 8s., the amount he had paid the defendants as premiums on the policies.

At the trial of the action the deputy judge put the following questions to the jury:

(1) In the jury's opinion had the person for whose benefit the assurance was really made a real pecuniary interest under either policy?—Yes. (2) Did the agent in either case make a statement which was false in fact? If so, what was it?—No. (3) Did the agent in either case know that what he was saying was untrue?—No. (4) Was either policy or were both taken out in consequence of what the agent said?—Yes. (5) Did the agent in either case represent that the policy was a good one?—Yes. (6) Were the agents in what they

did, or was either of them, guilty of any fraud, and if so in what respect?—No.

The deputy County Court judge said that on the death of the plaintiff's mother, her funeral expenses must practically fall on the plaintiff and there was never any chance of his declining to pay them, and the learned judge therefore held that the plaintiff had an insurable interest in his mother's life, and the policy being a valid one the premiums could not be recovered back. As to both policies he held that even if they were void the premiums could not be recovered back, the representation of the agents as to the validity of the policies being only a representation of law and being made innocently. He therefore gave judgment for the defendant company.

Upon the plaintiff's appeal the Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.) held that the fact that the plaintiff would at some future date be under a moral, though not a legal, obligation to pay for his mother's funeral expenses did not give him an insurable interest in his mother's life and the first policy was therefore void; that the second policy was really taken out for the benefit of the plaintiff and was also void; and that, as to both policies, the plaintiff being a person ignorant of the law in insurance matters, was entitled to rely upon the representations made by the defendants' agents that the policies would be good and he was therefore not *in pari delicto* with the defendants and was entitled to recover back the premiums he had paid.

The case is reported 89 L. T. Rep. 94; (1903) 2 K. B. 92.

The defendants appealed.

Sir Edward Clarke, K.C. and S. T. Evans, K.C. (*Parfitt* with them) for the defendant company.—First, the two policies are valid. The plaintiff had a pecuniary interest in his mother's life sufficient to satisfy the statutory requirements. His mother had no money of her own, and she was living in his house; so that upon her death he would morally be bound to pay her funeral expenses. It is not necessary that he should be under any legal obligation to pay these expenses. In a case where a County Court judge held that the plaintiff in the action had an insurable interest in the life of a young girl, her half sister, because there was a reasonable probability that in the event of the girl's death there would be nobody to undertake her burial, except the plaintiff, this decision was affirmed by the Divisional Court:

Barnes v. London, Edinburgh, and Glasgow Life Insurance Company, (1892) 1 Q. B. 864.

The second policy was in form taken out by the plaintiff's mother, and was perfectly valid. [*Shearman, K.C.*—In the court below the case was argued upon the assumption that this policy was in fact made for the plaintiff's benefit, and was void because he had no insurable interest in his mother's life, and because his name does not appear in it.] Assuming that both policies are void as the plaintiff contends, he is, nevertheless, not entitled to succeed in this action. A policy effected by a person who has no insurable interest in the life insured is a wagering policy and void, and premiums paid in respect of it cannot be recovered back. That was so held by Mathew, J.:

Howard v. Refuge Friendly Society, 54 L. T. Rep. 644.

Where money has been paid under an illegal

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contract which has been partly carried into effect it cannot be recovered back:

Kearley v. Thomson, 63 L. T. Rep. 150; 24 Q. B. Div. 742.

The plaintiff seeks to get out of that by saying that he was induced to enter into the contracts by the misrepresentations of the defendants' agents. If there had been any misrepresentation of fact, the plaintiff would perhaps be entitled to succeed:

Beattie v. Lord Ebury, 30 L. T. Rep. 581; L. Rep. 7 H. L. 102.

But the principle of relief arising out of misrepresentation is not to be extended to a statement of law which turns out to be an incorrect statement:

Rashdall v. Ford, 14 L. T. Rep. 790; L. Rep. 2 Eq. 750.

There is no attempt here to allege fraud, or any misleading of an ignorant man. The case is simply one of a bargain made by two persons of equal knowledge and intelligence. Both parties made a mistake of law. The representation of the agents that the policies would be binding in law is a representation, not of fact, but of law. The belief of the plaintiff in the opinion of the agents as to a point of law, an opinion which turns out to be wrong, is not enough to entitle the plaintiff to recover. This point as to the invalidity of the policies was raised by the plaintiff. The company has never repudiated its liability under them.

Montague Shearman, K.C. and Cecil Walsh for the plaintiff.—The two policies are void. A moral obligation is not enough to create an insurable interest. The second policy is also void, because the plaintiff's name is not inserted in it. In every policy on the life of another the name of the person who is really interested at the time of effecting the policy, or for whose benefit the policy is effected, must be inserted as the person interested; and the omission or erroneous statement of the person interested *per se* avoids the policy, whether it be a wagering policy or not:

Hodson v. Observer Life Assurance Society, 26 L. J. 303, Q. B.

The policies being void, the plaintiff is entitled to be repaid the premiums he has paid under them. The policies were entered into by the plaintiff relying upon the representations of the defendants' agents that they were valid. It is not an answer to the plaintiff's claim to say that the defendants are willing to pay the sum insured if the plaintiff will go on paying the premiums. The representation that the policies were valid was a representation, not of law, but of fact:

West London Commercial Bank Limited v. Kitson, 50 L. T. Rep. 656; 13 Q. B. Div. 360.

That was an action on a bill of exchange drawn on a company which had no power to accept bills and accepted by the defendants, who were directors of the company, for and on behalf of the company. The defendants were held personally liable, as by their acceptance they represented that they had authority to accept on behalf of the company, which, being a false representation of a matter of fact and not of law, gave a cause of action to the plaintiff, who had acted upon it. In the present case the defendant company, or their directors, must have known that

the policies were void, and they cannot protect themselves by sending out an ignorant agent to obtain money by making false statements of law. [ROMER, L.J.—You have not alleged fraud in this action.] The case is on all fours with

British Workman's and General Assurance Company v. Cunliffe, 18 Times L. Rep. 425, 502

[COLLINS, M.R.—It is clear from the report of that case that the ground of the decision in the Court of Appeal was the fraud of the company's agent.]

COLLINS, M.R.—This is an appeal from a judgment of the Divisional Court under the following circumstances. The plaintiff effected with the defendant company, through one of their agents, two insurances upon the life of his mother, and it appears that he had no pecuniary interest in her life except such as might arise from the fact that, under the circumstances in which his mother was living, he contemplated that on her death he would have to pay her funeral expenses. He continued to pay the premiums on these insurances for some years, until in point of fact the amount he had paid in premiums exceeded the sum for which his mother's life was insured. In that state of circumstances he bethought himself that the policies were really illegal, and that he was therefore entitled to be repaid the premiums on the ground that there had been a total failure of consideration. Now I will assume, without deciding the question, that the policies were illegal on the ground that the plaintiff had no insurable interest in his mother's life. That question depends upon the Life Assurance Act 1774 (14 Geo. 3, c. 48), sect. 1 of which enacts that "no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void, to all intents and purposes whatsoever." If the plaintiff's liability to pay his mother's funeral expenses was not an interest in her life within that section, the policies were illegal, and I will assume for the sake of this judgment that that was so. Therefore *ex hypothesi* the plaintiff has paid money to another person under an illegal contract, and the question is whether he is entitled to recover back what he has paid. Now, the plaintiff says, and the jury have so found, that he was induced to take out the policies by the representation made by the defendants' agent that the policies would be valid. The jury have also found that the agent did not know that this representation by him was untrue. The learned County Court judge held that the representation of the agent as to the validity of the policy having been made innocently the plaintiff was not entitled to recover back the money he had paid. That raises the point which was principally argued before us. Now, the general rule of law is perfectly clear that if one of two parties to an illegal contract pays money under it to the other party he cannot recover it back. If he has deposited the money in the hands of a third person, he may revoke his mandate and claim the money back from the person with whom it is

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HARSE v. PEARL LIFE ASSURANCE COMPANY.

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deposited. But when the money has been paid to the other party to the contract, it cannot be recovered. That was decided by my brother Mathew in 1886 with respect to a wagering policy in the case of *Howard v. Refuge Friendly Society* (51 L. T. Rep. 644). The headnote to the report of that case is as follows: "J. H. effected with the defendant company two policies of insurance on the life of his father J. H.; in which he had no insurable interest; according to the policies the premiums were to be paid by weekly payments. J. H., the son, continued to make these weekly payments for some years. J. H., the father, had at first no knowledge of the insurances effected on his life, but when he became aware of them he objected to their being continued, and gave notice to that effect to the company. J. H., the son, then gave notice to the defendants that the policies were at an end, and claimed the return of the amount of the premiums. The defendants refused to pay, and J. H., the son, brought his action for their recovery, and the County Court judge gave judgment for the plaintiff. The defendants appealed. Held, on appeal, that, under the circumstances of the case the policies were wagering policies, and consequently the premiums paid in respect of them could not be recovered." That is a clear decision on that part of the case, and now the distinction that arises is a distinction based on what the agent said. Now, we begin this discussion with an illegal contract. The plaintiff being party to an illegal contract is *prima facie* debarred from recovering any money paid under that contract to the other person. But it is said that, by reason of what happened between him and the agent, he is relieved from that rule of law. What was said by the agent in this case to begin with was a representation not of fact, but of law. It was a statement of opinion that the policies were valid. That seems to me to be a statement not of fact, but a statement of law, the general law of the land in relation to insurances; and it has been found as a fact that that statement was made innocently. Taking those two things together, we have a statement of law made innocently to a person who was desirous of entering into an illegal contract—a contract which, if he makes it, carries with it the consequences that he cannot recover any money he pays under it. How is his position altered by the fact that the other person told him that, in his opinion, the contract was not illegal, innocently told him so, believing what he said to be true. It seems to me that unless you can introduce some circumstances of oppression or fraud, or some difference in the position of the parties, which threw the person who made the statement into some fiduciary relation to the plaintiff so as to make it inequitable for him to insist upon keeping the bargain which had been made with the plaintiff, unless you can get those elements in, elements which in a court of equity would be considered either fraud or equivalent to fraud, the party to an illegal contract has to submit to the loss of whatever he has paid under it. That is perfectly clear. Now, I do not say that the jury might not here, if the evidence had supported it, have found that the plaintiff's relations to the agent were such as to bring him within that class of cases where money has been obtained from another person by fraud, duress, or oppression of some kind; but there is no evidence here at all of that, and the jury have

not found that, but they have found that this was an innocent statement of what the agent believed to be the law. There is no evidence of fraud or oppression, and there is certainly no finding of fraud or oppression, and we cannot assume it. All we have is that the plaintiff, whether he knew it or not, was a deliberate party to the contract, and was under no misapprehension as to the nature of the contract which he was making, though he may not have known what the law about it was. Nevertheless, what he was intending was clearly a contract forbidden by law, with the consequence that money paid under it cannot be recovered back. He seeks to get out of that position by saying that he acted on the advice of a person who told him to the best of his opinion what he believed to be the law, though there is no evidence, as I have said, of any oppression or any fraud having been practised upon him. Under these circumstances, in my judgment, he cannot recover back, and I think there is clear authority for that proposition in the case of *British Workman's and General Assurance Company v. Cunliffe* (*ubi sup.*). In that case it had been held in the court below that the money could be recovered back where it had been paid by a person relying upon the statement of the agent of the insurance company that the policy would be valid. That case came up to this court, and the decision of the court below was affirmed, but on the ground that the statement made by the agent on which the person seeking to recover back the money had acted was fraudulently made. The Court of Appeal expressly put their decision on that ground. To that degree they certainly qualify, or do not adopt at all events, the grounds of the judgment in the court below. It seems to me, therefore, both on the general law, and on the special authority in this court, the plaintiff in this case fails, and, therefore, I think the appeal must be allowed.

ROMER, L.J. — I am of the same opinion. Assuming that these two policies are void on the ground of illegality, it is clear that the plaintiff cannot recover the premiums which he has paid unless he can make out that he was not *in pari delicto* with the defendant company. Can it be said that he has established that? He relies on the statements alleged to have been made by the defendants' agent when the policy was effected. Now, as to those statements it is clear, in my opinion, that there was no misstatement of fact on the part of the agent. Further than that, it is clear that there was no fraud of any kind. The present case is not one of oppressor and oppressed, nor is it a case in which advantage has been taken by a clever man of an ignorant man. In fact, there is here no impropriety of any kind beyond the fact that the agent, like the plaintiff, appears to have forgotten or to have mistaken the law. As to the mistake of law, it is clear, as far as I can see, that they both made it. From the findings of the jury it appears that the agent believed the policies to be valid. So also did the plaintiff. In that respect they were equally guilty; their guilt, such as it was, consisting in their forgetting, or being ignorant of, or mistaking the law. There was no greater impropriety on the part of the agent than there was on the part of the plaintiff. But did the statements of the agent, statements which, in my

opinion, were only made as to the law, put him or the defendant company in a worse position than the plaintiff? I do not think that a misstatement as to the law in such a case as the present makes that difference. The case is one in which both parties to the contract ought to know the law; they are contracting on an equal footing, and are presumably persons of equal intelligence. It cannot, in my opinion, be laid down by this court as a principle of law that where a policy is effected with an insurance company, its agents must be treated, without more and without any special evidence, as being under a greater obligation to know the law than the persons whom they approach for the purpose of effecting the policies. Here it is clear to my mind that no fraud of any kind can be imputed. In fact, no case of fraud has been raised against the defendants, nor can it be said that they were in any way bound to appoint as agents persons having some special knowledge of the law. Under those circumstances it appears to me that for the purposes of this case the plaintiff and the defendants' agent must be taken to have been *in pari delicto* in the matter of effecting the policy, and the defendants cannot stand in a better or worse position than their agent. I say they are not in a worse position because there is no evidence that shows that any other agent of the defendants ever made such misstatement or was ever guilty of impropriety with reference to a transaction of this sort. On these grounds I agree that the appeal must be allowed.

MATHEW, L.J.—I am of the same opinion, and have very little to add. I think that this policy was illegal. Though it be an illegal contract, the plaintiff says that its illegality ought not to be set up as an answer to his claim because of the misrepresentation made by the defendants' agent that it was a valid policy. The answer to that is that the misrepresentation was made innocently, and it was a misrepresentation as to the law. A representation as to law is not on the same footing as a representation of a matter of fact. It has been pointed out that the representation made by the agent was not alleged to have been fraudulent. There is no ground whatever for imputing either to the agent or to the defendants any intention of misleading the plaintiff. With reference to the parties being *in pari delicto*, it was suggested by the plaintiff that this is the case of a great company imposing on an illiterate man. But we know that these policies of life insurance are largely effected through agents who are as humble and illiterate as those whom they approach for the purpose of getting them to effect the policies. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the plaintiff, *Essex and Mallam*, agents for *G. Mallam and Sons*, Oxford.

Solicitor for the defendants, *J. M. Storer*, agent for *E. T. Holt*, Oxford.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 30 and Feb. 9.

(Before KEKEWICH, J.)

Re SHEPHARD; GEORGE v. THYER. (a.)

Husband and wife—Presumption in favour of a valid marriage—Long-continued open cohabitation—Ceremony—Foreign marriage—Recognition—Strict proof.

Where there is clear proof that English persons intended to be married to one another, some evidence of a ceremony by way of a French marriage de facto, and of recognition of them afterwards as man and wife by their families and by them of their children as legitimate, during a long course of years, the court will not require strict proof of the marriage, even upon the assumption that to contract marriage in France in the manner alleged was not in accordance with the habits of law-abiding people there.

The offspring of such a union held therefore entitled to share in a gift under a will to "children."

ADJOURNED SUMMONS.

The substantial question arising upon this originating summons was whether the presumption of law in favour of a state of marriage existing between cohabiting persons rather than a condition of concubinage was rebutted in the following circumstances:—

Mrs. Ann Priscilla Shephard by her will, dated the 13th Dec. 1897, bequeathed her residuary estate to trustees, one of whom was the plaintiff, Richard J. George, and directed them to pay two-thirds thereof "to and in equal shares between all such of the children of the said George Allen as shall be living at my decease." Testatrix died on the 7th July 1902, and her will was proved by plaintiff on the 23rd Aug. 1902.

At the date of Mrs. Shephard's decease the George Allen mentioned in her will had five children living by his first wife, to whom he was married in the year 1860, and who died in the year 1870. The remaining six defendants to the summons also claimed to be the children of G. Allen. The five defendants, children of his first marriage, had supplied evidence of that marriage and of their births. The plaintiff, as executor and trustee of A. P. Shephard, called on the six remaining defendants to prove the second marriage of G. Allen, the question raised by the summons being what persons were entitled under the residuary gift in the testatrix's will.

The certificates of birth of the six defendants, the surviving younger children, were produced to the plaintiff, George Allen being registered in them as the father and "Elizabeth Allen, formerly Williams," as the mother.

George and Elizabeth Allen had filed a joint affidavit, upon which each of them was cross-examined in open court. In this affidavit they swore they were intermarried at some town in France in 1873. Its name they did not recollect. The effect of this evidence is alluded to in the judgment of Kekewich, J., and was, shortly, as

(a) Reported by W. P. PAIN, Esq., Barrister at Law.

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follows: George Allen being a widower in 1873, and having formed an intimacy with Elizabeth Williams, they wished to be married, but did not wish their marriage to be known until some time after it had taken place. E. Williams' brother was master of a Channel steamer, and it was arranged that they should proceed on board his vessel to France in order to be married quietly there. Accordingly in that year they travelled from Falmouth on board this John Williams' vessel to a port in France. On arrival they went some distance in the country by train and were married, the details having been arranged by J. Williams' fiancée, who was a governess in France. They neither remembered the names of the port of landing nor of the town where they were married, and they knew no French. The governess had died long since, and J. Williams had not been heard of for a long time. No clergyman officiated at the wedding, but there were two or three gentlemen besides the governess present at the alleged ceremony, which probably took place at a registry office. No priest officiated, nor was a register signed. E. Williams herself put on a ring, and what purported to be a certificate of marriage was given to George Allen, which he had since lost. He was not acceptable to her family, and a child was born six months after their marriage. They returned on board Williams' ship to Plymouth, and from three weeks after, and ever since, had always lived together, and had nine children, six of the defendants to the summons being the survivors. George Allen, being a policeman, stationed at Devoran, in Cornwall, reported his marriage to the police superintendent, and an entry of it appeared in the police register, but by mistake the marriage was there stated to have taken place at Devoran. Various reasons—such as an accident causing loss of memory, and excitement—were given by them for not remembering the French towns they visited.

On behalf of the six last defendants affidavits were filed with the object of showing that testatrix regarded them as the lawful children of G. Allen, and their mother, Elizabeth Allen, as lawfully married to him. One of them had at her request lived with testatrix, who was G. Allen's "sister," both being born out of wedlock; moreover, testatrix had in a letter to her signed herself "your loving aunt," and had given her and her brothers and sisters numerous presents.

On the other hand, some of the children of the first marriage, who now for the first time disputed the validity of the second marriage, filed affidavits in support of that view, the most relevant fact stated therein being that G. Allen had since the institution of these proceedings stated to one of these that he was not married.

J. M. Gover, for the trustee, submitted the case to the court.

A. H. Jessel for the six surviving younger children.—After long continued cohabitation as man and wife, the law raises a presumption in favour of a valid marriage having taken place between them:

The *Breadalbane* case; *Campbell v. Campbell*, L. Rep. 1 H. L. Sc. 182, per Lord Cranworth, at pp. 199, 200.

Sufficient evidence has been given in this case to

found the presumption, and the onus lies upon the other side to rebut it:

Re v. Inhabitants of Stockland, Barr. Settlement Cases, 508.

The court will not readily take away the status of legitimacy from the children:

St. Devereux v. Much Dew Church, 1 Sir W. Blacks. 366, per Lord Mansfield, L.C.J., at p. 367.

Though strict proof of the marriage would be the register, or an examined copy of it, with evidence of the identity of the parties, yet it may be proved by persons present at the ceremony, and the husband and wife are competent witnesses:

Standen v. Standen, Peake's N. P. Cas. 45.

The jactitation suit arising out of a Fleet marriage (*Hervey v. Hervey*, 2 Sir Wm. Blacks. 877), where the Court of Delegates upheld a marriage before Lord Hardwicke's Act, though no actual proof of it was forthcoming, where the parties lived together as man and wife for eighteen years, and there was evidence of acknowledgment by the husband's family, was mentioned by Hall, V.C. in *Lyle v. Ellwood* (L. Rep. 19 Eq. 98), and no distinction taken on account of the nature of the suit. There is a strong presumption in favour of the validity of a marriage once the intention to contract one is shown:

Piers v. Piers, 2 H. L. Cas. 331, per Lord Cottenham, L.C., at pp. 362, 368, and 369.

Lord Campbell also, at pp. 379, 380 of the same case, alludes to the presumption in favour of marriage as one which can only be negated by disproving every reasonable probability. In *Re v. Inhabitants of Stockland* (*ubi sup.*), thirty years' cohabitation was held sufficient to found the presumption. So in the present case there was sufficient evidence to found the presumption, and it must be rebutted.

E. Beaumont for four children of the first marriage.—The cases relative to Scotch marriages and English marriages before Lord Hardwicke's Act, stand upon a different footing from the present case. I ask for leave to cross-examine the parties on their affidavits.

His Lordship gave leave for the examination to take place in open court.

Feb. 9.—*E. Beaumont* [after the cross-examination of George and Elizabeth Allen].—I submit that on George Allen's own evidence the presumption comes to naught. Your Lordship asks me to prove a negative. My point is that the law of France is so extremely full upon the points of residence, consents, publicity, and notice, that when this man comes forward and tells the court under what circumstances he was married, the court will not listen to his evidence as proving his marriage. I tender a French advocate as witness that this ceremony, as alleged, could not have taken place in France. According to the practice there it is impossible that this could have taken place. There must be publicity. In *Sastry Velaidier Aronegary v. Sembeccutty* (44 L. T. Rep. 895; 6 App. Cas. 364) the "rice custom"—an ordinary formality for celebrating marriage in Ceylon—was gone through. The court must have regard to the evidence given to-day.

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E. Ford, for one child of the first marriage, adopted the last argument.

KEKEWICH, J.—No one who has listened, however cursorily, to this case can doubt that it is a case of considerable difficulty and peculiarity. Having now heard the evidence to-day, I am prepared to give judgment at once and without hesitation, and it is the examination here to-day, leave to hold which was granted really for the instruction of the court, and not merely, as has been suggested, by way of indulgence to Mr. Beaumont, which has enabled me to dispose of the case. It is a very singular story. George Allen was, in 1873, a widower with seven children. It is said that he desired to be married to Elizabeth Williams, and that she wished to be married to him. That is beyond doubt. They had been living together and there had been intimacy between them which made an early marriage extremely desirable. He was in the police force, and he knew that he should have to report his marriage to the chief constable. He did not intend to avoid that, and he apparently did not intend to conceal his marriage, but he did not wish anybody to know it until after the marriage had taken place. That is the weak point of his story. If he meant to live with her ultimately, I do not know why he did not go to the parish church instead of to France to be married, he did not know how or where. Nor is it easy as regards the wife—except that she desired to be married and, that being the desire on her part, was actuated by a reasonable wish to please her intended husband—and I can the more easily conceive her consenting to go to France to be married than his wishing to take her. She had relations who were “not agreeable.” I understand that to mean that they knew that she had been on very friendly terms with George Allen—whether they knew more does not appear—and they did not care for him as part of the family. She was content that the marriage should take place under the circumstances, not to be disclosed, in fact, until accomplished. That being the state of affairs before they started, Elizabeth Williams had a brother, captain of a merchantsteamer. His name was Johnny Williams. He was engaged to a governess in France, and either Johnny Williams or this lady suggested this marriage in France. How much was resolved on it is impossible to say. According to the cross-examination of Mr. and Mrs. Allen, who were cross-examined with proper severity, there is no doubt that it was arranged that these two should go in Johnny Williams’ ship to France, and that they left Falmouth, stayed for a short time, and came back to Plymouth. What they did in France it is very difficult to ascertain. On the evidence, they went somewhere in accordance with an arrangement made by the intended sister-in-law—they went somewhere where they went through something purporting to be a ceremony of marriage. There was a ring put on by the lady herself not very formally. There was some kind of ceremony, and there was something like an acknowledgment of their being husband and wife. They both agree that there was something in the form of a certificate given them, in what names they cannot tell. What it was, it is difficult to say, and I think it will be safer to leave it out of the question. It is not likely to have been in English;

neither of them know what it was like. They tell a long story about producing it to the chief constable of the county, and somehow or another the certificate was lost and is not forthcoming. We had better leave it out of consideration. They came home and shortly afterwards lived together as husband and wife. There seems to have been some reason for not doing so during the first two or three weeks. They have lived together as husband and wife up to the present time—that is, for thirty years. She has borne several children, whose claim I am considering. There is some evidence on the affidavits of recognition by the family, and there was some given in the witness-box to-day. It is not strong, and might be severely criticised. The question is whether, under these circumstances, I ought to require strict evidence of the marriage before I admit the children to share in the property which has been given to the children of George Allen. Counsel on behalf of the elder children wished to call evidence of a French expert to prove the impossibility of this man and this woman having been married in France in the way alleged. To avoid controversy, I have asked him to assume that this marriage, as alleged, was impossible according to French law, and according to the habits of law-abiding people in France. Beyond that the evidence of an expert could not possibly go. And no one can say that persons might not have met together in a room, and purported to marry them, and go through certain ceremonies, and even give them some certificate. But I will assume, as I repeat, that it was impossible, according to the law of France and the habits of law-abiding people in France, that the marriage as alleged should take effect. Now, what is the proper conclusion? There are many cases where the fact of marriage has been made a great deal of. If we start from the fact of marriage, the presumption arising from cohabitation is exceedingly strong. There are other cases which go very much on the recognition of the children and wife, or more often of the children, and point to that as strengthening the presumption in favour of a valid marriage. But counsel argues that, in the first place, the old law has been largely abrogated by the greater facilities afforded for proof since the establishment of registries; and, secondly, he says that the other cases cited are to a great extent dependent on Scotch law, under which, even at the present day, there are facilities for irregular marriages. But, as I pointed out just now, this case in the Judicial Committee of the Privy Council, decided in 1881, negatives both these arguments. So far as I know, it is the last case. There we have a case decided in quite modern times, long after all that legislation in favour of publicity and registries, and also it is free from the Scotch law. It was from Ceylon, and no doubt in the judgment there is a most interesting discussion of the law of Ceylon and the people called Tamils; but what was said by Sir Barnes Peacock (44 L. T. Rep., at p. 896) was this: “It appears from the authorities which he (Dr. Phillimore) cited that, according to Roman-Dutch law, there was a presumption in favour of marriage rather than of concubinage. It does not, therefore, appear to their Lordships that the law of Ceylon is different from that which prevails in this country—namely, that where a man and a woman are proved to have lived together as man

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and wife, the law will presume, unless the contrary be clearly proved, that they are living together in consequence of a valid marriage, and not in a state of concubinage." And later on he alludes to *Piers v. Piers* (*ubi sup.*), where there was a reference to *Morris v. Davies* (5 Cl. & Fin. 163). So that I have here the decision of a high authority getting rid of the fact of marriage and the recognition of children. It does not show that either of these is essential, but the fact that the parties were living together as man and wife for a time was, coupled with other facts, there held sufficient to establish the marriage. If that was enough to support the presumption there, so it is here. I have the intention of marriage. About that there is not a shadow of doubt. I have some evidence about which there is a great deal of doubt. There is a somewhat romantic story, which is certainly doubtful in some of its details, as to a marriage *de facto*, of something gone through to perfect the intention of marriage. And then I have some evidence of recognition of children afterwards. And now, after thirty years, the court is asked to say that because the marriage has not been proved, and cannot be proved, the children of George Allen are not entitled to share. To hold that would go against the authorities. I must therefore hold that they are entitled to share in the bequest to his children.

Solicitors for the trustee and one child of the first marriage, *Mead and Co.*, for *S. G. C. Cosham*, Bristol.

Solicitors for the remaining first defendants, *Gribble, Oddie, Sinclair, and Johnson*, agents for *Eastley and Eastley*, Paignton.

Solicitors for the children of *E. Allen*, *Busk, Mellor, and Norris*, agents for *Cleverton and Son*, Plymouth.

Feb. 19 and 23.

(Before KEKEWICH, J.)

Re HOUGHTON (deceased); HAWLEY v. BLAKE. (a)

Administration—Claim on estate—Compromise by executor of co-executor's claim—Parties acting honestly and reasonably—Trustee Act 1893 (56 & 57 Vict. c. 53), s. 21—Judicial Trustees Act 1896 (59 & 60 Vict. c. 35), s. 3.

Acting co-executors are seised of their office per mie et per tout, and where one of them, acting honestly and reasonably and to avoid the expense of litigation, has allowed the whole claim of his co-executor upon the estate of their testator such compromise will be upheld.

ORIGINATING SUMMONS.

The question on this adjourned summons taken out by residuary legatees under the will, dated the 23rd Feb. 1889, of the testator, Charles Houghton, who died on the 1st April 1894, was as to the effect to be given to an allowance of a claim by one executor upon the estate of their common testator by the other proving executor, where the parties acted honestly and reasonably.

Testator, C. Houghton, gave a life interest in his property to his wife Esther, and directed that, after her death, it should be realised and the net proceeds divided between his nephews and nieces therein specified, two of whom were

the applicants, and appointed the defendants John S. Blake and Ferdinand Houghton, with his wife, executors, but his will was proved on the 1st May 1894 by John S. Blake and his widow alone, leave being reserved to the defendant F. Houghton to prove, which power he had not exercised.

Esther Houghton, the widow of the testator, died on the 7th June 1902 leaving a will dated the 25th July 1901, under which her nephew, the defendant J. S. Blake, was sole executor.

In May 1903 the executors of the will of the testator, represented by the defendant J. S. Blake, delivered an account to the residuary legatees, including the plaintiffs, from which they alleged that they first learned that Esther Houghton, claiming to be a creditor of the testator for 1180*l.*, had, shortly after his death, appropriated, with the concurrence of her co-executor, the defendant J. S. Blake, certain securities standing in the name of the testator and also a portion of a debt due to his estate.

The material portions of such account read as follows on the credit side:

April 1, shares, &c., allocated to Mrs. Houghton in discharge of moneys belonging to her separate estate, and lent to the deceased, (*see contra*) 1180*l.*

On the debit side were particulars of various shares, and 155*l.* "cash proportion of a debt," the shares being stated to be "allocated to Mrs. Houghton at current price in part discharge of 1180*l.* due to her as per *contra*."

The gross estate of the testator amounted to 2208*l.*

At an interview between J. S. Blake and his aunt, E. Houghton, shortly after testator's death, E. Houghton, as he alleged, took a number of securities from a safe and stated to him that they did not all belong to her husband, but that a great deal of the money they represented was hers, and came partly from her father and partly from her mother, through her father, amounting in all to the sum of 1180*l.*, and she also showed him a memorandum of four items making up such sum.

J. S. Blake consulted a solicitor as to the matter, who had unfortunately since died. He also spoke to his father, who was the personal representative of the relatives of Esther Houghton, from whom the amounts mentioned in the memorandum were derived, with reference to the statements made by his aunt, and he confirmed those statements, and showed the defendant Blake the receipts in his possession as such personal representative for the several sums.

Particulars as to the dates on which the items composing the 1180*l.* were advanced to the testator had been supplied to the Inland Revenue authorities by the solicitor to his estate in June 1894, together with a statement that the money in question was Mrs. E. Houghton's share of her father's estate, and other evidence was given which rendered it probable that Esther Houghton might have been so entitled to the amounts in question, and as to 820*l.* thereof for her separate use. Under these circumstances J. S. Blake, as one of the executors of C. Houghton, did not object to her claim against the testator's estate being admitted, and to her being allowed to retain the securities mentioned in the account delivered to the residuary legatees.

The summons asked for an inquiry and a consequent direction thereupon that all moneys, shares,

(a) Reported by W. P. PAIN, Esq., Barrister-at-Law.

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and property retained by Esther Houghton, deceased, out of the estate of the testator in alleged discharge of moneys alleged to be owing to her from him might be paid or transferred by the defendant J. S. Blake, as executor of E. Houghton, deceased, into the names of himself and the defendant F. Houghton, to be applied as part of the residuary estate of the testator.

Christopher James for the plaintiffs.—This is the case of a claim by one executor upon the estate of their common testator being admitted by another executor, and, without impugning the power of a personal representative to compromise claims of strangers upon his testator's estate, what has been done here is invalid against the residuary legatees. There is no authority for the proposition that an executor can compromise a claim of his co-executor. I submit there is no such power. Sir Barnes Peacock, in the case before the Judicial Committee of the Privy Council, *De Cordova v. De Cordova* (41 L. T. Rep. 43; 4 App. Cas. 692) states that there is no decision as to one executor compromising his co-executor's debt (at p. 45). So that up to that date there was no authority that such compromises are valid. There the compromise was injurious to the estate, so here the compromise was unfair and not beneficial to the testator's estate. Both executors receive a certain sum, and they want a discharge. What follows in the judgment in *De Cordova v. De Cordova* (*ubi sup.*) relates to compromises between executors and other debtors to the estate. Here one executor made a claim and another admitted it, and there is no evidence of the independent executor doing anything in relation to the compromise. The two admit the claim of one.

Warrington, K.C. and *Theodore Ribton*, for the defendants, contended that this was a compromise within the powers of an executor under the Trustee Act 1893 (56 & 57 Vict. c. 53), s. 21. [They were stopped by the Court.]

KEKEWICH, J.—This is a claim by beneficiaries under the will of Charles Houghton to a sum of 1180*l.* received by the widow, Esther Houghton, and for which, if that be so, the estate of Esther Houghton became accountable, and the summons asks, if necessary, for administration of her estate for that purpose. As regards 820*l.* receipts have been produced which clear the matter up entirely. There is no doubt that 820*l.* really belonged to Esther Houghton. The story is a curious one. Esther Houghton was the widow of Charles Houghton. John S. Blake was with her executor of Charles Houghton, and on Charles Houghton's death Esther Houghton, the widow, produced a number of securities, but said that they did not all belong to her husband's estate, but some belonged to her amounting altogether to 1180*l.* Blake went into the matter more or less, but eventually he did not object to her claim, but allowed her to retain the securities. It is said he did wrong, and that therefore the money is now recoverable from him as executor of Esther Houghton, which he also happens to be. The real question is whether Blake, as one of the executors of Charles Houghton's will, could compromise the claim with Esther Houghton by allowing it in full. I use the word "compromise" advisedly. In one sense there was no compromise, because, the whole claim being allowed, there was no give and

take about it. Esther Houghton had all she claimed, and in that sense there was no compromise. But the widow had possession of the securities, and they could not have been got from her without discussion and possibly litigation. It was entirely for those representing the estate to say whether the delay and expenses of litigation should be incurred or whether the claim should be acceded to. I therefore think what happened was properly called a compromise. Very little was given up, and there was reason when once you get the possibility of litigation and its consequences. There being no question about the honesty of the parties, was it competent for Blake, as one of the two executors, to admit the claim of his co-executor, particularly when the co-executor was the widow of the testator? In my opinion, the fact that the co-executor was the testator's widow made no difference. It is not disputed that one of two executors can compromise with a stranger. This power of compromise is a common law power. There is also statutory authority for it, but the statute really adds nothing to the common law powers, which have been recently recognised in *Re New's Settlement; Langham v. Langham* (85 L. T. Rep. 174; (1901) 2 Ch. 534) in the Court of Appeal. Executors are seized of their office *per mis et per tout*, each of them representing the estate for all purposes. In my opinion it would be an infringement of the rule to say that an executor cannot compromise a claim of his co-executor. But the position is a delicate one, and I think that an executor in that position would do well to come to the court for its sanction before entering into a compromise of this kind. As regards the Judicial Trustee Act 1896 (59 & 60 Vict. c. 35), s. 3, I have no doubt that he acted honestly, and I have no doubt that he acted reasonably. Therefore, whether I take the case on his executorial power, or whether I take only the last statute to which I have referred, it seems to me that I must uphold the executor as having done what is right. There will be a declaration that 1180*l.* was properly allowed to Esther Houghton out of the testator's estate. Costs of all parties to be paid out of the estate; those of the defendant Blake to be taxed as between solicitor and client.

Solicitors: for the plaintiffs, *Clarke, Rawlins, and Co.*, agents for *Percival and Son*, Peterborough; for the defendant, *Field, Roscoe, and Co.*, agents for *Senior and Furbank*, Richmond, Surrey.

Feb. 3, 4, 13, and 25.

(Before KEKEWICH, J.)

Re HOPE-JOHNSTONE'S TRUSTS; HOPE-JOHNSTONE v. HOPE-JOHNSTONE. (a)

Husband and wife—Policy of the law—Post-nuptial settlements by husband—Trusts for his wife "so long as she shall continue the cohabiting wife or the widow" of husband—Condition—Limitation.

By post-nuptial settlements, which did not purport to be agreements between husband and wife, in consideration of natural love and affection, the husband assigned leaseholds to trustees upon

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trusts during the natural life of the wife or so long as she should continue the cohabiting wife or the widow of the husband, to pay the income to the wife for her separate use, and from the decease of the wife in the lifetime of the husband, or from and after the dissolution of the marriage or judicial separation between them, a protected life interest in the annual proceeds was given to the husband, with a provision for the maintenance of their children. The deed contained an ultimate trust of the corpus of the trust premises in default of children in favour of the next of kin of the husband. There was also a power of advancement during the joint lives and the subsistence of the marriage with the joint consent of the husband and wife and, after her decease or after the dissolution of their marriage or a judicial separation between them, with the consent of the husband.

The wife separated from her husband in 1889 and had never lived or cohabited with him afterwards, and he became bankrupt in 1890 but the bankruptcy was annulled in 1896.

The question having arisen whether, although the wife was no longer in fact "the cohabiting wife" of the husband, the trust in her favour was still subsisting, on the ground that the settlor had attempted to fetter her interest in a manner which was contrary to public policy:

Held, that the gift of the life interest to the wife was by way of limitation, and was not a gift defeasible on the performance or non-performance of a condition, and that being so long as she cohabited with her husband, it was a gift rather in favour of morality than against it, and upon the proper construction of the settlements it must be held good.

Per Kekewich, J.: "Policy of the law" ought not to be impressed into the service of highly improbable contingencies.

THE question on this adjourned summons, which was directed to be reargued, was, who was entitled to rents accrued and accruing under certain post-nuptial settlements in the following circumstances.

The defendant Emily M. Hope-Johnstone, had been married once only—namely, to her present husband, the defendant William J. Hope-Johnstone—on the 17th Feb. 1877.

By settlement, dated the 11th April 1877, the defendant William J. Hope-Johnstone, in consideration of his natural love and affection for his wife the defendant Emily M. Hope-Johnstone, assigned to trustees (now represented by the three plaintiffs Charles G. Hope-Johnstone, James K. A. Knapperton, and Robert E. Campbell) certain leasehold premises, subject to subsisting mortgages and underleases, upon trust during the natural life of the defendant Emily M. Hope-Johnstone, "or so long as she shall continue the cohabiting wife or the widow of the said William J. Hope-Johnstone," to pay the annual proceeds to Emily M. Hope-Johnstone for her own separate and inalienable use, her receipts, or those of her appointees, to be a good discharge. And from and after the decease of Emily M. Hope-Johnstone in the lifetime of William J. Hope-Johnstone, or from and after the dissolution of their marriage, or judicial separation between them, upon trust as to the annual proceeds for William J. Hope-Johnstone until his decease, for a restricted life interest

defeasable on bankruptcy, insolvency, or alienation, and thenceforth for the maintenance of the children of the defendants, William J. Hope-Johnstone and Emily M. Hope-Johnstone, with various trusts as to the annual proceeds in default of children, a trust of the corpus of the trust premises in favour of such children in default of appointment by their parents during their joint lives, with an ultimate trust for the next of kin of William J. Hope-Johnstone. The indenture contained a power of advancement of children, during the joint lives, and the subsistence of their marriage, with the joint consent in writing of the defendants William J. Hope-Johnstone and Emily M. Hope-Johnstone, or after the dissolution of their marriage or a judicial separation between them, with his consent in writing, and after the decease of William J. Hope-Johnstone, in the lifetime of Emily M. Hope-Johnstone if their marriage should be then subsisting, with her consent during widowhood, the powers of sale of the trust premises, and of appointment of new trustees, and of varying trust securities being guarded in a similar way.

By another indenture of settlement dated the 1st Dec. 1880, other leasehold premises were, subject to the mortgages subsisting thereon, settled upon similar trusts, and subject to the like powers and provisions as were contained in the settlement of the 11th April 1877.

The six other defendants to the summons were the only children of the marriage.

A moiety of certain leasehold premises was the only property remaining subject to the trust of the two settlements.

On the 21st Dec. 1889 a receiving order in bankruptcy was made against William J. Hope-Johnstone, and on the 21st Jan. 1890 he was adjudicated a bankrupt.

In April 1896 the bankruptcy was annulled, William J. Hope-Johnstone having obtained the court's approval to a composition scheme.

In March 1889 the defendant E. M. Hope-Johnstone separated from her husband, the defendant W. J. Hope-Johnstone and had never lived or cohabited with him since that date.

MacSwinney, for the trustees, stated the case.

Martelli, for the defendant E. M. Hope-Johnstone, asked that the words "or so long as she shall continue the cohabiting wife or widow of the said W. J. Hope-Johnstone" might be struck out of the settlement on grounds of public policy. Provisions for a contemplated event which the law abhors have been frequently held void on this ground not only in contracts but under limitations in wills:

H. v. W., 3 K. & J. 382.

Such a voluntary settlement as this by a husband upon his wife is bad according to this authority. *Turner, L.J. in Cartwright v. Cartwright* (3 De G. M. & G. 982), which was the case of an ante-nuptial settlement providing for the event of separation (at p. 991), refers to these conditions in language which does not limit the application of the principle to cases of contract or agreement, but extending, as in *Egerton v. Brownlow* (4 H. L. Cas. 1)—*ex. gr.*, to wills. There are other cases to the same effect:

Merrycather v. Jones, 10 L. T. Rep. 62; 4 Giff. 509; *Re Moore; Trafford v. Maconochie*, 59 L. T. Rep. 681, per Cotton, L.J.; 39 Ch. Div. 116.

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The leading case is *Westmeath v. Salisbury* (5 Bli. N. S. 339), where the House of Lords was dealing with post-nuptial settlements by the husband on his wife. The same considerations apply to ante-nuptial and post-nuptial settlements. The subject-matter of these settlements being leaseholds there was valuable consideration:

Price v. Jenkins, 37 L. T. Rep. 51; 5 Ch. Div. 619.

I assert the broad proposition that if there is a provision contrary to public policy it must be struck out. If your Lordship is against me on that point then I say that, having regard to the form of the gift over, the wife remained a cohabiting wife, within the meaning of the settlement, until there was either a dissolution of the marriage or a judicial separation. The settlor has been his own dictionary. "Cohabiting wife" is a phrase defined by other parts of the settlement. The gift over is "from and after the decease of the said Emily M. Hope-Johnstone in the lifetime of the said William J. Hope-Johnstone or from and after the dissolution of their marriage or judicial separation." The power of advancement is given to the trustees for the children during the joint lives of their father and mother and the subsistence of the marriage, and so also are the powers of sale and of varying securities. In the case of a partnership deed where the share of a bankrupt partner is given over to the others, it passes to his trustee in bankruptcy on the ground that such a provision is a fraud on the bankruptcy laws:

Higginbotham v. Holme, 19 Ves. 87;

Ex parte Barter; Ex parte Black; Re Walker, 51 L. T. Rep. 811; 26 Ch. Div. 510.

There is a substantial difference between the principle of these cases and that applicable to a gift to a wife if she continues to cohabit with her husband:

Whitmore v. Mason, 5 L. T. Rep. 631; 2 J. & H. 204;

Wilson v. Greenwood, 1 Swanst. 471, per Lord Eldon, L.C., at p. 481, and note

[KEKEWICH, J.—I am not satisfied that that distinction is sound, because there is no express provision in the Bankruptcy Acts making such limitations void; it is only the policy of the law which effects that. You must introduce some rule of law from outside to the effect that the limitation is void.] In the bankruptcy cases it is against the policy of a particular set of statutes. In this case it is an infringement of the common law. It is against the morals of society. It was formerly argued that a lease until bankruptcy was void. There is nothing wrong in a settlor contemplating bankruptcy, there is in his endeavouring to induce a wife to live separately from her husband. *H. v. W.* (*ubi sup.*) is the only case in which provision was made for the wife if she so long continues to live with her husband, and that was held bad. Provisions for separation where it is immediately contemplated were formerly bad:

Hunt v. Hunt, 5 L. T. Rep. 778; 4 De G. F. & J. 221.

But that is not so now:

Per Lord Eldon, *Westmeath v. Salisbury*, 5 Bli. N. S. 339, at p. 375.

Nutter for the defendant W. J. Hope-Johnstone.—I put my contention on the following four grounds: The court does not now regard these limitations in the strict way it formerly did before the Divorce Act was passed:

Bishop v. Bishop, 76 L. T. Rep. 409; per Lord Lindley, at p. 414; (1897) P. 138.

This is shown by Westbury, L.C.'s first judgment in *Hunt v. Hunt* (*ubi sup.*), at p. 780. The event contemplated is not such an event as would have been regarded as being against public policy, and therefore void within *Cartwright v. Cartwright* (*ubi sup.*) and *Re Moore; Trafford v. Maconochie* (*ubi sup.*), which is in my favour. The true policy of the law is to prevent the evil of separation of married persons happening and to support limitations, offering, as this does, an inducement to the wife to discharge her duties faithfully. In old days this matter was regarded strictly; now the question must be looked at as a whole:

Per Williams, L.J., *Lily Dowager Duchess of Marlborough v. Duke of Marlborough*, 83 L. T. Rep. 578, at p. 583; (1901) 1 Ch. 165.

These are voluntary deeds of gift and not settlements, as was the case in both *Cartwright v. Cartwright* (*ubi sup.*), in which the separation was induced by the misconduct of the husband, and *H. v. W.* (*ubi sup.*). Here there was no consideration at all moving from the wife. Bargains as to the effect of a future separation are bad, and the two cases last mentioned are dealt with by Rigby, L.J. in his judgment in *Lily Dowager Duchess of Marlborough v. Duke of Marlborough* (83 L. T. Rep. at p. 583). The clause in question must be treated as one single limitation and not as a condition. If it is treated as a condition I must fail; but if it is regarded as a limitation I can succeed. *Brown v. Peck* (1 Eden, 140) and *Wren v. Bradley* (2 De G. & Sm. 49) were both cases of conditions and not of limitations. The provisions there induce separation and not cohabitation. The limitation is to the wife so long as she does what she ought to do:

Heath v. Lewis, 3 De G. M. & G. 954.

Cartwright v. Cartwright (*ubi sup.*) was the case of an ante-nuptial, this is a post-nuptial, settlement.

Owen Thompson, for the children, took no part in the argument.

Martelli, in reply, said that the Divorce Act only altered procedure, and that there is no difference in the policy of the law since it was passed. There is nothing in that Act to encourage the argument that provisions looking to the separation of man and wife or the dissolution of the marriage contract are regarded more favourably now than they were previously to Lord Hatherley's remarks in *H. v. W.* (*ubi sup.*). I admit that when separation is necessary the parties may agree on the terms:

Whitmore v. Mason (*ubi sup.*);

Lily Dowager Duchess of Marlborough v. Duke of Marlborough (*ubi sup.*).

On the 4th Feb. his Lordship had directed the case to stand over for further argument, saying that it was one of the disadvantages of the procedure by adjourned summonses that important questions thereby raised often did not receive the attention from counsel and the court which they deserved. His Lordship, however, expressed the

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opinion that the liability to the performance by the trustees of the lessee's covenants in the leases of the subject-matter of the settlements did not make them deeds for value as between donor and donee, although that point had not been strongly urged in argument. He drew attention to the fact that the words "dissolution of their marriage or judicial separation" between the husband and wife were repeated again and again in the first settlement. His Lordship did not concur in the view that that implied that the wife was to be regarded as the "cohabiting wife" of her husband until the dissolution of the union by legal process. The question was whether the limitation as it was written was bad in law, so that the lady would take the income during her life. There was no doubt that if the deeds were regarded as settlements in the ordinary sense of the word or as contracts such a limitation, under the decision of Page-Wood, V.C. and the Court of Appeal referred to in the arguments, would be bad. But the difficulty was raised that these were not agreements, but only gifts by the husband, to which possibly other considerations would apply. The applicability of the law of bankruptcy to similar cases and to those arising under wills ought to be considered. The questions raised deserved the best attention they could receive.

The case having been reargued as above the following written judgment was delivered:

Feb. 25.—KEKEWICH, J.—By the deed which it falls to me to interpret the settlor secured to his wife by the intervention of trustees an annuity in the shape of the rents and profits of the property comprised in the deed, which was directed to be paid during the natural life of the said Emily M. Hope-Johnstone, "or so long as she shall continue the cohabiting wife or the widow of the said William J. Hope-Johnstone." The meaning of this is perfectly clear. There is no occasion for the moment to look beyond the joint lives, but during the joint lives the lady is to receive the rents and profits if and so long as she continues to cohabit with her husband. It is a conditional gift in that a condition is attached to it, but it is a limitation and not a gift defeasible on the performance or non-performance of a condition precedent or subsequent. The lady is no longer cohabiting with her husband, and she insists that she is nevertheless entitled to receive the rents and profits, because her enjoyment of them is fettered in a manner which the law will not sanction. The phrase most frequently used in argument was "public policy"; but, following the example of many eminent judges, I prefer "the policy of the law." The question is whether the fetter or restriction thus placed on the lady's enjoyment is so antagonistic to the public good that the court is bound to refuse its sanction of it. What the court is or is not bound to do must depend on authority. There may be, and, indeed, there certainly are, from time to time modifications of the view taken by the courts respecting restrictions on liberty of gift or contract, but, generally speaking, it is the duty of a judge considering a question of this kind to examine the authorities and to determine whether the particular case submitted to him falls within them. There are many authorities, old and modern, showing that the courts abhor

provisions in instruments of whatever kind contemplating the interruption of conjugal relations and hold such provisions void as against the policy of the law. It is sufficient for the moment to refer to the words of Wood, V.C. in *H. v. W.* (3 K. & J., at p. 387), where he says: "It is forbidden to provide for the possible dissolution of the marriage contract which the policy of the law is to preserve intact and inviolate." There is no desire on my part to narrow this principle, or to avoid the application of language used in connection with it to any case to which it may properly be extended. But it is well to look at some of the cases with the view of ascertaining what the principle was understood to be by the judges who decided them, and how they intended to apply it. *Westmeath v. Salisbury* (*ubi sup.*) may be taken as the first of the series. There had been disputes between husband and wife, and an arrangement for continued cohabitation was made. That arrangement was expressed in a deed of 1817, which contained provisions contemplating the renewal of disputes and the cesser of cohabitation. After the execution of that deed the husband and wife continued to live together for a time; but in 1818 they agreed to separate, and another deed providing for their separation was executed. The circumstances under which those deeds were executed, and the conduct of the parties were of the most peculiar character, and formed the main subject of elaborate discussion in the House of Lords. No useful purpose would be answered by following that discussion in detail. The case is abridged for the present purpose with sufficient accuracy in 35 R. R. 54, and the headnote there states correctly the conclusion arrived at. Lord Eldon took a prominent part in the discussion in the House of Lords, and more than once supported the principle on which this conclusion was founded. That is the principle the expression of which I have taken from Wood, V.C.'s language above quoted. In the case of *Cartwright v. Cartwright* (*ubi sup.*), to be presently mentioned, Lord Eldon is said to have stated that conclusion in language quoted from *Westmeath v. Westmeath* (Jac. 126). I have been unable to find the passage there; but the quotation accords in substance with a passage in *Westmeath v. Salisbury* (5 Bli. N. S., at p. 395; 1 Dow & Clark, at p. 543). Another case declaring the principle and illustrating its application is *Cartwright v. Cartwright* (*ubi sup.*). There was an ante-nuptial settlement distinctly providing for the event of a separation by reason of any disagreement or otherwise between the intended husband and wife, and this, first Wood, V.C., and then the Court of Appeal, held altogether void. The judgments are in part concerned with the question whether the provision was in the nature of a condition or was a limitation, and it was determined to be the former. Having determined that Knight-Bruce, L.J. says: "I am of opinion that such proviso is against public policy and therefore void"; and Turner, L.J. expresses the same view. The next case deserving attention is one already referred to—*H. v. W.* (*ubi sup.*). In his judgment the Vice-Chancellor referred to *Cartwright v. Cartwright* (*ubi sup.*), which he was unable to distinguish from that before him; but the facts were different and require careful observation with reference to the question now

to be determined. Income of property vested in trustees was directed to be paid to the wife during the joint lives of herself and her husband if she should so long continue to live with him and should not live separate and apart from him through any fault of her own, and this limitation was followed by a direction that in the event of the wife living separate and apart from her husband through any such fault as aforesaid then, from and immediately after such an event, the trustees should permit the survivor in case of death, and the husband in the event of the wife living separate and apart from him as aforesaid, to receive the income for the rest of his or her life. I am not sure whether the Vice-Chancellor treated this as a limitation or as a gift with a condition. On p. 384 he treats it as a gift with a condition attached, and on p. 387 he refers to *Egerton v. Brownlow* (*ubi sup.*) as a leading authority on questions relating to conditions, but further down on the same page he speaks of the gift as a limitation, which I venture to think was the proper view. But however that may be, he expresses himself clearly and strongly on the question of the policy of the law. Immediately after the passage on p. 387, which has already been quoted, he says this: "I cannot look on this limitation for the benefit of the husband in the event of the wife leaving him without cause as otherwise than contrary to the policy of the law, because it would give to the husband a benefit by waiving his marital right, which in the event of the wife leaving him capriciously might induce him to consent to a continued separation in order that he might enjoy this property instead of enforcing those rights which the law requires him to enforce to preserve intact the marital contract." A later case deserving notice is *Re Moore; Trafford v. Maconochie* (*ubi sup.*). The subject of decision was a direction by will for payment of a weekly sum to a lady during such time as she should live apart from her husband. The real question was whether this was a gift of an annuity subject to a condition or a limited gift, and it was held by Kay, J. and the Court of Appeal to be a limited gift, the commencement and duration of which was fixed in a way which the law does not allow. Consequently the entire gift failed. On p. 681 Cotton, L.J. is reported to have said: "The testator did not like the husband, and his apparent object was to induce the wife to live separate from him. If so, the gift was for a purpose which is contrary to the law of England, for that law does not allow provisions made in contemplation of a future separation between husband and wife." The only other case necessary to mention in this connection is *Lily Dowager Duchess of Marlborough v. Duke of Marlborough*. The court had to consider whether a power of jointuring, which, on the face of it, might be exercised in favour of any number of wives in succession, was exercisable in favour of a second wife who only filled that character by reason of the first wife having been divorced, Byrne, J. and the Court of Appeal decided that it was exercisable, holding that the policy of the law did not interfere to prevent that conclusion. Dealing with the authorities which were relied on for a different conclusion Rigby, L.J. is reported to have said (at p. 583) "All these cases are alike in one respect. The parties there

to a marriage settlement, or what was equivalent to it, meeting together, chose to bargain about what should take place in the event of a separation of the spouses. One has never had any doubt that such a bargain as to what should be the effect of a future separation of people who are living together as man and wife is absolutely bad. All that was there held was that if you will bargain about an event which you are not entitled to look forward to or to anticipate, your bargain will be bad." The decision of Lord Westbury, L.C. in *Hunt v. Hunt* (*ubi sup.*), and other decisions upholding separation deeds as enforceable in equity, cannot properly be regarded as an infringement of the principle thus firmly established. These decisions treat the separation of husband and wife as an event which cannot be styled illegal when it is an accomplished fact, and hold reasonably enough, if I may be allowed to say so, that there is no objection to enforcing the terms according to which the separation took place. That is a very different thing from sanctioning provisions for a contemplated event which the law abhors. It is difficult to see how the provision now under consideration falls within these authorities or the judicial dicta which I have quoted. Here the gift is to the wife so long as she cohabits with her husband, and there is no contemplation of a future separation except so far as the terms of the gift necessarily imply that if she lives apart from her husband she shall no longer enjoy the gift. That seems to be a provision rather in favour of morality than against it; rather to secure the continuance of cohabitation than to encourage a severance. It might possibly be argued, and Wood, V.C.'s language might be quoted in support of the argument, that the interest of the husband arising on the ceasing of the annuity when, according to the terms of the deed, he would be entitled for life to the annual proceeds might induce him so to treat his wife as to provoke a separation, but such an argument, to my mind, is altogether wanting in substance. "Policy of the law" ought not to be pressed into the service of highly improbable contingencies. In this I am supported by the opinion of many of the judges who advised the House of Lords in *Egerton v. Brownlow* (*ubi sup.*). The House of Lords decided the particular case before it adversely to the opinion of the majority of the judges, but those opinions are nevertheless entitled to great weight in the consideration of the general question what is against the policy of the law and of the application of the principle to special facts. If that view be correct there is no reason either in principle or on authority for declining to give effect to this deed according to the plain construction of it, and in my opinion the gift must be held good. In saying that I do not consider myself as in the slightest degree differing from Wood, V.C., who was dealing with the case before him from another point of view. In the preceding remarks I have dealt with the only question argued, to which by reason of its importance, apart from the particular case, I have thought it right to devote much attention. But, as at present advised, and I only say that because the point was not argued, the case might equally well be disposed of on another and shorter ground. What is meant by a provision being void as against the policy of the law? The phrase means no more than that the provision is not enforce-

CHAN. DIV.] *Re COOPER & CRONDACE'S CONTRACT AND V. & P. ACT 1874.* [CHAN. DIV.]

able by anyone or in any court. This, as I have already said, is a limitation and not a gift defeasible by the performance or non-performance of a condition. In other words, there is no condition which can be rejected, because not allowed by law, and the limitation must be taken as a whole as it stands. The wife is not cohabiting with her husband, and she cannot insist on the gift of an annuity limited to endure only during cohabitation. Granted, for the sake of argument, on this point that the limitation is contrary to the policy of the law then it is still unenforceable, and not less or more so, because the wife is not cohabiting with her husband. On this point the case seems to fall directly within the authority *Re Moore; Trafford v. Maconochie* already cited. This further point was made. The deed provided that "from and after the decease of the wife in the lifetime of the husband, or from and after the dissolution of their marriage or a judicial separation between them," the annuity shall be held upon trust for the benefit of the husband and ultimately for the children. And this phrase "after the dissolution of their said marriage or a judicial separation between them" is repeated several times in the provisions respecting the application of the settled property, which properly find a place in such an instrument. It is said that this phrase shows the intention of the settlor in limiting an annuity to the lady so long as she shall continue the cohabiting wife, and, that as there has been no dissolution or judicial separation, nothing has occurred to determine the annuity which must therefore be taken to be still subsisting. If I am right in thinking that the gift is by way of limitation only, a decision favourable to the wife on this point would not assist her; but I am not prepared to give such a decision. I do not think that entirely different words, used in other parts of the deed, can be imported into the limitation, so as to enable the court to give it a meaning different from that which, according to ordinary interpretation of the language used, it would bear.

Solicitors for the trustees, *Minet, Harvie, May, and Co.*

Solicitors for the remaining parties, *Campbell and Baird.*

Friday, March 4.

(Before KEKEWICH, J.)

Re COOPER AND CRONDACE'S CONTRACT AND VENDOR AND PURCHASER ACT 1874. (a)

Vendor and purchaser—Sale by auction—Maintaining fences—Covenant—Form of conveyance to purchaser.

The object of having a deed of conveyance is not merely to vest the property the subject of it in the purchaser, but to embody covenants as to what must be done under the contract of sale after completion of the purchase. Therefore where a purchaser bought under a contract which made him liable to erect and for ever after maintain fences, as marked on the plan of property sold by public auction, the vendor was held entitled to have the obligations of the purchaser expressed in the conveyance to him of his lot.

(a) Reported by W. P. PAIN, Esq., Barrister-at-Law.

VENDOR and purchaser summons.

On the 16th Sept. 1903 freehold premises were, with other lots, offered for sale by public auction on behalf of John Eggar Cooper, by the description in the particulars (so far as material) of "Lot 17 (coloured violet on plan)—A choice freehold building site. Nos. 128 (part of) and 144 (part of) on plan, adjoining the last lot" (lot 16).

The particulars of sale were prefaced by certain printed "General Remarks" annexed thereto, the sixth clause of which was in the following terms:

Each purchaser will have to erect, within six months from the date of sale, and afterwards maintain, a good and sufficient fence on the sides of his plot marked T on the plan within the boundary.

The defendant, Charles Hutton Crondace, was the purchaser of lot 17, described in the particulars subject to the conditions of sale.

By the 7th condition each lot was declared to be sold subject to such chief, quit, and other rents . . . rights of way . . . and to other easements, restrictions, and liabilities as were mentioned in the particulars, or as might be, ascertained to be charged thereon or to affect the same, and to any subsisting liability under inclosure award, private Act, covenant, or otherwise, to repair fences or roads, and by condition 10, the vendor was to execute to each purchaser an assurance of the lot purchased.

The 12th Nov. 1903 was the date fixed for completion of the purchase.

The only question arising upon this summons taken out by the vendor was whether, under the terms of the contract, the vendor was entitled to have inserted in the conveyance by him to C. H. Crondace, a covenant by him as such purchaser to erect forthwith, and for ever afterwards maintain a good and sufficient fence on the north side of the said hereditaments, adjoining lot 18, being one of the sides marked T on the plan annexed in accordance with No. 6 of the general remarks annexed to the contract, the fencing by the purchaser on the west side also marked T on the plan having been waived by the vendor.

G. Cave, K.C. for the purchaser, cited

Re Birmingham and District Land Company and Allday, 67 L. T. Rep. 850; (1893) 1 Ch. 342.

The object of a deed of conveyance is not only to convey the property sold, but to embody stipulations as to its user and having regard to matters to be done thereon after the date of execution. The applicant is entitled to have the obligations of the purchaser expressed in the conveyance to him of his lot. Stirling, J. granted in that case the application to have the obligations in the case of unsold land under a building scheme, some of the land subject to which had been sold by public auction, expressed and made binding in the conveyance. The same principle applies to purchaser's obligations. The words used in the conveyance must agree with those in the contract:

Re Peck and the School Board for London, 68 L. T. Rep. 847; (1893) 2 Ch. 315.

Hon. T. H. Watson for the purchaser.—There is no mention made in the general remarks, particulars, or conditions of sale, of the vendor

having the right to require any covenant from the purchaser. This is a reason why no covenant should be ordered to be inserted in the conveyance. According to ordinary practice, if there is to be a special covenant between vendor and purchaser, it is always mentioned in the particulars:

1 Key & Elphin. Free., 6th edit. pp. 294, 295; 7th edit., p. 311.

According to the contract the purchasers are to make a fence. The vendor settles the particulars and conditions of sale, and must settle them so as to give himself the right to insist on the inclusion of the covenant which he wishes included in the conveyance. Not having done this, the conveyance must be according to the contract between the parties:

Hardman v. Child, 52 L. T. Rep. 465, per Pearson, J., at p. 466; 28 Ch. Div. 712.

The vendor meant to rely on the contract, which in this respect will be operative after conveyance:

Palmer v. Johnson, 51 L. T. Rep. 211; 13 Q. B. Div. 351.

In *Re Birmingham and District Land Company and Allday (ubi sup.)* there was a special provision in the conditions as to covenants. *Re Peck and the School Board for London (ubi sup.)* was a case upon the construction of the Conveyancing Act 1881, and has nothing to do with the question here. Secondly, the covenant goes beyond what the vendor is entitled to.

KEKEWICH, J.—This is a case of some novelty. Counsel on behalf of the applicant and defendant cited no authority directly bearing on it. Any authority they have cited goes far from being decisive on the particular case. Going back to the real question in the case, I think it is better to approach it from the proper quarter. I ask myself what is the object of having a conveyance? It is not merely to vest the estate in the purchaser—the estate which he has contracted to purchase and the vendor has agreed to sell—but to express in a definite, concluded form all the terms of the contract which have to be performed by the purchaser. Things which have to be done beforehand it is not usual to include in the conveyance, as, for instance, a stipulation that the vendor before completion will put up a fence. And the purchaser is well advised to see that it is done before the purchase is completed. Again, if there is something entirely *dehors* the contract—as, for instance, a question of compensation for injury to the property—that would not appear on the conveyance. But otherwise it is meant to express in a binding and clear form once for all the clear contract between the parties so far as it has not been performed. I think that a conveyance that falls short of that is not a well-settled conveyance. For instance, if there are restrictive covenants to which the vendor is liable, and as he is entitled to a covenant by the purchaser—which I have held to be a covenant of indemnity—that must be put in the conveyance. If it is not there I agree the conveyance is not properly settled. And when you have once got a conveyance you cannot go behind that and say there is something more to be done. When once you have passed the bridge of conveyance neither party can go back, and you cannot sue on an agreement made

pending the contract, not included in the conveyance, which must be assumed not to have been embodied in the conveyance because it is presumed to be abandoned. That seems to me to be the object of a conveyance. Therefore, when you have to inquire whether this or that ought to be in the conveyance, you must find out if it is part of the contract. Does the contract provide that it must be done, either by the vendor or purchaser, after the estate has been vested. For that purpose you must look at the contract itself. This particular contract is made that "lot 17" described in the particulars and subject to the conditions should be sold by the vendor to the purchaser. It is common knowledge that, although conditions of sale are different things from particulars of sale, the purchaser takes the property in the particulars subject to the conditions. It is the commonest possible occurrence to find in the particulars a reservation of rights of way, some restrictive covenant, some easement, which is part of the description of the property sold, and which is recognised as a part of, or a fetter on, the enjoyment of the property. Now, in this particular instance we have three divisions instead of two. I have seen the same thing before. Besides the conditions which are properly called the signed conditions there are "general remarks." They generally fall into the particulars. Take the general remark 6: "Each purchaser will have to erect, within six months from the date of sale, and afterwards maintain a good and sufficient fence on the sides of his plot marked T on the plan within the boundary." If that obligation had been intended to be imposed as one of some half a dozen out of a larger number on two or three of these lots, it would have probably occurred to the draftsman to have inserted it at the foot of each description in the particulars as a note to each special lot. But it applies to every one. Therefore it comes into the particulars. The purchaser takes lot 17 as described in the particulars with the obligation to erect and afterwards maintain the fences specified. There you have something that must be done after the date of completion. It was possible that it was intended that the fence should be erected before completion. But it is, at any rate, looking to the future as to maintaining the fences, and so it is directed to something after completion. That points to something after completion. So that you have something which ought to be introduced, and to be inside the conveyance, in order to complete it and perform the contract. But it is pointed out by counsel for the purchaser that there is no condition to that effect, and the conditions would have been more perfect had it been there. But I cannot think that the omission removes the obligation—the obligation is to do this; and if the conveyance is prepared without this, the vendor runs great risk of not being in a condition to insist on it at all. It would be extraordinarily difficult to frame the indorsement of a writ so as to enforce this if there was nothing in the conveyance about it. I do not say it would be impossible. The answer would be that it is an obligation which now has no legal means of enforcement, not having been inserted in the conveyance. There will be a declaration that the vendor is entitled to have a covenant regarding the fencing inserted in the conveyance.

CHAN. DIV.]

HURRELL v. LITTLEJOHN.

[CHAN. DIV.]

Solicitors for the applicant, *Johnson, Weatherall, and Sturt*, agents for *Potter and Crundwell*, Farnham.

Solicitor for the purchaser, *F. C. Holland*.

Nov. 24, 25, 1903, Jan. 13, 14, and 30, 1904.

(Before JOYCE, J.)

HURRELL v. LITTLEJOHN. (a)

Settled Land Acts—Sale by tenant for life—Undervalue—Action by remainderman to set aside sale—Settled Land Act 1882 (45 & 46 Vict. c. 38), ss. 4 (1), 53, 54.

The mere fact that, upon a sale by a tenant for life under the powers of the Settled Land Acts, the purchase is at an undervalue is not of itself sufficient to invalidate the sale.

In 1902 a tenant for life, purporting to act under the powers conferred upon him by the Settled Land Acts, sold the freehold of certain public-house property to W. for the sum of 2000l.

At the time of the sale the property was subject to a lease which had been granted as from Christmas 1892 for a term of twenty-one years at a rent of 63l. per annum.

Within a few days after the sale W. contracted to resell the property for 3000l., although it was doubtful whether 3000l. was not in excess of the true value of the property.

W. had not, before making the original purchase, made any inquiry as to whether the trustees or tenant for life had had any valuation made.

Held, that these circumstances were not sufficient to sustain an action by a remainderman to set aside the sale.

ACTION to set aside a sale by a tenant for life under the Settled Land Acts of a public-house known as the Coach and Horses, Old Bexley.

The facts, which will be found set out in his Lordship's judgment, were shortly as follows:—

The Coach and Horses was settled upon trust for the defendant Richard Littlejohn for life, and after his death for his children equally.

There were seven children, of whom the plaintiff was the eldest; the other six were infants.

The defendant Richard Littlejohn, purporting to act under his statutory power as tenant for life under the Settled Land Acts, had in 1902 sold the Coach and Horses to the defendant Henry Christian Wasmuth for the sum of 2000l.

At the time of the sale the property was subject to a lease which had been granted as from Christmas 1892 for a term of twenty-one years at a rent of 63l. per annum.

Within a few days after the sale Wasmuth contracted to resell the property for 3000l. This contract had not yet been carried out, but it appeared that the purchasers were still willing to pay the 3000l. if they could get a good title.

His Lordship, however, doubted whether 3000l. was not in excess of the true value of the property.

The defendants to the action, other than Richard Littlejohn and Henry Christian Wasmuth, were Edward Norfolk, a mortgagee of Wasmuth, the trustees for the purposes of the Settled Land Acts, and the infant children of Richard Littlejohn.

The plaintiff now claimed a declaration that the sale of the Coach and Horses to the defendant Wasmuth was not a valid exercise of the power of sale conferred by the Settled Land Act 1882 on the defendant Richard Littlejohn, and that the sale might be set aside accordingly, and that the conveyance to the defendant Wasmuth and the mortgage to the defendant Edward Norfolk might be delivered up respectively to be cancelled, and that the purchase money might be returned.

W. F. Hamilton, K.C. and W. A. Peck, for the plaintiff, contended that, Wasmuth having purchased the public-house at 2000l. when he knew that it was worth a great deal more, the sale could not stand. An ordinary advance in price would not affect the sale; but an immediate advance of one-half upon the price invalidated the sale. The very fact that Wasmuth knew that he was obtaining the property at a gross undervalue showed that he did not act in good faith. The sale was then a fraud upon the power, and must be set aside. They referred to sects. 3 (1), 4 (1), 42, 53, and 54 of the Settled Land Act 1882 and to the following cases:

Chandler v. Bradley, 75 L. T. Rep. 581; (1897) 1 Ch. 315;

Stevens v. Austen, 3 L. T. Rep. 810; 3 E. & E. 685;

Re Cooper and Allen's Contract, 35 L. T. Rep. 890; 4 Ch. Div. 802;

Oliver v. Court, 8 Price, 127;

Cottrell v. Cottrell, 52 L. T. Rep. 486; 28 Ch. Div. 628.

Badeock, K.C. and George Henderson, for the defendants Henry Christian Wasmuth and Edward Norfolk, contended that Wasmuth, having dealt in good faith with the tenant for life, was protected by sect. 54 of the Settled Land Act 1882. The mere fact that he knew he was making a good bargain did not take away that protection.

Hughes, K.C. and C. Church for the trustees.

Younger, K.C. and C. Herbert Brown for the defendant Richard Littlejohn.

C. Lyttleton Chubb for the infant children.

Cur. adv. vult.

JOYCE, J.—This is an action by one of a number of persons beneficially entitled in remainder to set aside the sale by a tenant for life under the powers of the Settled Land Act 1882 of a public-house, the Coach and Horses, Old Bexley. The several defendants are the tenant for life, Mr. Littlejohn; the purchaser, Mr. Henry Christian Wasmuth; Mr. Edward Norfolk, a mortgagee of Mr. Wasmuth; Mr. Benjamin Fryer and Mr. Richard Carroll Pearman, the trustees for the purposes of the Settled Land Acts; and the other persons interested in remainder with the plaintiff. At first there were extensive allegations of fraud, not made, I think, perhaps altogether wantonly, but under a misapprehension of certain facts and figures which have subsequently been explained. However, a short time before the trial a letter was written withdrawing the charges of fraud, and other claims were withdrawn in the course of the trial. The action ultimately became reduced to a claim against the purchaser and his mortgagee, Mr. Norfolk, to set aside the sale as being made at an inadequate price; in fact, I may say

(a) Reported by SYDNEY DAVEY, Esq., Barrister-at-Law.

that practically the question I have to decide is, Whether a purchaser who buys from a tenant for life at less than the market price—or, I should rather say, who succeeds in getting a good bargain—can insist upon retaining it against the beneficiaries, having regard to the Settled Land Act 1882, sect. 4, sub-sect. 1, of which provides that “every sale shall be made at the best price that can reasonably be obtained”; and sect. 13 of which provides that “a tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.” As to Mr. Norfolk, who is the mortgagee of the purchaser, he must, I think, upon the facts proved or admitted, be taken to have been, *quoad* his mortgage, a purchaser for value without notice; and there is no case for relief against him. Whether he ought to be made a party at all I doubt, but as against him—or, rather, as against his representatives, for he is dead—the action must be dismissed. The principal defendant is Mr. Wasmuth. He is a director of a brewery company or firm, and has been all his life associated with a firm of distillers, to whom he described himself as being advising expert. He thus naturally has had considerable experience with respect to what is called licensed property. One Stapylton, formerly occupier of the Station Hotel, Sidcup, who had had business relations with Mr. Wasmuth or his firm, mentioned to him that he knew of a public-house for sale. He did not at first give the name or any particulars. Later, he came to Mr. Wasmuth and stated that the public-house in question was the Coach and Horses, Old Bexley, and gave the name of the solicitors, Messrs. Barton and Pearman, who had the business in hand. This public-house Mr. Wasmuth knew very well, for his firm were in the habit of supplying the spirits there consumed. Stapylton was then told to get the particulars, and, after some bargaining and negotiation with the solicitors, Mr. Wasmuth ultimately obtained a contract, dated the 22nd Feb. 1902, with the tenant for life for the purchase of the property at the price of 2000*l.*, with a further sum of 50*l.*—or not exceeding 50*l.*, or something of that sort—for the payment of the vendor’s solicitors’ costs. What I have called “the property” was the freehold subject to a lease which had still nearly twelve years to run. The lease was made in Aug. 1893, by the same tenant for life, to Messrs. Beasley, the brewers, for twenty-one years from Christmas 1892, at a rent of 63*l.*. The rent paid by the occupying tenant to the brewers, subject to the usual tie, was 60*l.* per annum. The price agreed to be given by Wasmuth was thus about thirty-two and a-half years’ purchase. I see no reason to suppose that the property had materially increased in value since the lease in 1893; but, of course, the public-house property is or was notoriously of a speculative character. Now, the purchaser certainly thought that he had made an advantageous bargain. Indeed, he bought as a speculation, and, of course, he would not have bought at all unless he had hoped and expected to make a profit. He swears—and I believe him, for I see no reason whatever to question his veracity as a witness—that he did not expect to make nearly

so much as 1000*l.*—that is, 1000*l.* profit. Stapylton was an old schoolfellow, and on friendly terms with a member of the firm of Messrs. Barton and Pearman; and, having been in the trade, he was requested by them, in the month of Nov. 1901, to make some inquiry with a view to ascertaining what were the monthly takings of the public-house, the sale of which was then contemplated. He appears to have done so. But on the 20th Nov. 1901 he wrote a letter of that date to Messrs. Barton and Pearman, in which he stated: “After our conversation the other day, I smelt around the Coach and Horses and I attach the result. He probably lied a bit, but if you can get anything like 1800 for your Johnny you are not doing any harm.” This he is supposed to have got from the occupier, the tenant. After the contract Wasmuth promised to give Stapylton, who had introduced the matter to him and who was in pecuniary difficulties—in fact, he was an undischarged bankrupt—one half of any profits that he, Wasmuth, might make out of the transaction. At one time it was rather suggested, though never distinctly contended, that the sale was invalid by reason of Stapylton’s connection with the matter; but, as I say, this was not seriously contended, and I am satisfied that there is no ground for such a contention. Stapylton was never the agent of the vendor or his solicitors to find a purchaser or in any fiduciary relation to them. To my mind it was quite natural that Wasmuth should be disposed to deal generously with him under the circumstances, and I think he was fairly entitled to something in the nature of a commission from Wasmuth. Wasmuth, before purchasing, made no inquiry as to whether the trustees or the tenant for life had any valuation made or anything of the kind. In my opinion he was not bound to make any such inquiry any more than he was bound to inquire whether notice had been given to the trustees—as to which see sect. 45, sub-sect. 2, of the Settled Land Act 1882. Now, pausing here to consider the position on the 22nd Feb. 1902, the date of the execution of Wasmuth’s contract, I cannot find in the circumstances of the case any ground for concluding that Wasmuth in any way dealt with the tenant for life, or his solicitors, otherwise than in good faith. Consequently sect. 54 of the Settled Land Act appears to me to apply; that section providing that “upon a sale a purchaser or other person dealing in good faith with the tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act.” Now, I do not mean to say that in an action for setting aside a sale under this Act the fact of the price being inadequate (whatever that may mean) may not, together with other circumstances, be material; but what I do think is this, that the mere fact that the purchase is at an undervalue of itself without anything more at all is insufficient to invalidate the sale if the purchaser acted in good faith. If I am right in this there is an end of the plaintiff’s case as against Wasmuth; and I think there is no case as against him. As already intimated, no charge is made or relief sought against the tenant for life or any of the other defendants, except Norfolk’s representatives; and, as I have already said, the action must be dismissed

CHAN. DIV.] ASHWORTH v. ENGLISH CARD CLOTHING COMPANY LIM. (NO. 1). [CHAN. DIV.]

against them. It appears that Wasmuth, within a few days after his contract with the tenant for life, offered the property to Messrs. Beasley, the brewers, for 3000*l.*, which offer they, somewhat to his surprise, accepted, entering into a verbal contract to purchase from him for 3000*l.* This had not been carried out, but rescinded by reason of Messrs. Beasley insisting that the beneficiaries should concur for the purpose of confirming the sale. Messrs. Beasley, no doubt, were much annoyed at finding that Wasmuth had purchased without their being aware of what was going on. They, in fact, communicated with some of the beneficiaries, and hence this action. The facts are, however, that Messrs. Beasley, as early as Oct. and Nov. 1901, were in correspondence with the solicitors of the tenant for life in reference to a renewal of the lease, and in effect these solicitors practically offered to sell the freehold to them for 2750*l.* Instead of accepting this offer or making any counter offer, they wrote in such a manner that Messrs. Barton and Pearman considered that any negotiations with Messrs. Beasley for the sale of the property was at an end. There may have been a misunderstanding, but, upon a careful perusal of the correspondence, and having seen Mr. Barton and other members of his firm in the witness-box, who were perfectly fair and straightforward witnesses, I do not think—and I think I am bound to say this after what fell during the trial—that Messrs. Barton and Pearman are in any way to blame. There was no actual valuation before the sale, but Mr. Lucas, one of the trustees, who was himself a competent surveyor and valuer, though without any special experience in reference to valuing public-houses, knew the property well, and considered that Wasmuth's offer of 2000*l.* ought to be accepted if there was to be a sale—and the tenant for life had long been desirous of selling, with a view, no doubt, to investing the proceeds upon securities that would produce a larger income. As to what the value of the property really was, there is a considerable difference of opinion and a conflict of evidence; but I am not at all satisfied with the estimates of value put forward on behalf of the plaintiff. I think they are fallacious, having regard to the fact that it was not a sale of the freehold in possession, but subject to a lease. Without the licence I do not think the property was worth more than 40*l.* a year to rent, if so much. What the value of the licence may be at the end of twelve years when the lease expires cannot, in my opinion, be predicted with anything like certainty. It is quite true that Mr. Furmage, the representative of Messrs. Beasley, the brewers, who are much annoyed with Messrs. Barton and Pearman and possibly with the defendant Wasmuth, deposed that Messrs. Beasley were still willing to give 3000*l.* if they could get a good title. This does not under the circumstances satisfy me that the property was or is really worth in the market anything like 3000*l.*, especially as they would have nothing to say to the offer originally made to them by Messrs. Barton and Pearman to sell for 2750*l.* Upon the whole, as I have said already, I think sect. 54 of the Settled Land Act 1882 furnishes the purchaser with a good defence to this action, which consequently, in my opinion, fails altogether.

Solicitors for the plaintiff, *Heath and Hamilton*.

Solicitors for the defendants, *Wasmuth and Norfolk, Benwell and Norfolk*.

Solicitor for the defendant *Richard Littlejohn, H. S. Knight-Gregson*.

Solicitors for the trustees, *Barton and Pearman*.

Solicitors for the infant children, *Leesmith, Munby, and Neville*.

Saturday, Feb. 6.

(Before JOYCE, J.)

ASHWORTH v. ENGLISH CARD CLOTHING COMPANY LIMITED (NO. 1). (a)

Costs—Taxation—Inspection of machinery by arrangement between parties and without order of court—Discretion of taxing master—Order L., r. 3.

Where for the purposes of an action there has been an inspection of machinery by arrangement between the parties and without an order of the court being obtained thereto, the taxing master is not debarred by Order L., r. 3, of the Rules of the Supreme Court from allowing the costs of such inspection.

SUMMONS to review taxation in the above action for infringement of the plaintiff's patent, the action being dismissed with costs on the ground that the patent was invalid in that there was insufficient subject-matter for a patent and on the ground that there had been no infringement.

The taxing master, in taxing the defendants' costs, disallowed the fees to counsel and an expert for inspecting certain machinery, the inspection having been arranged between the solicitors of the parties without the expense of obtaining an order of the court thereto.

The fees in question were disallowed by the taxing master on the ground that, in the absence of an order under Order L., r. 3, he had no discretion to allow such fees.

Order L., r. 3, provides that:

It shall be lawful for the court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorise any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

Younger, K.C. and A. S. Walter for the defendants.

Terrell, K.C. and J. F. Graham for the plaintiff.

JOYCE, J. overruled the objection of the taxing master and allowed the costs of the inspection.

Solicitors for the plaintiff, *W. J. and E. H. Tremellen*, for *Blair and Seddon*, Manchester.

Solicitors for the defendants, *Rowcliffes, Rawle, and Co.*, for *Ramsden, Sykes, and Ramsden*, Huddersfield.

(a) Reported by STURDY DAVEY, Esq., Barrister-at-Law.

Feb. 6 and 20.

(Before JOYCE, J.)

ASHWORTH v. ENGLISH CARD CLOTHING
COMPANY LIMITED (No. 2). (a)

Costs—Interest—Action dismissed with costs—Payment of costs and interest—Order reversed by Court of Appeal—Return of costs and interest—Order of Court of Appeal reversed by House of Lords—Second return of costs and interest—Right to further interest.

On the 22nd June 1901 the plaintiff's action was dismissed by Joyce, J. with costs; and on the 26th March 1902 the plaintiff accordingly paid the defendants' costs, together with interest thereon.

On the 11th July 1902 the Court of Appeal reversed the order of Joyce, J.; and on the 21st July 1902 the defendants repaid to the plaintiff the costs and interest.

On the 9th Nov. 1903 the House of Lords reversed the order of the Court of Appeal and restored the order of Joyce, J. The plaintiff returned the costs and interest to the defendants.

Held, that the defendants were also entitled to interest on the costs as from the 21st July 1902.

MOTION that the order of the House of Lords in the above action made on the appeal of the defendants from the order of the Court of Appeal, dated the 11th July 1902, might be made an order of this court; and that the plaintiff might be ordered to pay the sum of 51*l.* 1*s.* 4*d.*, being interest at 4 per cent. less tax from the 21st July 1902 to the 23rd Nov. 1903, on the sum of 1013*l.* 2*s.* 10*d.*, being the amount of the defendants' taxed costs of the hearing of the action before Joyce, J. returned to the plaintiff on the 21st July 1902.

On the 22nd June 1901 the above action was dismissed with costs.

On the 26th March 1902 the plaintiff paid to the defendants such costs, being taxed at 1013*l.* 2*s.* 10*d.*, together with 29*l.* 12*s.* 6*d.* interest thereon, making in all the sum of 1042*l.* 15*s.* 4*d.*

On the 11th July 1902 the Court of Appeal reversed the order of Joyce, J.

On the 21st July 1902 the defendants repaid to the plaintiff the above sum of 1042*l.* 15*s.* 4*d.*, together with the sum of 13*l.* 3*s.* 7*d.*, the interest thereon, as reckoned from the 26th March 1902—in all, 1055*l.* 18*s.* 11*d.*

On the 9th Nov. 1903 the House of Lords reversed the order of the Court of Appeal and restored the order of Joyce, J.

The plaintiff repaid the above sum of 1055*l.* 18*s.* 11*d.*, but declined to pay any interest on the sum of 1013*l.* 2*s.* 10*d.*, as from the 21st July 1902, alleging that, although he had that sum in his hands from the 21st July 1902 to the 23rd Nov. 1903, he was not liable to pay any interest thereon.

Terrell, K.C. and J. F. Graham for the plaintiff.—The defendants are not entitled to interest on the costs in question at common law; the obligation to pay such interest is merely statutory. That statutory obligation is to be found in the Judgments Act 1838 (1 & 2 Vict. c. 110); sect. 17 of that Act providing that every judgment debt shall carry interest at the rate of 4 per cent. per annum "from the time of entering up the judgment

until the same shall be satisfied," and sect. 18 providing that all decrees and orders of courts of equity and all rules of courts of common law whereby any sum of money, or any costs, charges, or expenses shall be payable to any person shall have the effect of judgments in the superior courts of common law. Thus the defendants were entitled to the interest on their costs as from the time of entering up the judgment "until the same was satisfied." Here the judgment was satisfied on the 26th March 1902 by the payment by the plaintiff to the defendants of their costs before Joyce, J. with interest thereon; and, being once satisfied, there cannot be any further obligation on the plaintiff to pay interest under the statute.

Younger, K.C. and A. J. Walter for the defendants.—The order of Joyce, J. was only suspended by the order of the Court of Appeal. If there had been no prior payment of the costs incurred by the defendants before Joyce, J., no doubt the plaintiff would have to pay interest on these costs from the time of the entering up of the judgment of Joyce, J. until the costs were paid consequent upon the order of the House of Lords. It would seem very unjust that the intermediate adverse decision of the Court of Appeal should deprive them of interest on the costs. They referred to *Edge and Sons v. W. Gallon and Son* (1899) W. N. 137, where at the trial of the action judgment was given for the plaintiffs with costs. The defendants intending to appeal, it was ordered that they should pay the amount of the plaintiffs' taxed costs to their solicitors, on their personal undertaking to refund the amount in case the appeal should succeed. The Court of Appeal reversed the decision, and ordered that the plaintiffs should pay the defendants' costs in both courts. The defendants had paid 1105*l.* to the plaintiffs' solicitors, this being the amount of the plaintiffs' taxed costs. In drawing up the order of the Court of Appeal the registrar inserted a direction that the plaintiffs should pay the 1105*l.* to the defendants, together with interest thereon from the date of payment to the plaintiffs' solicitors up to the date of the judgment of the Court of Appeal. The Court of Appeal had not given any express direction for the payment of interest. On the plaintiffs objecting to pay the interest, and moving the court to vary the order accordingly, the court, without expressing any opinion whether the court had power to order interest to be paid, said that the direction for payment of interest ought not to be inserted as common form.

Cur. adv. vult.

JOYCE, J.—In this case, in the court of first instance, the plaintiff's action was dismissed with costs on the 22nd June 1901. On the 26th March 1902 the plaintiff paid the defendants' costs, 1013*l.*, with interest to date, amounting altogether to 1042*l.* On the 11th July 1902 the order of the court below was reversed by the Court of Appeal, and on the 21st of the same July the defendants, being required to do so by the plaintiff, returned to him the amount he had paid for costs and interest as I have mentioned. Now, pausing here for a moment, it appears to me that at that moment matters stood in the same position as if the plaintiff had never paid or been ordered to pay

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[PROB.]

these costs. On the 9th Nov. 1903 the House of Lords reversed the order of the Court of Appeal, and restored the original order. The plaintiff is willing to repay, and has repaid, the defendants' costs and interest that were returned to him under the order of the Court of Appeal, this interest being interest on the defendants' costs from the original judgment to the 21st July 1902. He objects, however, to pay interest on such costs for the period since the 21st July 1902, although he has had the money in his hands, without, as it ultimately turns out, being entitled thereto. But, by law, if these costs had never been paid at all, the defendants would be now entitled to have them with interest from the date of the original judgment; and it appears to me that they ought not to be in a worse position by reason of having, under an order of the Court of Appeal, now reversed, returned the amount of these costs with interest to the 21st July 1902. I think that this return of costs demanded by and received by the plaintiff put the defendants in the same position as if they had never been paid by the plaintiff. Therefore, in my opinion, the motion is entitled to succeed. I should add that the case which was cited to me of *Edge and Sons v. W. Gallon and Son* (1899) W. N. 137 was altogether different. There the costs refunded were simply costs which an erroneous order of the court below, subsequently reversed, compelled the defendants to pay, and there was no statute or rule entitling the defendants to interest on the costs so refunded. Therefore there must be an order according to the notice of motion with costs.

Solicitors for the plaintiff, *W. J. and E. H. Tremellen*, for *Blair and Seddon*, Manchester.

Solicitors for the defendants, *Rowcliffes, Rawle, and Co.*, for *Ramsden, Sykes, and Ramsden*, Huddersfield.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Tuesday, Feb. 16.

(Before Sir F. JEUNE, President.)

In the Goods of MARTIN. (a).

Probate—Corporate body—Grant to corporate body and to individuals—Jurisdiction—Bodies Corporate (Joint Tenancy) Act 1899 (62 & 63 Vict. c. 20)—Practice.

The court will not make a grant of probate to a body corporate and to one or more individuals, all of whom have been appointed executors by a will.

MOTION.

This was a motion on behalf of the Law Guarantee and Trust Society, a limited body, for a grant of probate of the will of James Martin, of No. 17, Compton-road, Canonbury, in the county of London, who died on the 2nd Sept. 1903. The deceased executed his will on the 22nd May 1902, and appointed two of his nephews, William Alexander Shearer and Donald Francis Shearer, together with the Law Guarantee and Trust Society, as executors and trustees. On the 17th Sept. 1903 the society duly appointed its syndic to apply for letters of administration to the estate of the deceased with the will annexed. The

authorities at Somerset House, however, declared that such a grant could not be made unless the two nephews declined to take probate. A grant of probate could be made to the two nephews or a grant of letters of administration to the society, but not both. On the 13th Oct. a grant of the will in common form was issued to the nephews, no mention being made of the society. The present motion was to ask the President to change the practice, and make it conform with that of other countries. The gross value of the estate was about 12,500*l.*

Priestley, K.C. and Barnard for the society.—The change desired was one which was in accordance with the legal procedure favoured by other countries. In New South Wales probate had been granted in 1902 in a case where the manager of the Permanent Trust Company had sworn that the company would pay the just debts and legacies of the testator. It was true that the grant was there made to the company alone. The Bodies Corporate (Joint Tenancy) Act 1899 (62 & 63 Vict. c. 20) had been passed in consequence of the decision in *Law Guarantee and Trust Society Limited and Hunter v. Bank of England* (62 L. T. Rep. 496; 24 Q. B. Div. 406) and the partial remedy supplied by the Act of 1892, which only applied to the Banks of England and Ireland. By sect. 1 of the Act of 1899, bodies corporate were enabled to hold property in joint tenancy. Perhaps sooner or later it might come to pass that a society would be appointed sole executor; but that was for the consideration of the testator, who must be taken to know what he was doing. There was a disadvantage in a case like the present under the existing practice. It would be a considerable saving of expense if a grant was made to the nephews and the society direct.

Gordon Brown for the two nephews.

The PRESIDENT.—I should have been very glad to have acceded to this application if I could have seen my way clear to do so, especially as I think that the courts have over and over again lost opportunities in modifying or changing rules of practice. In my opinion the practice should always be extended by the judges whenever it is certain that they have the power to alter it, and there is a manifest advantage in the change. But I do not feel disposed to act in the present case, nor to follow the case mentioned by Mr. Priestley, for it is possible there may have been special legislation in New South Wales upon the subject. I think that a society like the Law Guarantee and Trust Society should obtain special powers from Parliament to enable them to act in the way desired, and I am of opinion that they are well qualified to act. But such a grant as the one now sought for has never yet been made, and I am not sure that this is merely a matter of practice. On the contrary, I think it is a matter with which the Legislature alone ought to deal. As I have said, I should have been glad to grant this application if I considered it was within my power to do so. As I am not of that opinion, the motion will be dismissed.

Solicitors for the society, *Gribble, Oddie, Sinclair, and Johnson*.

Solicitors for the executors (the nephews), *Linklater, Addison, Brown, and Jones*.

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Feb. 10.

(Before WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.)

LEA v. THURSBY. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Staying proceedings—Frivolous and vexatious action—Interlocutory application in County Court—Subsequent action in High Court raising same question—Order XXV., r. 4.

Where an action was brought in good faith to try a legal point which ought to be tried, a motion, under Order XXV., r. 4, to dismiss the action as frivolous and vexatious and an abuse of the process of the court, on the ground that the point was *res judicata*, having been raised and determined in previous proceedings, was dismissed with costs in any event.

Decision of Eady J. (89 L. T. Rep. 744) affirmed.

By an indenture of lease dated the 20th Aug. 1880, and made between T. Worthington of the one part and R. H. Milward of the other part, certain property was demised to R. H. Milward for a term of ninety-five years at the rent of 222l. 5s. 6d.

By an indenture of mortgage dated the 24th June 1881, and made between R. H. Milward of the one part and James Horsfall of the other part, R. H. Milward demised the term, less three days, at a peppercorn rent, to James Horsfall to secure 2000l. and further advances.

At the present time the sum of 8000l. was due upon the security.

James Horsfall died on the 17th Oct. 1887, and the plaintiffs were the present trustees of his will.

On the 27th March 1882 R. H. Milward procured a conveyance in fee of the property demised to him, and in 1885 he sold the property to W. E. J. B. Farnham.

The conveyance was dated the 1st Aug. 1885, and was expressed to be subject to the lease of the 20th Aug. 1880.

The defendant was a purchaser from W. E. J. B. Farnham, and he claimed that the lease was subsisting.

In July 1902 R. H. Milward became bankrupt.

On the 5th May 1903 an order was made in bankruptcy by the registrar of the County Court of Warwickshire that the plaintiffs should be excluded from all interest in the lease, and that the same should be vested in the defendant, unless they declared their option to accept a vesting order of the lease.

The plaintiffs had not appealed from that order, being advised that if the lease was subsisting the order was right; and that if such lease was not subsisting their rights were not adversely affected. Accordingly they commenced this action against the defendant, and by their statement of claim asked a declaration that when R. H. Milward acquired the fee in 1882 the lease became merged, and that the only term now subsisting was the term at a peppercorn rent to secure the mortgage.

Thereupon a motion was made by the defendant, under Order XXV., r. 4, to dismiss the action as frivolous and vexatious and an abuse of the process of the court.

On the 22nd Jan. 1904 the motion came on to be heard before Byrne, J., when his Lordship decided (89 L. T. Rep. 744) that the action was brought in good faith to try a legal point which ought to be tried, and that the motion wholly failed and must be dismissed with costs in any event.

The defendant appealed.

Eve, K.C. and *Wootten* for the appellant.—The question raised in this action is whether there was a merger of the term created by the lease of the 20th Aug. 1880. All we now ask is that the court will say that this very point has been the subject of adjudication between the same parties in the County Court proceedings, and that therefore the present action is frivolous and vexatious and an abuse of the process of the court:

Order XXV., r. 4.

It is precisely the same question as was determined in the previous case by a court of competent jurisdiction. As to disclaimer, see Bankruptcy Act 1883, s. 55, sub-s. 1. It was open to the plaintiffs to appeal, if they had thought proper to do so, from the decision of the registrar of the County Court. The fact that the question in dispute has already been the subject of adjudication *inter partes* is a good ground for staying the action; and the defendant ought not to vexed again by an action of this nature. The case is within Order XXV., r. 4, according to the decisions, and it is very similar to

Stephenson v. Garnett, 78 L. T. Rep. 371; (1898) 1 Q. B. 677.

They referred also to

Reichel v. Magrath, 61 L. T. Rep. 131; 14 App. Cas. 665.

Vernon Smith, K.C. (with him *W. C. Druce*) for the respondents.—There was, I submit, no jurisdiction to decide this question of title in the bankruptcy proceedings, being a question between strangers to the bankruptcy:

Re Lowenthal; Ex parte Beesty, 51 L. T. Rep. 431; 13 Q. B. Div. 238.

Moreover, the order does not decide that the lease is subsisting. The court ought to be slow to strike out a statement of claim:

Stephenson v. Garnett (*ubi sup.*).

He referred also to

Attorney-General of the Duchy of Lancaster v. London and North-Western Railway Company, 67 L. T. Rep. 810; (1892) 3 Ch. 274.

Eve, K.C. replied.

WILLIAMS, L.J.—It is evident that the transactions are extremely complicated, and I think that the point raised by the plaintiffs ought to be tried. The decision of Eady, J. is, in my opinion, quite right, and the appeal must be dismissed with costs.

STIRLING and COZENS-HARDY, L.JJ. concurred.

Appeal dismissed.

Solicitors for the appellant, *Robins, Hay, Waters, and Hay*.

Solicitors for the respondents, *Hadley and Dain*.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.
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Re FITZGERALD; SURMAN v. FITZGERALD.

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Jan. 19, 20, 21, and March 7.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re FITZGERALD; SURMAN v. FITZGERALD. (a)

APPEALS FROM THE CHANCERY DIVISION.

Conflict of laws—Scotch contract of marriage—Husband domiciled in England—Wife domiciled in Scotland—Trustees subject to English courts—Settlement of wife's property—Real estate in Scotland—Life interest of husband—Alimentary clause—Provision against alienation—Charges created—Validity.

A contract executed in Scotland in Scotch form on the marriage in Scotland of a domiciled Englishman with a domiciled Scotchwoman, whereby certain Scotch heritable bonds, the property of the wife—which according to the law of Scotland are regarded as immovables—were (inter alia) settled, was held to be subject to Scotch law, and the husband was held to be entitled to such interest only thereunder as the courts in Scotland would declare him entitled to, and that he was therefore entitled to the whole income of the settled property during his life free from the claims of any assignees or incumbrancers, but without prejudice to the rights (if any) of his alimentary creditors, and without prejudice to any prior payment in respect of a certain policy of insurance on his life.

So held by Williams and Cozens-Hardy, L.JJ. (dissentiente Stirling, L.J.), reversing the decision of Joyce, J. (88 L. T. Rep. 326).

By an indenture dated the 20th Sept. 1862, and made between William Robert Seymour Vesey Fitzgerald of the first part; Sir William Gerald Seymour Vesey Fitzgerald of the second part; Jane Margaret Matilda Macdonald Lockhart, spinster, of the third part; Henry Bullar, Gerald Surman, Charles James Abbott, Sir Hugh McCalmont Cairns, Sir Archibald Alison, and Sir Norman Macdonald Lockhart (hereinafter called "the trustees") of the fourth part, being a settlement made in the English form in contemplation of the marriage then intended and shortly afterwards solemnised between Sir William Gerald Fitzgerald and Jane Margaret Lockhart (and hereinafter referred to as "the English settlement"), William Robert Fitzgerald covenanted with the trustees that his heirs, executors, or administrators would within six months after his death pay to the trustees the sum of 6000*l.* with interest thereon at the rate of 4 per cent. per annum from the day of his death, to be held by them upon trust to invest the same in manner therein mentioned and to pay the income of the trust fund to Sir William Gerald Fitzgerald and his assigns during his life, and after his death to Jane Margaret Lockhart and her assigns during her life, and after the death of the survivor of them to stand possessed of the trust fund in trust for the issue of the intended marriage as therein declared. And Sir William Gerald Fitzgerald thereby assigned unto the trustees a policy of assurance upon his life for the sum of 4000*l.* effected with the Western Life Assurance Company at the annual premium of 7*l.* 3*s.* 4*d.*, to hold the same upon the trusts and with and subject to the powers and provisions thereinbefore

declared concerning the sum of 6000*l.* so covenanted to be paid as aforesaid.

And the English settlement contained covenants by Sir William Gerald Fitzgerald and provisions for keeping on foot the policy, including a power to the trustees to apply any part of the income of the trust fund for that purpose.

On the same date a marriage contract in the Scotch form (hereinafter called "the Scotch contract") was made by Sir William Gerald Fitzgerald and Jane Margaret Lockhart whereby, after reciting (amongst other things) the English settlement and the assignment of the policy of assurance on the life of Sir William Gerald Fitzgerald upon the aforesaid trusts, it was declared that the trustees of the Scotch contract (being the same persons as were the trustees of the English settlement) might from time to time apply a sufficient part of the income arising from the trust funds comprised therein in payment of the premiums and such other money (if any) as might be necessary for keeping up the policy or any other policy or policies which might be substituted for it under the provisions contained in the English settlement. And Jane Margaret Lockhart thereby assigned and conveyed unto the trustees all and sundry the lands and heritages, goods, gear, debts, and sums of money, and generally the whole property of Jane Margaret Lockhart (except that to which she was entitled under the English settlement, and jewels and other articles of the like nature, and all real or personal property under the value of 100*l.*) to the uses and purposes thereafter mentioned—that was to say: First, for payment of the expenses of executing the trust; secondly, for payment of the free annual proceeds of the trust estate to Jane Margaret Lockhart during all the days of her life, and that on her own receipt alone, exclusive of the *jus mariti* and right of administration of Sir William Gerald Fitzgerald; thirdly, in case Sir William Gerald Fitzgerald should be the survivor of the spouses, for payment of the whole free annual proceeds of the estate to him during all the days of his life after the death of Jane Margaret Lockhart, declaring that all payments to Sir William Gerald Fitzgerald should be "strictly alimentary," and should "not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors"; fourthly, on the death of the survivor of the spouses, the trustees should pay over or assign the whole trust funds and estate in their hands to such one or more of the child or children of the marriage as should then be in life, and to the heirs, executors, administrators, and assignees of such one or more of the children as might have died after having attained the age of majority or been married, and that in such proportions and at such times and under such conditions as were thereafter specified in the contract, with the provision that Jane Margaret Lockhart might, out of the sums provided by her under the contract and relative deeds, make grants not to exceed in all the sum of 1000*l.*

The English settlement and the Scotch contract were both executed in Scotland.

On the 23rd Sept. 1862 the marriage was duly solemnised in Scotland.

At the date of the Scotch contract Jane Margaret Lockhart was a domiciled Scotch-

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

woman; at that date—and ever since—Sir William Gerald Fitzgerald was domiciled in England.

Of the trustees, all, except Sir Norman Lockhart, were domiciled in England, he being a domiciled Scotchman.

The trusts of the Scotch contract were administered in England.

There was issue of the marriage one child only—namely, Geraldine Tryphœna Margaret Seymour Vesey Fitzgerald—who was born on the 19th June 1863.

No part of the sum of 6000*l.* which by the English settlement William Robert Fitzgerald had covenanted that his representatives should pay to the trustees thereof after his death, or of the interest thereon, was ever paid to the trustees.

On the 29th June 1866 Sir Norman Macdonald Lockhart executed an instrument in Scotch form, known as a deed of directions, and thereby directed "his said" trustees to assign to five trustees, being the trustees other than himself of the English settlement and the Scotch contract, the sum of 6000*l.* for payment of the annual proceeds to Lady Fitzgerald during her life, and upon her decease for payment to the child or, if more than one, then to the children of the said marriage equally between them, share and share alike.

Lady Fitzgerald died on the 16th May 1901.

Between that date and the date of the execution of the English settlement and the Scotch contract there had been numerous dealings by Sir William Gerald Fitzgerald and Lady Fitzgerald and also by Geraldine Tryphœna Fitzgerald with their respective interests under those instruments and also under the deed of directions. Some of the assignments or charges upon the interest of Sir William Gerald Fitzgerald under the Scotch contract were made by him with the concurrence of his wife and daughter.

Subsequently to 1901 Sir William Gerald Fitzgerald further incumbered his life interest under the instruments, and Colonel Frederick Henry Harford was the first mortgagee of the life interest under the Scotch contract.

The following were the particulars of the funds now subject to the trusts of the Scotch contract: Two sums of 6000*l.* and 850*l.* respectively secured by bond relating to heritable or immovable property in Scotland; three sums of 1350*l.*, 1200*l.*, and 750*l.* respectively secured by mortgages of property in England; 709*l.* 9*s.* 9*d.* in New Consols; and 908*l.* 11*s.* 3*d.* India Three per Cent. Stock.

The Western Life Assurance Company with which the policy of assurance for 4000*l.* was effected as aforesaid, failed many years ago, and nothing was ever received by the trustees of the English settlement in respect thereof. But Sir William Gerald Fitzgerald subsequently either assigned or caused to be assigned or delivered to the trustees a policy for the like amount which had been effected on his life in the London and Provincial Law Assurance Society, which had since been amalgamated with and was now represented by the Guardian Fire and Life Insurance Company Limited. Such last-mentioned policy had since been kept on foot, and was still subsisting.

It was a policy with profits at an annual premium of 95*l.* 3*s.* 4*d.*, whereas the former policy was one without profits at an annual premium of 79*l.* 3*s.* 4*d.* The amount payable under the policy, with bonuses, was considerably more than 4400*l.*

Henry Bullar, Charles James Abbott, Sir Hugh McCalmont Cairns, and Sir Norman Macdonald Lockhart were all dead, leaving Sir Archibald Alison and Gerald Surman the surviving trustees; and they were the sole trustees at the date of the issue of an originating summons, on the 12th Oct. 1901, for the determination of the question whether Sir William Gerald—Fitzgerald was entitled for his life to the income of the trust funds comprised in or subject to the trusts of the Scotch contract free from incumbrances and without power of alienation, or who was now entitled to such income.

The summons also asked for the directions of the court as to the payment of the premiums upon the policy of 4000*l.* upon the life of Sir William Gerald Fitzgerald in the Guardian Fire and Life Insurance Company Limited.

It appeared from an affidavit made by the Right Honourable Andrew Graham Murray, Lord Advocate of Scotland, that by the law of Scotland it was possible for a person to create a life interest in favour of another person, and, by declaring that life rent to be "alimentary," to exclude (so far as the life interest did not exceed in amount a reasonable provision) the diligence of ordinary creditors, and restrain all power of anticipation; so that when, as here, a lady by ante-nuptial marriage contract conveyed her funds to trustees, it was possible for her to create a life rent of these funds in favour of her surviving husband, and to exclude his ordinary creditors and restrain him from anticipation.

The affidavit went on to state that in the Scotch contract the words used in this connection were of ordinary Scottish style, and were appropriate in a Scottish deed to the effect above mentioned; and, further, that these observations were not affected by any consideration as to whether the settled funds were heritable or movable.

As regarded the property settled under the Scotch contract, affidavits of Scotch advocates showed that the original securities, which consisted of bonds for 6000*l.* and 7200*l.* (being bonds secured over heritable property in Scotland), were both heritable or real estate for all purposes down to the 31st Dec. 1868, when the Titles to Land Consolidation (Scotland) Act 1868 (31 & 32 Vict. c. 101) came into operation, and certain exceptions were introduced as specified in sect. 117 of that statute.

The affidavits further showed that the security for 6000*l.* which still subsisted remained wholly real or heritable estate in the hands of the trustees; and that as regarded the balance of the security of 7200*l.* (this security having been uplifted in 1881)—namely, 850*l.*, which was reinvested in bond and disposition in security over heritable property in Scotland—that sum of 850*l.* was also real or heritable estate in the hands of the trustees; but that this was subject to the Act of 1868, whereby heritable securities, unless executors were expressly excluded, and except in certain respects specified in sect. 117 of the Act—namely, in regard to questions of *legitim* taxation, rights of courtesy and *terce*, *jus mariti* and *jus relicte*—were made movable or personal as regarded the succession of the creditor; but that the change in the nature or quality of the security from heritable to movable operated only so far as concerned inter-

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tate succession of the living to the dead *provisions juris*, and the provision of the statute did not apply to transmissions from a deceased trustee to a nomination substitute.

A contrary affidavit, however, showed that the bonds in question fell within the description of "movable" in a case of testate succession.

It further appeared that the alimentary provision in the Scotch contract would, according to the law of Scotland, be subject to the alimentary claims of those who were dependent upon Sir William Gerald Fitzgerald for alimentary support—namely, the children of the marriage; and that the children of the marriage would have the right, if he failed to maintain them, to attach the alimentary provision made for him under the Scotch contract, such alimentary provision being arrestable for alimentary debts, though not for other debts.

The summons was adjourned into court, and came on to be heard before Joyce, J. in March 1903, when the principal question argued was whether the Scotch contract must be construed according to the law of Scotland or that of England.

His Lordship, in a considered judgment, decided (68 L. T. Rep. 326) that, even if the construction and effect of the Scotch contract were to be determined by the law of Scotland (*Re Barnard; Barnard v. White*, 56 L. T. Rep. 9), its validity and operation with respect to the matter now in question must be determined by the law of England; that the prohibition against alienation of the alimentary provision was void and inoperative according to English law, being repugnant and contrary to public policy; and that, therefore, Sir William Gerald Fitzgerald's assignees or incumbrancers were the persons entitled to receive payment of the income from the trustees of the Scotch contract.

His Lordship also decided that, with regard to the policy of life assurance comprised in the English settlement, the trustees should surrender the existing policy with profits for a fully paid-up policy for 4400*l.*, the insurance company having notified their willingness to accept such a surrender.

As to the first part of that decision Sir William Gerald Fitzgerald, and as to the second part Geraldine Tryphena Fitzgerald, respectively now appealed.

Sir William Gerald Fitzgerald's appeal first came on to be heard.

A. H. Jessel for the appellant.—In this case a settlement of the property—mainly heritable property in Scotland—of a Scotch lady was made in Scotch form; and she thereby declared that all the interest that her husband was to take thereunder was to be "strictly alimentary," and should "not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors." If the settlement had been an English one—which it is not, according to my contention—it is conceded that the alimentary provision would be void so far as English law is concerned. But the contract of marriage being in Scotch form, the necessary inference is that the parties intended that the contract should be governed by Scotch law, which protects the husband's life interest subject to aliment, the children of the marriage being entitled to a reasonable amount

thereout. The question that has always to be considered in a case of this nature is, What was the intention of the parties at the time when the contract was executed:

Corbet v. Waddell, 7 Rettie's Ct. of Sess. Cas., 4th series, 200;

Chamberlain v. Napier, 15 Ch. Div. 614;

Re Barnard; Barnard v. White, 56 L. T. Rep. 9;

Dicey's Conflict of Laws, pp. 540, 568, 586, 652;

Re Megret; Tweedie v. Maunder, 84 L. T. Rep. 192; (1901) 1 Ch. 547;

Vidits v. O'Hagan, 80 L. T. Rep. 794; (1899) 2 Ch. 569; reversed on appeal on another point,

82 L. T. Rep. 480; (1900) 2 Ch. 87;

Re Bankes; Reynolds v. Ellis, 87 L. T. Rep. 432; (1902); 2 Ch. 333.

[*WILLIAMS, L.J.* referred to *Re Simpson; Simpson v. Simpson* (89 L. T. Rep. 542; (1904) 1 Ch. 1).] The court has always applied the rule that contracts are to be treated as valid, although they may contain provisions which are not consistent with the law of the matrimonial domicile, and that doctrine applies to the present case. Assuming that the Scotch contract deals with the Scotch property, the income thereof is cash in the hands of the trustees in England, so that the learned judge in the court below decided that he could hold the alimentary provision void as being inoperative according to English law. That decision is, however, I submit, contrary to

Harrison v. Harrison, 28 L. T. Rep. 145; L. Rep. 8 Ch. App. 342.

The form of administration has nothing to do with the matter, as the court will give effect to the law of the country whose forms the parties have chosen. [*COZENS-HARDY, L.J.*—The case of *Harrison v. Harrison* (*ubi sup.*) deals with the descent of Scotch real estates to the heir on an intestacy. There was no question of contract in that case.] Lord Selborne, L.C. in that case was dealing with the whole question of administration: (see p. 348 of L. Rep. 8 Ch. App.). There is Scotch real estate in the present case. Joyce, J. relied on *Noell v. Robinson* (2 Vent. 358), but that is contrary to *Harrison v. Harrison* (*ubi sup.*). I am desirous of distinguishing the case of *Scott v. Alnutt* (2 Dow. & Cl. 404), which I say does not apply here. The rule which Joyce, J. laid down, quoting from *Westlake on Private International Law*, 3rd edit., pp. 71, 76, is inaccurate. If that were correct, those cases which have supported the rights of parties under foreign and Scotch instruments would be wrongly decided:

Anstruther v. Adair, 2 My. & K. 513;

Westlake on Private International Law, 3rd edit., p. 72, citing *Lansdowns v. Lansdowne*, 2 Bli. 60, at p. 87.

The correctness of that passage has been challenged:

Foots on *Private International Jurisprudence*, 2nd edit., p. 315 *et seq.*;

De Nicola v. Curlier, 81 L. T. Rep. 733; (1900) A. C. 21.

As to the passage cited by Joyce, J. from *Vaizey's Law of Settlements of Property*, p. 1640 *et seq.*, that does not assist here. I submit that the authorities upon which I rely show that the law of the place where a contract is made is to be assumed to be the law according to which the parties intended the contract to be construed.

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Badcock, K.C. and T. T. Methold for the respondent Colonel Harford, the first mortgagee.—English law is the law which properly governs this contract, and is the law to be applied here. It is the law by which the parties intended, or may fairly be presumed to have intended, that the contract should be governed:

Dicey's Conflict of Laws, pp. 74, 540, 563.

This is an attempt by means of an instrument in Scotch form to create an interest which is repugnant to English law, for the contract is contrary to the policy of English law, which requires that if a man has a life interest he cannot enjoy it to the exclusion of his creditors:

Graves v. Dolphin, 1 Sim. 66; 27 R. R. 166;

Brandon v. Robinson, 8 Ves. 429, at p. 433; 11 R. R. 226;

Youngusband v. Gisborne, 1 Coll. 400.

The law of the matrimonial domicile applies to the contract of marriage, and is the proper law to regulate the present contract:

Westlake on Private International Law, 3rd edit., pp. 540, 570, 571, 572;

Dicey's Conflict of Laws, pp. 653, 654.

The validity of a marriage contract is determined on the same principles which govern other contracts:

Colliss v. Hector, 32 L. T. Rep. 223; L. Rep. 19 Eq. 334;

Foley v. Burnell, 1 Bro. P. C. 274; 4 Bro. P. C. 319.

The question affects the rights of English creditors; and if, as we submit, on the authority of the rule stated in *Dicey's Conflict of Laws* (*ubi sup.*), the law of the matrimonial domicile is the law according to which a marriage contract or settlement is to be construed, then English law must apply in the present case. And the court will not enforce a contract contrary to the policy of English law; and it will not, as against the English creditors, assist the protected life interest created by the Scotch contract:

Roussillon v. Roussillon, 42 L. T. Rep. 679; 14 Ch. iv. 351;

Re Megret; Tweedie v. Maunder (*ubi sup.*);

Brook v. Brook, 9 H. of L. Cas. 193, at pp. 212, 218;

Hope v. Hope, 8 De G. M. & G. 731;

Grell v. Levy, 16 C. B. N. S. 73;

Sottomayor v. De Barros, 37 L. T. Rep. 415; 3 P. Div. 1.

There is no question as to the jurisdiction of the English court, and the proper forum is the English court:

Lord Cranston v. Johnston, 3 Ves. 170, at p. 182; 3 R. R. 80.

[COZENS-HARDY, L.J. referred to *Holmes v. Godson* (8 De G. M. & G. 152).] The selection of the forum is an important consideration; if the court held that this was a valid provision against the claims of creditors, the court would be deciding on the existence of a right, the nature of which is unknown to English law. To say that Miss Fitzgerald has an alimentary right is merely to beg the question at issue. English courts have regard to English rules even when they are construing contracts which purport to be made according to foreign law:

Es parte Pollard; Re Courtney, Mont. & Ch. 236.

[COZENS-HARDY, L.J. referred to *Freke v. Lord Carbery* (L. Rep. 16 Eq. 461).] As to whether a

Scotch heritable bond is movable or immovable property, see

Foots on Private International Jurisprudence, 2nd edit., pp. 185, 187, 189.

[A. H. Jessel referred on this point to *Dicey's Conflict of Laws*, p. 514, citing *Jerningham v. Herbert*, 4 Russ. 388, at p. 395.]

Other cases on this point are

Duncan v. Lawson, 60 L. T. Rep. 732; 41 Ch. Div. 394;

Duchess of Buccleuch v. Hare, 4 Madd. 467;

Johnstone v. Baker, 4 Madd. 474n.

C. Stafford Crossman for the respondent Geraldine Tryphena Fitzgerald.—The daughter of the marriage is an alimentary creditor, and possesses an independent right of asserting her claim against the fund. She has a creditor's right which this court will enforce. The father, in attempting to assign his life interest, has dealt with property over which there is an overriding charge in favour of the children of the marriage; and he must be taken to have assigned, having regard to the alimentary provision, that which does not belong to him.

W. F. Hamilton, K.C. and W. E. Vernon; G. D. Pepys; G. R. Northcote; A. H. Withers; and G. H. Blakesley for the respondents other incumbancers.

Edward Ford for the respondents the trustees.

A. H. Jessel in reply.—This Scotch contract is a conveyance and not a contract at all. It is a conveyance except as to 500*l.* of real estate, and as to that the *lex situs* must apply not only to the land, but to all the incidents thereof—that is to say, to the land and to the rents and income. If it were otherwise, the law applicable would vary from time to time according as the investments were varied—at one time the law of Scotland, at another the law of England. The court will involve itself in no such absurdity. Quite apart from any consideration of whether the property in question is movable or immovable, and assuming this instrument to be a contract—every marriage settlement is a contract—the law of the contract determines the law applicable. It is a Scotch contract, and the Scotch law is the proper law of the contract—that is to say, the parties intended it to be governed by Scotch law. If the matrimonial domicile is to be attached that is overborne by the express provision that the law of another country is to apply. If the court holds otherwise, it will be deciding contrary to numerous cases, including the decision in the case before Buckley, J. of *Re Bankes; Reynolds v. Ellis* (*ubi sup.*), and in the case before the Court of Appeal of *Vidits v. O'Hagan* (*ubi sup.*), and also in the earlier case of *Chamberlain v. Napier* (*ubi sup.*). The intention of the parties prevails; the domicile of the husband has nothing to do with the matter. The nature of the instrument here is such that the parties must have intended that it should be construed by Scotch law. [WILLIAMS, L.J.—Can you draw a line between cases in which English courts will enforce and in which they will refuse to enforce foreign law?] Where those cases offend against public policy—as, for instance, where they offend against the morals or the foundations of society or are expressly forbidden by positive law—the court may decline to enforce the provisions of foreign law. Thus, if a contract validly made abroad and

intended to be governed by foreign law is of such a nature that it ought not to be permitted according to the law of civilised countries, it will not be enforced by the courts of this country:

Re Missouri Steamship Company Limited; Monroe's Claim, 61 L. T. Rep. 316; 42 Ch. Div. 321, at p. 336;

Kaufman v. Gerson, 88 L. T. Rep. 691; (1903) 2 K. B. 114.

In the present case the alimentary provision is not immoral nor contrary to the policy of the law. There is nothing contrary to the policy of the English law in a person settling property on another so that he shall not alienate it. And there is nothing in the comity of nations to prevent the English court from giving effect to the present contract although it may contain provisions which according to English law are invalid. As to contracts which are void as being against public policy, cases supporting the statement in *Dicey's Conflict of Laws* as to this point are

Egerton v. Earl Brownlow, 4 H. of L. Cas. 1, cited in *Jansen v. Driefontein Consolidated Gold Mines Limited*, 87 L. T. Rep. 372; (1902) A. C. 484;

Printing and Numerical Registering Company v. Sampson, 32 L. T. Rep. 354; L. Rep. 19 Eq. 462, at p. 465.

The observations of Sir George Jessel, M.R. in *Printing and Numerical Registering Company v. Sampson* (*ubi sup.*) have been cited in several cases. See (*inter alia*)

Maxim Nordenfjelt Guns and Ammunition Company v. Nordenfjelt, 68 L. T. Rep. 833; (1893) 1 Ch. 630, at p. 674;

Badische Anilin und Soda Fabrik v. Schott, Segner, and Co., (1892) 3 Ch. 447, at p. 452.

The same views are expressed in

Westlake on Private International Law, 3rd edit., p. 260, s. 215.

He referred also to

Wharton v. Masterman, 72 L. T. Rep. 431; (1895) A. C. 186;

Saunders v. Fautier, Cr. & Ph. 240.

Badcock, K.C. referred to

Theobald on the Law of Wills, 5th edit., pp. 440, 441.

Cur. adv. vult.

Geraldine Tryphena Fitzgerald's appeal then came on to be heard.

C. Stafford Crossman for the appellant.—This appeal relates to the policy of assurance on the life of Sir William Gerald Fitzgerald comprised in the English settlement. I ask that some part of the income arising under the Scotch contract should be applied in keeping up that policy. If not the larger premium of 95*l.* 3*s.* 4*d.*, at least the original premium of 79*l.* 3*s.* 4*d.*, should be paid as a first charge out of that income.

Badcock, K.C. and *T. T. Methold* for the respondent Colonel Harford.

G. R. Northcote for the respondents the Guardian Fire and Life Insurance Company Limited.

Edward Ford for the respondents the trustees.

Cur. adv. vult.

March 7.—The following written judgments were delivered in the appeal by Sir William Gerald Fitzgerald.

COZENS-HARDY, L.J., by the desire of Williams, L.J., read his judgment first:—The first question for consideration on this appeal is whether what I may shortly describe as the Scotch settlement is subject to the law of Scotland, or whether it must be governed by English law. Now, this Scotch settlement dealt with the property of a domiciled Scotch lady, who was about to marry a domiciled Englishman, and there is no doubt that the "matrimonial domicile" was English. It is not suggested that a permanent residence in Scotland after the marriage was contemplated. As a general rule the law of the matrimonial domicile is applicable to a contract in consideration of marriage. But this is not an absolute rule. It yields to an express stipulation that some other law shall apply. See *Van Grutten v. Digby* (31 Beav. 561), in which case the matrimonial domicile was French, but the contract, though made in France and void by French law, was nevertheless treated by Sir John Romilly as valid so far as it related to property within the jurisdiction; see also *Viditz v. O'Hagan* (80 L. T. Rep. 794; (1899) 2 Ch. 569). The decision in that case was reversed by the Court of Appeal, but not on a ground in any way affecting this point: (see 82 L. T. Rep. 480; (1900) 2 Ch. 87). It is not necessary that there should be an express stipulation. It is sufficient if the court arrives at the conclusion that the parties in fact contracted with reference to some law other than that of the matrimonial domicile. Applying these principles to the Scotch settlement, I find several important indications. (a) The great bulk of the property—viz., 13,200*l.*—was invested in heritable bonds. It has been settled by a chain of authorities, which ought not now to be reviewed by us—viz., by Sir William Grant in *Johnstone v. Baker* (4 Madd. 474*n.*); by Sir John Leach in *Jerningham v. Herbert* (4 Russ. 388); and by Sir James Wigram in *Allen v. Anderson* (5 Hare, 163), that heritable bonds must be regarded in our courts as immovables. If so, it can scarcely be denied that the *lex loci*—i.e., the law of Scotland—must apply to the extent of the 13,200*l.* I am aware that there has been a change of investment of part of this sum into English securities, but this change cannot alter the law applicable to the settlement. I may add that, as to the 13,200*l.*, the matter does not rest in contract. There is an actual completed assignment of the heritable bonds. (b) There was, however, 500*l.* cash belonging to the lady, which was paid over to the trustees for investment, and which was, in fact, invested in Consols, although it might have been invested in heritable securities in Scotland. It seems to me that this sum cannot fairly be treated as intended to be subject to a different law from that which is applicable to the bulk of the property. (c) The whole frame of the settlement is in Scotch form, and the limitations are of such a nature that they can only take effect if Scotch law is to be applied. I therefore feel bound to treat this as a settlement made in Scotland by a domiciled Scotch lady of Scotch property, in Scotch form, and subject to Scotch law. The trustees of this Scotch settlement must in Scotland follow the Scotch law, and their residence in England, or their English domicile, is irrelevant. This being so, it follows, in my opinion, that we are bound to hold that Sir Gerald Fitzgerald takes such interest, and such interest only, as the courts

in Scotland would declare him entitled to: (*Anstruther v. Adair*, 2 My. & K. 513). There ought to be no difference in a matter of this kind between the Court of Session and the High Court. The nature and extent of his interest cannot depend upon his domicile, although his capacity to deal with his interest may perhaps depend upon his domicile. To take the somewhat analogous case of a life interest in English property given by the will of a domiciled Englishman for the separate use of a married woman, without power of anticipation, it has never, so far as I am aware, been suggested that the nature and extent of her interest varied according as her domicile was, or was not, English. The trust would be regarded in our courts as valid and operative, even though by the law of her domicile neither the separate use nor the restraint upon anticipation was recognised. And, on general principles, the same view ought to be adopted by the courts of the country in which the married woman was domiciled. In short, by the law of England, it is the Scotch law which must be applied to this Scotch settlement. It is, however, strongly urged that a strictly alimentary provision for an adult male is not only unknown to and inconsistent with the provisions of English law, as in general it undoubtedly is, but that it is contrary to public policy, and ought therefore to be wholly disregarded in an English court. I cannot adopt this argument. There is nothing immoral in such a provision. Indeed, there are many instances in which pensions or retiring allowances are by statute made not transferable, or liable to be attached by any legal process. I may refer to the pension allowed to a retiring clergyman under the Incumbents' Resignation Act 1871, and to the observations of the Court of Appeal on that statute in *Gathercole v. Smith* (44 L. T. Rep. 439; 17 Ch. Div. 1). Moreover, it has been long settled that at common law, and apart from any statutory enactments prohibiting assignment, certain salaries or pensions are inalienable. For example, the half-pay of an officer. In *Flarty v. Odum* (3 T. R. 681) Lord Kenyon says: "I am clearly of opinion that this half-pay could not be legally assigned by the defendant. . . . Emoluments of this sort are granted for the dignity of the State and for the decent support of those persons who are engaged in the service of it. It would, therefore, be highly impolitic to permit them to be assigned, for persons who are liable to be called out in the service of their country ought not to be taken from a state of poverty. It might as well be contended that the salaries of the judges, which are granted to support the dignity of the State and the administration of justice, may be assigned." In the following year the same question came up for consideration in *Lidderdale v. Duke of Montrose* (4 T. R. 249). This was an action by an officer on half-pay against the Paymasters-General of the army to recover arrears of his half-pay, and the only question was whether an assignment by way of mortgage, of which the defendants had due notice, justified them in withholding the money from the plaintiff. The court were clearly of opinion that, "on principles of public policy, as well as on account of the interest of the officers themselves, by law such assignments were void." The mortgagee was not party to this action, but it seems to have been thought that he might obtain equitable relief,

and he accordingly filed a bill in the Exchequer: (see *Stone v. Lidderdale*, 2 Anstr. 533). It was argued that the assignment was good in equity, as a transfer of any valuable contingency or possibility, if made for good consideration, is affirmed in equity. But Macdonald, C.J., in a considered judgment, declined to accept this view, and held that the plaintiff was not entitled to any relief in equity in respect of the mortgage. In short, he declined to affect the conscience of the mortgagor in respect of future instalments of the half-pay. In my opinion it is impossible to disregard this "alimentary provision" on the ground of public policy. The Scotch court would declare that the interest given to Sir Gerald cannot be assigned, and would disregard the claim of his specific mortgagees, and it is our duty to follow and adopt the Scotch law: (*Anstruther v. Adair*, *ubi sup.*). But then it was urged that Sir Gerald could bind, and did bind, the income as and when it reaches the hands of the trustees in England, and that, whatever might be the rights of his alimentary creditors, he himself ought not to be allowed to claim from the trustees the income which he has, by a contract binding on his conscience, charged in favour of his mortgagees. I doubt whether this doctrine, which is explained and illustrated by Lord Macnaghten in *Tailby v. Official Receiver* (60 L. T. Rep. 162; 13 App. Cas. 543), has any application to a vested life interest, the assignment of which takes effect, if at all, for reasons wholly independent of conscience. An assignment of a vested equitable interest is complete and operative, though voluntary. It in no way depends upon contract, or upon anything further to be done by the assignor. The doctrine applies only where there is no present property capable of assignment, such as possibilities and expectancies. The case of *Stone v. Lidderdale* (*ubi sup.*) is an authority against the respondent's contention, and I know of no authority in its favour. I may observe that the defendant Lidderdale was a domiciled Englishman, whose general capacity to contract was undoubted. Moreover, this contention is really only another way of presenting the argument that we ought to disregard the Scotch law. If the life interest is capable of assignment, the court would grant specific performance of the contract, and would aid the mortgagees by granting an injunction. If, however, as in *Stone v. Lidderdale* (*ubi sup.*), the interest is non-assignable, I think it follows that no effect can be given to a deed purporting to assign by way of anticipation. The decision of the House of Lords in *Scott v. Allnutt* (2 Dow. & Cl. 404), which was relied upon, does not really touch the case. In my opinion, the order of Joyce, J. was wrong, in so far as it declared that the whole of the income during the life of Sir Gerald is payable to his assignees or incumbrancers, according to their respective priorities. If the amount of the income were very large, any excess beyond a reasonable amount would, according to the Scotch law, pass to the assignees or incumbrancers, but I do not understand that it is suggested that there is any excess in the present case. I think the declaration should be to the effect that Sir Gerald is entitled to the whole income during his life, free from the claims of any assignees or incumbrancers, but without prejudice to the rights (if any) of his alimentary creditors, or of Miss Fitzgerald, and

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without prejudice to any prior payment in respect of the policy, which is the subject of Miss Fitzgerald's appeal.

STIRLING, L.J. then read his judgment, in which he differed from the other learned Lord Justices:—I agree with Cozens-Hardy, L.J. that Sir Gerald and Lady Fitzgerald entered into a contract that their rights in the property of Lady Fitzgerald (who at the time of the marriage was domiciled in Scotland) should be regulated by the Scotch law: (*Este v. Smyth*, 18 Beav. 112; *Chamberlain v. Napier*, 15 Ch. Div. 614). That property is now vested in trustees who are domiciled in England. But that circumstance is merely accidental, and cannot, as between the trustees and Sir Gerald Fitzgerald, affect either the duty of the trustees or the rights of Sir Gerald, which must, I conceive, be governed by the law of Scotland; and if a Scotch court would (as I think the evidence shows it would) hold that trustees domiciled in Scotland ought to pay the alimentary provision made for Sir Gerald by the contract in Scotch form of the 20th Sept. 1862 into his hands from time to time as it becomes payable, regardless of the incumbrances which he has purported to create thereon, then, in my opinion, this court ought likewise to hold that such is the duty of the trustees in the present case. If Sir Gerald Fitzgerald were a domiciled Scotchman there would be nothing more to be said. But he was at the date of the marriage, and has ever since been, a domiciled Englishman, and he is now resident within the jurisdiction of the English courts. His capacity to deal with his property is an incident of his status (see *Viditz v. O'Hagan*, 80 L. T. Rep. 794; (1899) 2 Ch. 569; on appeal, 82 L. T. Rep. 480; (1900) 2 Ch. 87), and, therefore, is governed by English law. By that law, as stated by Lord Macnaghten in *Tailby v. Official Receiver* (60 L. T. Rep. 162; 13 App. Cas. 523, 543), "it has long been settled that future property, possibilities, and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial, provided the intention of the parties is clear. To effectuate the intention, an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract when it comes into existence, if this is of such a nature and so described as to be capable of being ascertained and identified." In *Re Coleman* (60 L. T. Rep. 127; 39 Ch. Div. 443) this principle was applied to an assignment of an interest under a will to which the assignor became entitled only by virtue of the exercise, from time to time, in his favour of a discretion vested in the trustees of the will. In this respect the capacity of Sir Gerald Fitzgerald is entirely different from that of a domiciled Scotchman, who, according to the law of Scotland, is unable to alienate an alimentary provision any more than, according to the law of England, a retired officer can alienate his half-pay, either at law or in equity, or a retired incumbent the pension allowed to him under the Incumbents Resignation Act 1871, or a married woman separate estate as to which she is restrained from anticipation. In such cases the person entitled to the property in question is by English law incapacitated from dealing with it. But that law does not in general recognise any restraint as

regards the property of a man of full age. I cannot see why the English owner of an alimentary provision, created by foreign law, should be held to be incapable of making a disposition of it when it comes to his hands. The foreign law has full effect given to it when it is allowed to determine what ought to come to the hands of the owner in respect of the alimentary provision; after it reaches his hands he is not under any obligation imposed by the foreign law as to how he should apply it, and, as it seems to me, the English law ought to determine whether that which has come to his hands, and become property at his disposal, is to any and what extent subject to obligations arising out of dealings valid according to that law. In my opinion, therefore, an assignment of an alimentary provision, created under foreign law, by will or voluntary deed (*inter vivos*) in favour of a domiciled Englishman ought to be held by the courts of this country to bind funds coming in respect of that provision to his hands within the jurisdiction of those courts. In the present case the alimentary provision was created by a contract into which Sir Gerald entered for valuable consideration. But I cannot see that this puts Sir Gerald in a better position than if he were a volunteer; for I take it to be clearly settled that the doctrine on which I rely applies to property acquired by contract for value just as much as to property acquired by gift. In my judgment, therefore, an order ought to be made on the lines of that actually made by the Court of Appeal in *Re Coleman* (*ubi sup.*), to which I have already referred. But, although I have been unable to satisfy myself that the opinion which I have expressed is opposed to any existing authority, I can adduce no decision in support of it, while the weighty and considered opinions of my brethren are adverse. In these circumstances I cannot regret that my own view is not to prevail.

WILLIAMS, L.J. then read his judgment:—In my judgment the ante-nuptial contract entered into by Sir William Gerald Seymour Fitzgerald, then William Gerald Seymour Fitzgerald, and Miss Lockhart, with the concurrence of her mother Lady Lockhart, ought not to be construed and applied according to English law, which is undoubtedly the law of the matrimonial domicile of the husband and wife, and which law would *prima facie* determine all questions arising under that marriage contract, but ought to be construed and applied according to Scotch law. It is the intention of the parties, gathered from the terms and circumstances of the contract, which determines the law which governs it, and in my judgment the Scotch form of this contract, coupled with the fact that Miss Macdonald Lockhart at the time of the marriage was a domiciled Scotchwoman and that the property, the subject of settlement, came from her family, is sufficient to displace the *prima facie* presumption that the law of the matrimonial domicile is to govern the contract. Now, the Scotch law is thus stated by Mr. Murray in his affidavit: "By the law of Scotland it is possible for a person to create a life interest in favour of another person, and by declaring that life rent to be alimentary to exclude, so far as the life interest does not exceed in amount a reasonable provision, the diligence of ordinary creditors and restrain all power of anticipation. When therefore, as here, a lady

by ante-nuptial marriage contract conveys her funds to trustees, it is possible for her to create a life rent of these funds in favour of her surviving husband, and to exclude his ordinary creditors, and to restrain him from anticipation." The late Lord Advocate further points out that the non-chargeable nature of such an alimentary life rent would be upheld by the Scottish courts if the question were there raised by a creditor against a Scottish trustee, and says that it is for the English court to determine whether in a question with the English creditors of an English debtor it will give effect to the Scotch law. Assuming, as I do, that Scotch law governs all the rights created by the express or implied force of the words of the contract, it may be that there are rights which operate upon the contractual rights which are governed not by the law which by the disclosed intention of the parties has come to be the "proper law of the contract," determining all questions of its legal effect and construction, but by the law of the actual domicile at the time when any dealing with the property the subject of the contract is attempted, such as questions of personal capacity in cases of minority, coverture, &c. I cannot, however, persuade myself that in this case any question of personal capacity is raised. The case is simply this: That previous to the marriage a contract in the Scotch form, governed as to its legal construction and effect by the law of Scotland, was executed, whereby Miss Lockhart's property was settled upon trust (amongst other things), in case the husband should survive, that the proceeds of the estate should be paid to him for his life, but that all payments to him should be strictly alimentary, and should not be assignable nor liable to arrestment or other legal diligence at the instance of his creditors. These words of the contract limit the interest which the husband is to take, in the same way as in an English marriage contract the wife's interest is made subject to a restriction on anticipation. The restriction on chargeability in either case arises out of the terms of the contract and the trust thereunder. There is no personal incapacity. Neither the wife in the case which I have put, nor the husband in the present case, can claim more under the trust than is given to her or him by the trust. It seems to me that no equity acting on the conscience of Sir Seymour Fitzgerald can enable him in respect of the life income given to him by the trust created by the contract to do that with that income which is impossible for him to do according to the effect of the Scotch contract when construed by the Scotch law. Indeed, in the matter of the comparison of equities, I think that no obligations can bind the conscience of a person taking a life estate bestowed on him by another more strongly than the trust contract containing the conditions under which the donor has bestowed the gift, and this whether the conditions are express or are imposed by the law governing the contract. *Anstruther v. Adair* (2 My. & K. 513) is really an authority for the proposition that an English court of equity in construing a Scotch contract or enforcing a trust thereunder will not enforce a wife's equity to a settlement against a husband who comes to the court to enforce against the surviving trustee resident in London his right to have a fund transferred to him absolutely as the survivor of

his wife by virtue of a clause in the marriage contract. This seems to me in principle to decide that a court of equity in England will not, in contravention of plain provisions in a foreign contract, enforce equities binding the conscience of a beneficiary claiming under that contract. If I am right in holding that in this case no question of personal capacity is raised, and am also right in what I have just said as to a court of equity not enforcing equities which, though binding the conscience of such a beneficiary, are inconsistent with the instrument under which he claims when construed by its proper law—i.e., the foreign law—the only remaining question is whether the provision in this Scotch marriage contract, "that all payments to Sir William G. S. V. Fitzgerald should be strictly alimentary, and should not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors," so conflicts with what are deemed in England to be essential public interests that such a provision could not be enforced here. This, as I understand, is the ground on which Joyce, J. refused to give effect to this provision. He relies upon the law as stated in sect. 215 of Mr. Westlake's book on Private International Law, that "where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here, notwithstanding that it may have been valid by its proper law." The law thus stated seems to me accurate and to correspond, as pointed out by Mr. Westlake on p. 40 of his book, with art. 6 of the Code Napoleon: "Private contracts cannot derogate from laws which interest public order or good morals." The question in each case is whether the foreign law or the private agreement conflicts with a law in which the public order and good morals concerned are essential enough to call into operation the reservation in favour of stringent domestic policy which, in principle, is recognised and insisted upon by all civilised nations. The English law, in so far as it refuses to give effect to provisions which affect to control the rights of disposition which are attached to an absolute transfer of property, does not seem to me to be a matter regarding public order and good morals. It is, I think, merely a logical development from legal definitions adopted by the English law. But it is true that in its application this law has been made the means of protecting creditors, and yet I do not think that in a country which allows restriction on anticipation in respect of the separate property of a wife it can possibly be said that to enforce a provision in a Scotch contract inconsistent with this law would be contrary to public order and good morals, even though the result might be to defeat the just rights of a creditor. There are other instances to which my attention has been called by the judgments of my brethren, which I have been allowed to read, in which sometimes the Legislature and sometimes the courts at common law have recognised restrictions as inconsistent as those in this Scotch contract with the alleged essential rule of public order and good morals. I agree with the judgment delivered by Cozens-Hardy, L.J.; I cannot agree with the conclusion of Joyce, J.

Appeal allowed.

On the application of counsel for the respondent Colonel Harford, their Lordships granted a

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stay of execution pending an appeal to the House of Lords, on the terms that the appeal should be presented by the end of the sittings, and that out of the arrears of the alimentary provision 200*l.* should be paid to Sir William Gerald Fitzgerald now, and that, pending the appeal, a moiety of the alimentary provision should be paid to him.

March 7.—The following written judgment of the court (Williams, Stirling, and Cozens-Hardy, L.J.J.) in the appeal by Geraldine Tryphena Fitzgerald was then delivered by

COZENS-HARDY, L.J. — The appeal of Miss Fitzgerald deals with a point entirely distinct from that raised in the main appeal. By the English settlement, made on the marriage of Sir Gerald, dated the 20th Sept. 1862, a policy upon his life for the sum of 4000*l.* without profits in the Western Life Assurance Company at an annual premium of 79*l.* 3*s.* 4*d.* was assigned to the trustees upon trust, in the events which have happened, for Miss Fitzgerald as the only child of the marriage, and Sir Gerald entered into the usual covenants to pay the premium and to keep on foot the policy. By the Scotch settlement of even date the first provision was that the trustees might from time to time apply a sufficient part of the income arising from the trust funds in the Scotch settlement in payment of the premium and such other moneys, if any, as might be necessary for keeping up the said policy or any other policy which might be substituted for it under the provisions contained in the English settlement. In consequence of the failure of the office this policy was dropped. In 1867 a policy for the same amount of 4000*l.*, but with profits, in the London and Provincial Assurance Company, was assigned by Sir Gerald to the trustees upon and for the like trusts, provisions, and agreements in the English settlement declared and contained, or such of them as were capable of taking effect in reference to the said policy. The deed of assignment has been lost, but there is no dispute as to its purport and effect. All premiums have been paid up to a recent date, but the premium on the substituted policy was 95*l.* a year instead of 79*l.*, and the amount payable under the policy with bonuses was considerably more than 4400*l.* The trustees asked for directions with respect to this premium, Sir Gerald not being in a position to pay it; and Joyce, J. has made an order to the effect that a new policy for 4400*l.* without any premium should be substituted for the existing policy. Miss Fitzgerald complains of this, and contends that she ought not thus to be deprived of the benefit of the larger policy, and that she is entitled to require, if not the larger premium of 95*l.*, at least the original premium of 79*l.* to be paid as a first charge out of the income of the Scotch settlement, and that any provision that might be necessary for raising the difference is a mere matter of administration. It seems to us that this contention is well founded. As the deed of assignment of 1877 is not forthcoming, we are not entitled to assume that it contained any covenant by Sir Gerald to pay the larger premium of 95*l.* But we think it is clear that this second policy was validly settled by Sir Gerald, and that neither he nor anybody claiming under him could take it out of settlement on the

ground that it was more beneficial than the original policy. And Miss Fitzgerald is not to be bought off by giving her a policy for 4400*l.*, which is 400*l.* more than the policy originally settled. She can claim the full benefit of the policy which was settled in 1867, and which has been kept up by Sir Gerald for more than thirty-five years. This being so, it cannot be right that, at the instance of the mortgagees of Sir Gerald's life interest, income available for keeping up the policy should be diverted from that purpose. The proper course would have been to direct the trustees to pay 79*l.* a year out of the income of the trust funds, and to arrange either with the office or with someone else to advance the small difference as a first charge on the policy: (*Re Leslie; Leslie v. French*, 48 L. T. Rep. 564; 23 Ch. Div. 552). Unfortunately this cannot now be done, because the policy has, pursuant to the order of Joyce, J., been surrendered. From inquiries which have been made since the hearing of the appeal, it seems that the surrendered policy cannot be revived or restored. Under these circumstances the only relief which we can give to Miss Fitzgerald is to direct the trustees out of the income of the Scotch settlement to pay her the annual sum of 79*l.* 3*s.* 4*d.* as from the date of the surrender of the policy during the life of Sir Gerald. Mr. Badcock's clients must pay Miss Fitzgerald's costs of this appeal.

Appeal allowed.

Solicitors: George J. Fowler; Surman and Quekett; Redfern and Hunt; Trouver, Still, Freeling, and Parkin; White, Borrett, and Co.; Keen, Rogers, and Co.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 13 and 14.

(Before BYRNE, J.)

Re BEARD'S TRUSTS; BUTLIN v. HARRIS. (a)

Will—*Forfeiture*—*Endowment for National school*—*Gift over in event of school becoming subject to the control of a school board*—*Education authority*—*Education Act 1902* (2 Edw. 7, c. 42), ss. 1, 5, 6, sub-s. 2, 7, sub-s. 1 (d), 13.

A testator, who died in 1891, bequeathed certain shares in a bank to trustees "upon trust to pay and apply the interest or income thereof in or towards the annual expenses of" a national school so long as it was "supported by voluntary subscriptions as now and heretofore in addition to the Government grant," with a gift over in the event of the school "ceasing to be so supported or becoming subject to the control of a school board." Since the death of the testator the necessity for subscriptions had practically ceased owing to the bequest, but the managers were in debt to a small extent. By the Education Act 1902 school boards were abolished, and public elementary schools came under the control of the county council as the education authority.

Held, that there had been no forfeiture on either of the grounds mentioned by the testator, and that the gift over did not take effect.

(c) Reported by E. L. HOPKINS, Esq., Barrister-at-Law.

ADJOURNED SUMMONS.

This was an application by the trustees of the will of the late G. H. A. Beard for the opinion of the court as to the effect of the Education Act 1902 upon a trust for the endowment of the Leonard Stanley National Schools, Gloucestershire. The testator died in May 1891. By his will testator bequeathed to the managers for the time being of the Leonard Stanley National Schools thirty shares in the County of Gloucester Bank Limited, to be held by the said managers with power to vary investments, "upon trust to pay and apply the interest or income thereof in or towards the annual expenses of the said schools so long as the said schools shall be supported by voluntary subscriptions as now and heretofore (or by a voluntary rate) in addition to the Government grant; but in the event of the said schools ceasing to be so supported or becoming subject to the control of a school board," then the testator declared, directed, and bequeathed that the said bank shares, or the investments for the time being representing the same, should go and be transferred or paid to the vicar and churchwardens for the time being of the parish of Leonard Stanley, to be held and applied by them, in their absolute discretion in or towards the repairs, improvements, or restoration of the fabric of the parish church.

The thirty bank shares had been duly transferred by the executors into the names of the managers for the time being of the Leonard Stanley National Schools, and still stood in the names of the present managers as trustees of this fund, which produced an income of about 115*l.* per annum.

These particular schools were the only public elementary schools in the parish of Leonard Stanley.

The school-house was provided by voluntary subscriptions, and was erected upon land belonging to a private owner for which the owners paid a rental of 1*s.* per annum.

There was no trust deed, but the schools were founded and had always been conducted as Church of England schools.

Up to the death of the testator in May 1891 the schools had had no endowment except a sum of 15*l.* per annum, and the remainder of the expenses of the schools, other than such as were defrayed by the Government grant, had been provided by voluntary subscriptions, the testator in his lifetime being one of the most generous supporters of the schools.

Since the death of the testator the income from the thirty bank shares had generally proved sufficient, with the 15*l.* and the Government grant, to support the schools without the necessity for private subscriptions. During the last few years there had been a small annual deficit, at the present time amounting to about 63*l.*, which had been provided for by an overdraft at the bank, for which the managers were personally responsible.

By the Education Act 1902, s. 7, sub-s. 1 (d), the managers of a school have to provide funds for keeping the school-house in good repair, and making such alterations and improvements in the buildings as may reasonably be required by the local education authority, and there was evidence that some portion of the income of the fund or voluntary subscriptions, or both, would be needed for this purpose. It also appeared that the income of the fund and the 15*l.*, together with

the increased Government grant provided by sect. 10, sub-sect. 1, would probably be more than sufficient to provide for the maintenance of the schools, without any necessity for further help from the rates.

In consequence of the passing of the Education Act 1902, the question now arose whether the income arising from the said thirty bank shares should, as from the appointed day mentioned in the Act, continue to be applied towards the annual expenses of the schools, or be otherwise dealt with as directed by the Act, or whether the bank shares and dividends thereon from that date should be transferred and paid to the vicar and churchwardens for the time being of the parish, to be applied by them in accordance with the trusts of the will.

By the Education Act 1902 (2 Edw. 7, c. 42):

Sect. 1. For the purposes of this Act, the council of every county and of every county borough shall be the local education authority.

Sect. 5. The local education authority shall, throughout their area, have the powers and duties of a school board and school attendance committee under the Elementary Education Acts 1870 to 1900 and any other Acts, including local Acts, and shall also be responsible for, and have the control of, all secular instruction in public elementary schools not provided by them: and school boards and school attendance committees shall be abolished.

Sect. 6 (2). All public elementary schools not provided by the local education authority shall, in place of the existing managers, have a body of managers consisting of a number of foundation managers, not exceeding four, appointed as provided by this Act, together with a number of managers, not exceeding two, appointed (a) where the local education authority are the council of a county, one by that council and one by the minor local authority; and (b) where the local education authority are the council of a borough or urban district, both by that authority.

Sect. 7 (1) (d). The managers of the school shall provide the school-house free of any charge, except for the teacher's dwelling-house (if any) to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the school-house in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority: Provided that such damage as the local authority consider to be due to fair wear and tear in the use of any room in the school-house, for the purpose of a public elementary school, shall be made good by the local education authority.

Sect. 13 (1). Nothing in this Act shall affect any endowment, or the discretion of any trustees in respect thereof: Provided that, where under the trusts or other provisions affecting any endowment, the income thereof must be applied in whole or in part for those purposes of a public elementary school for which provision is to be made by the local education authority, the whole of the income or the part thereof as the case may be, shall be paid to that authority: . . . (2) Any money arising from an endowment and paid to a county council for those purposes of a public elementary school for which provision is to be made by the council, shall be credited by the council in aid of the rate levied for the purposes of this part of the Act in the parish or parishes which, in the opinion of the council, are served by the school for the purposes of which the sum is paid, or, if the council so direct, shall be paid to the overseers of the parish or parishes in the proportions directed by the council and applied by the overseers in aid of the poor rate levied in the parish.

CHAN. DIV.]

Re BEARD'S TRUSTS; BUTLIN v. HARRIS.

[CHAN. DIV.]

The only question argued upon this application was whether, in the events which had happened, the gift over to the vicar and churchwardens took effect.

Cave for the trustees of the fund.

W. Baker for the present managers.—Owing to the generosity of the testator, there is not now the same need for subscriptions as formerly, but subscriptions will be necessary to provide a fund for the repair of the school buildings in accordance with sect. 7, sub-sect. 1 (d) of the Education Act 1902. The managers will have to subscribe or obtain subscriptions to clear off the debt to the bank, therefore the schools have not ceased to be supported by voluntary subscriptions within the meaning of the trust, and no forfeiture has taken place on this ground. Sect. 5 of the Act expressly abolishes school boards, so the new education authority is not a school board, and the event contemplated by the testator—namely, that the school might become subject to the control of a school board, has not yet happened.

George Lawrence, for the Gloucestershire County Council, adopted the above argument. So long as the schools are not wholly supported by public moneys the gift stands, and the income of this fund is still applicable towards the expenses of these schools.

Gutty for the vicar and churchwardens.—The gift over takes effect on the happening of either of the two events specified by the testator. The schools have ceased to be supported by voluntary subscriptions as heretofore, because since the testator's death subscriptions have not been required. The schools have come under the control of the local education authority, which is only a school board under another name. The county council is substituted for the school board. On both these grounds there has been a forfeiture, and the fund ought to be transferred to the vicar and churchwardens in accordance with the trust.

BYRNE, J.—In this case the testator made his will in 1886, and thereby gave and bequeathed to the managers for the time being of the Leonard Stanley National Schools thirty shares in the County of Gloucester Bank Limited, the same to be held by the said managers, with power to vary investments, upon trust to pay the income thereof in or towards the annual expenses of the said schools, so long as the said schools should be supported by voluntary subscriptions; but in the event of the said schools ceasing to be so supported, or becoming subject to the control of a school board, a gift over. The testator died in 1891. During his lifetime he appears to have found moneys when wanted for the purposes of these schools. The schools are built upon property in respect of which a rent of only 1s. a year is paid, and there were a certain number of subscriptions. As to what the amounts were and when they were paid I have no information; but up to the time of the testator's death moneys were found by himself and by others for the purposes of the schools as required. There was in the testator's lifetime an endowment bringing in about 15*l.* a year, which was applicable to the purposes of the schools, and which has been continued up to the present time. After the testator's death, a Mr. Jones found moneys from time to time for the schools when wanted, but

there has never been any occasion to call for subscriptions generally, or to get annual subscribers, except to this extent, that year by year there has been some small sum over and above the receipts to be expended, and it appears that the managers have on their own credit obtained an overdraft from the bank to make the extra payments. In all these years there is somewhere about 60*l.* due to the bankers. That is a sum which, unless the money is forthcoming, the managers have taken upon themselves the liability to pay, and, therefore, if the bank should require them to pay the money, and they were to pay it, they would have no right to get the money back from anyone else, and they would in fact become subscribers for the necessary amount. Now in consequence of the gift of the testator, and in consequence of the passing of the Education Act of 1902 (if those funds given by the testator are available, in addition to the old endowments and in addition to the Government grant provided by sect. 10 of the Act of 1902), there will be ample funds for carrying on these schools properly without having to call for any further subscriptions, and, indeed, perhaps enough to pay off in a short time the sum due to the bankers for past over-expenditure. It is argued on behalf of the vicar and churchwardens that the gift over has taken effect, by reason of the fact that there has been nothing like a receipt of subscriptions, either annually or otherwise, for the period I have mentioned, and, further, that the gift over takes effect either if the schools "cease to be supported by voluntary subscriptions as now and heretofore in addition to the Government grant," or in the event of its becoming "subject to the control of a school board." With reference to the latter, I am satisfied that that event has not taken place, because this school has never yet come under the control of a school board. The local education authority is now the county council. It has many duties formerly discharged by the school boards; but the Act expressly abolishes school boards in so many words. The new education authority is now a different body from the former school board. It has a different constitution and different rights and powers. The question is, Can the schools be said now to be "supported by voluntary subscriptions as now and heretofore in addition to the Government grant"? How were they supported before the testator's death? They were supported by voluntary subscriptions so far as the endowment was not sufficient. Now the testator, knowing the position of affairs, gave only the income of this fund in or towards the annual expenses of the schools so long as they "shall be supported by voluntary subscriptions as now and heretofore." That is, in aid of the endowment for the time being existing; and it appears to me that he must have contemplated that these subscriptions that he referred to would only be such subscriptions, if any, as were necessary, with the endowment, to support the schools. In my opinion there has not yet been any forfeiture under this clause, and consequently the trustees are not bound to transfer this fund to the vicar and churchwardens.

Solicitors: *Le Brasseur and Oakley*, for *E. B. Haygarth*, Cirencester; *Walker and Rowe*, for *J. Lapage Norris*, Stroud; *Field, Roscoe, and Co.*, for *E. T. Gardom*, Gloucester.

CHAN. DIV.]

Re WHITAKER; WHITAKER v. PALMER.

[CHAN. DIV.]

Dec. 15 and 16, 1903.

(Before FARWELL, J.)

Re WHITAKER; WHITAKER v. PALMER. (a)

Administration—Bankruptcy and Chancery rules as to distribution of surplus—Insolvent estate—Master's certificate—Estate originally insolvent enabled through fund falling in to pay principal of all debts—Interest payable by law—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 40—Order LV., rr. 62, 63.

An estate originally insolvent, and so found by the master's certificate in an administration action, was augmented through a fund falling in through the court's setting aside a settlement, and so became able to pay the principal of all debts, but not the full interest even on debts that carried interest at law.

Held, that interest must be paid according to the bankruptcy and not the Chancery rules.

Re Henley (75 L. T. Rep. 307) not followed.

SUMMONS.

On the 13th Feb. 1899 an order was made for the administration of the estate of William Augustus Whitaker, deceased. The plaintiffs were Susannah Matilda Maria Whitaker and others, and the defendants were John William Palmer, executor of the will, and others. The case is reported on another point 83 L. T. Rep. 342; (1900) 2 Ch. 676, and, on appeal, 83 L. T. Rep. 449; (1901) 1 Ch. 9.

It was there certified by the master that two settlements of 5000*l.* and 14000*l.* made by the testator and dated the 1st Oct. 1889 and 21st Dec. 1896 were debts, and it was held in that case that they ranked *pari passu* with the other creditors, the one estate being deemed to be insolvent. By a deed of covenant of the 30th Aug. 1886 the testator on his marriage with Miss Bryant covenanted to pay her an annuity of 400*l.* per annum, and he subsequently made a voluntary settlement of property on her by an indenture dated the 5th Oct. 1894. By an order of the 29th July 1902, on a second further consideration of the action, the voluntary settlement was declared void against creditors, except in so far as it was necessary to secure the annuity. It was ordered that an annuity should be purchased for her and the rest of the money paid into court. The effect of this decision was that the estate, which was formerly held to be insolvent, became solvent, and that there was a balance of about 400*l.* or 500*l.* to the good. The solicitors of the Cardiff branch of the London and Provincial Bank, who were creditors for a large amount, raised the point whether, in view of the fact that in their case interest was payable by law, while in the case of the other creditors it was only payable under the rules of the court, the bank would be entitled to be paid its interest first, as would be the case if the Chancery rules prevailed. The surplus would not be sufficient to pay the interest of this debt in full. A summons raising the question was taken out and adjourned into court.

S. B. L. Druce for the trustees of the voluntary settlement.

E. Ford for the London and Provincial Bank.—The fact that there is a surplus ousts the

bankruptcy rules and makes the Chancery rules apply. The case is covered by

Re Henley, 75 L. T. Rep. 307;

Order LV., r. 63.

T. L. Wilkinson for creditors whose debts did not carry interest by law.—The rules of bankruptcy still apply, for the estate is insolvent in that it cannot pay interest on a debt which by law carries interest. In *Re Henley* the estate was able to pay interest in full on all debts that by law carried interest. *Re Whitaker* (83 L. T. Rep. 449) is an authority that the bankruptcy rules apply when an estate is insolvent.

E. P. Hewitt for a creditor of the same class.—Even where an estate is unable to pay the costs of administration, the bankruptcy and not the Chancery rules apply:

Re Leng, 72 L. T. Rep. 407; (1895) 1 Ch. 652.

He also referred to

Re Hopkins, 30 L. T. Rep. 627; 18 Ch. Div. 370;

Re Summers, 60 L. T. Rep. 45; 13 Ch. Div. 136.

J. G. Micklethwait for other creditors of the same class.

J. G. Wood for the executors.

FARWELL, J.—This is in some way a difficult case. Before the Judicature Act, the rules in bankruptcy and in the Court of Chancery differed as to the payment of interest in the case of an insolvent estate. Sect. 10 of the Judicature Act 1875 provides that "in the administration by the court of the assets of any person who may die after the commencement of that Act and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the Companies Acts 1862 and 1867 whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to valuation of annuities and future and contingent liabilities respectively as may be in force for the time under the law of bankruptcy. Is this estate now insufficient to meet the debts and liabilities of the deceased debtor? It was insufficient originally when the estate was being administered, but since then a settlement has been set aside, and the estate has been increased by an unexpected fund, so that it is now able to pay the principal of all debts. But there is not a surplus available to pay all interest due up to the date of payment in respect even of debts that carry interest at law. As a matter of fact, is the estate insufficient? Has every creditor who has come in been paid everything that he was entitled in any way to be paid as interest? I think that it is clear that the estate is insolvent within the meaning of sect. 10. I should therefore hold that the bankruptcy rules apply, but I am told that North, J. decided to the contrary in *Re Henley* (*ubi sup.*), and I am asked to follow that decision. Now, Rigby, L.J. in *Re Whitaker* (1901) 2 Ch., at p. 12) says: "Sect. 10 provides (among other things) that the rules for the time being in force in bankruptcy as to debts provable shall apply in the administration by the High Court of the estate of a deceased insolvent. Upon the true construction of the words I think they do not deal simply with the proof of debts. The same

(a) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

rules are to prevail 'as to debts and liabilities provable.' I cannot read these words as meaning simply 'as to the proof of debts and liabilities.' I think they mean that, whatever general rules are in force in the Court of Bankruptcy for the time being with regard to debts and liabilities provable shall apply in the administration of insolvent estates in Chancery." It is said that interest in this case would not be provable in bankruptcy. This in a way is true. Still the creditor gets it there as something incidental to his provable debts. I think, however, that Rigby, L.J. intended to show the true construction of the section in the Judicature Act—that it was broader than was supposed in cases like *Re Maggi* (46 L. T. Rep. 362; 20 Ch. Div. 545). It would be a curious result if, following the decision of North, J. in *Re Henley*, the court were on one set of principles to pay the principal debts owing, and on another set of principles to pay the interest due thereon. As to that decision, it may be distinguishable from this case on the grounds urged in the argument, that there the estate was actually solvent, for it was able to pay all principal debts and all legal interest, though unable to pay what may be called bounty interest. In my opinion, however, this is immaterial. Even if the case were the same as the case here, it would be inconsistent with *Re Whitaker*. I do not, therefore, follow it, and I hold that the surplus is distributable according to the bankruptcy rules.

Solicitors: Gamlen, Burdett, and Gamlen; Ridsdale and Son, for Grover, Grover, and Williamson, Cardiff; Indermaur and Brown; Stow, Preston, and Lyttelton, for Keary, Stokes, and White, Chippenham.

Feb. 26 and March 1.

(Before FARWELL, J.)

LAWSON v. REYNOLDS AND OTHERS. (a)

Justices—Mayor of borough—Borough justice ex officio—County Justice sitting within the borough—Mayor's right to preside—Borough business—Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), ss. 154, 155.

If a borough has no separate commission of the peace, so that the mayor is a borough justice virtute officii, he is not entitled to take the chair at a sitting within the borough of county justices where the court is sitting as a petty sessional division, the fact that the offence being tried was committed entirely within the borough makes no difference.

The expression "business of the borough," as used in the Municipal Corporations Act 1882, s. 155 (2), means the business which a court assembled by the mayor of a borough transacts. The business of a court sitting as a petty sessional division is county business and remains so, although the particular case being tried might have been treated as borough business.

The principle of R. v. Sainsbury (1791, 4 T. R. 451) applied.

By Royal Charter, dated the 17th Aug. 1903, the Urban District of Hornsey was constituted a

borough. The creation of this borough took effect on the 9th Nov. 1903, and the plaintiff was on that day elected mayor of the borough.

By virtue of holding that office he became a borough justice, and on the same day he duly took the oath of allegiance and the judicial oaths required to be taken by a justice in accordance with sect. 157 (2) of the Municipal Corporations Act 1882.

The new borough forms part of the Highgate petty sessional division of the county of Middlesex. There is no separate commission of the peace for the borough, and there has been no grant of a separate court of quarter sessions of the peace to the borough.

For some years the justices of the county have sat at a court house situate in Archway-road, within the borough of Hornsey, where they have held special petty sessions for the Highgate Division.

The plaintiff claimed to be entitled under sect. 155 of the Municipal Corporations Act 1882 to take the chair at the meetings of the county justices at the court house whenever business arising out of acts committed within the borough was being transacted.

The county justices passed a resolution on the 25th Nov. 1903 of which the following is a minute:

The justices are not prepared to admit the right of the mayor to take the chair during the hearing of cases arising in the borough.

The justices, however, intimated to the plaintiff that they were prepared to consider any claim made on his behalf to take the chair for any specific business arising within the borough.

On the 9th Dec. 1903, when the county justices had met in the ordinary course at the court house for the transaction of the business of the petty sessional division, the plaintiff claimed to take the chair for the trial of a youth charged under 2 & 3 Vict. c. 47, s. 54 (15), with throwing stones to the damage or danger of any person. This offence had been committed within the area of the borough.

The defendants (being the justices of the county then present) refused to admit the plaintiff's claim.

The plaintiff thereupon commenced this action, the writ being issued on the 11th Dec. 1903.

The following sections of the Municipal Corporations Act 1882, in addition to sect. 155, which is set forth in *extenso* in the judgment, were referred to in the course of the argument:

Sect. 15 (5). He shall, subject to the provisions of this Act respecting justices, have precedence in all places in the borough.

"He" in the above sub-section is "the mayor."

Sect. 154 (1). Where a borough has not a separate court of quarter sessions, the justices of the county in which the borough is situate shall exercise the jurisdiction of justices in and for the borough as fully as they can or ought in and for the county.

Sect. 156. It shall be lawful for the Queen, on the petition of the council of a borough, to grant to the borough a separate commission of the peace.

Sect. 157 (1). It shall be lawful for the Queen, from time to time, to assign to any persons Her Majesty's commission to act as justices in and for each borough having a separate commission of the peace. (2) A justice for a borough shall not be capable of acting as

(a) Reported by H. C. GARNIA, Esq., Barrister-at-Law.

such until he has taken the oaths required to be taken by justices, except the oath as to qualification by estate, and made before the mayor or two other members of the council a declaration, as in the eighth schedule. (3) He must, while acting as such, reside in or within seven miles of the borough, or occupy a house, warehouse, or other property in the borough.

Sect. 158 (1). A justice for a borough shall, with respect to offences committed and matters arising within the borough, have the same jurisdiction and authority as a justice for a county has under any local or general Act with respect to offences committed and matters arising within the county; except that he shall not, by virtue of his being a justice for the borough, act as a justice at any court of gaol delivery or quarter sessions, or in making or levying any county or borough rate.

Macmorran, K.C. and E. Beaumont for the plaintiff.—We submit that the plaintiff is clearly entitled to the right he now claims in view of the wordings of sect. 155 of the Municipal Corporations Act 1882. The older statute—viz., the Municipal Corporations Reform Act (5 & 6 Will. 4, c. 76) only provided by sect. 57 that the mayor of a borough should have "precedence in all places within the borough." This was held in *Ex parte the Mayor of Birmingham* (3 L. T. Rep. 270; 30 L. J. 2, Q. B.) to refer only to social and not magisterial precedence. The present Act goes further, and, after providing that the mayor shall have precedence "over all other justices acting in and for the borough," sect. 155 goes on: "And be entitled to take the chair at all meetings of justices held in the borough at which he is present by virtue of his office of mayor; except that he shall not by virtue of this section have precedence over the justices acting in and for the county in which the borough or any part thereof is situate, unless when acting in relation to the business of the borough." This can only relate to magisterial precedence. Where, as in this case, there are no quarter sessions nor commission of the peace, the county justices and the mayor and ex-mayor have concurrent jurisdiction within the borough; the mayor and ex-mayor being borough justices *ex officio* (Municipal Corporations Act 1882, ss. 154, 155)—that is, county justices, with their powers limited to a special locality, viz., the borough: (*Mayor of Reigate v. Hart*, L. Rep. 3 Q. B. 244, 248). This exactly brings the case within the wording of the exception in sect. 155 (2), and the mayor is therefore entitled to preside when the justices are acting in relation to the business of the borough. The sole question becomes, therefore, what is "business of the borough." We submit that it is any business which comes before the justices for transaction and which has arisen entirely within the borough. Just such a case in fact, as this offence of throwing stones within the borough: (see the definition of "borough business" in 17 & 18 Vict. c. 20, ss. 2, 16.) They also referred to

Reg. v. Whittles, 1849, 13 Q. B. 248;

Wilson v. Strugnell, 45 L. T. Rep. 219; 7 Q. B. Div. 548;

Municipal Corporations Act 1882, s. 15 (1).

Warmington, K.C. and Danckwerts, K.C. (*Eustace Hills* with them) for the defendants.—Sect. 155 (2) of the Municipal Corporations Act 1882 does not give the mayor the right to preside at petty sessions. The mayor and ex-mayor can

hold sittings in their borough, and the mayor is then entitled to preside, even though assisted by county justices. Here the county justices were meeting to take petty sessional business and not borough business, and the mere fact that a certain offence to be tried was committed within the borough does not alter the business from petty sessional to borough business as suggested. If "business of the borough" was intended to mean what has been suggested, why was not the expression in sect. 158, "offences committed and matters arising within the borough," employed? A consideration of the old common law position will throw light on what was meant by borough business. The original position of borough justices, who could, since 27 Hen. 8, c. 24, be appointed by Royal Charter alone, is clearly seen by the cases of

Blankley v. Winstanley, 1789, 3 T. R. 279;

R. v. Sainsbury, 1791, 4 T. R. 451;

Jones v. William, 1825, 3 B. & C. 762;

R. v. Amos, 1819, 2 B. & Ald. 533.

From these we see that the Municipal Corporations Act 1882, in dealing with this subject, was to a great extent declaratory. Sect. 154 (1) stated the recognised position in boroughs where there were no quarter sessions. Then sects. 156, 157, 158, 159, and 160 state how a separate commission of the peace is obtained, and deal with the position of borough justices in such a case, and lay down what had been long recognised at common law, that the borough justices and county justices were to have concurrent jurisdiction. Sect. 155 (1) deals with the case where there is no commission of the peace, and exact that the mayor and ex-mayor shall be borough justices *virtute officii*, and it is submitted that the intention of the Act was to give them the status of borough justices, as set forth in the subsequent sections and no more. Sect. 155 (2) must then relate to the position when there is a separate commission of the peace for the borough, while the exception in that sub-section exactly covers a case like the present, and gives no precedence to the mayor, because borough business was not being transacted. The county justices had assembled to transact business of the petty sessional division, that is county business. They had seisin of the jurisdiction in the business before them as being county business, and in accordance with *R. v. Sainsbury* (*ubi sup.*) no part of that business could be intercepted by the borough justices and treated as borough business. We submit, therefore, that the plaintiff's contention must fail. They also referred to

R. v. Justices of Devon, 1818, 1 B. & Ald. 588;

Darby v. The Queen, 1845, 12 Cl. & F. 520.

Macmorran, K.C. in reply.

March 1.—*FARWELL, J.* delivered the following written judgment:—The Mayor of Hornsey claims a declaration that he is entitled, by virtue of sect. 155 of the Municipal Corporations Act 1882, to precedence over all justices of the peace for the county when sitting at petty sessions within the borough and acting in relation to the business of the borough under the following circumstances. The borough of Hornsey forms part of the county of Middlesex, and was incorporated by Royal Charter of the 17th Aug. 1903. The plaintiff was duly elected mayor of the borough on the 9th Nov. 1903, and has taken the oath of allegi-

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ance and the judicial oaths required to be taken by a justice of the peace for the borough and also by a justice of the peace for the county. The borough has not a separate court of quarter sessions, nor has it a separate commission of the peace, and the county justices continue to hold petty sessional courts for the Highgate Division in exactly the same way as they held them before the incorporation, and their jurisdiction is in no way abridged or affected by the incorporation. The question turns on the true construction of sect. 155 of the Municipal Corporations Act 1882, which is as follows: "(1) The mayor shall, by virtue of his office, be a justice for the borough, and shall, unless disqualified to be mayor, continue to be such a justice during the year next after he ceases to be mayor. (2) The mayor shall have precedence over all other justices acting in and for the borough, and be entitled to take the chair at all meetings of justices held in the borough at which he is present by virtue of his office of mayor; except that he shall not, by virtue of this section, have precedence over the justices acting in and for the county in which the borough or any part thereof is situate, unless when acting in relation to the business of the borough, or over any stipendiary magistrate engaged in administering justice." The Act obviously contemplates that the mayor will sit with the county justices, and gives him the right to take the chair at all meetings of justices held in the borough at which he is present *virtute officii*, and not merely at meetings of borough justices, for, having regard to the exception, I cannot read "justices" as if it were "such justices." This right to attend meetings of the county justices is in accordance with the general law as laid down in *R. v. Amos* (1819, 2 B. & A. 533), and stated by Lord Blackburn in *Mayor of Reigate v. Hart* (L. Rep. 3 Q. B. 244, at p. 248), that in a borough where there is no court of quarter sessions and no non-intromittant clause in the charter (which is this case) the justices of the borough have no exclusive jurisdiction within the borough and no jurisdiction beyond the borough, but act in ease and in aid of the county justices, so far as they act upon what are at the same time borough and county offences, and all acts that the borough justices can do can be done by the county justices. The county justices and the borough justices have exactly the same powers and authorities, but the ambit of the exercise of such powers is different—that of the county justices includes, and that of the borough justices is limited to, offences committed within the borough. They may act together (per Lord Kenyon, *R. v. Sainsbury*, 4 T. R. 451, at p. 456), and the county justices cannot lawfully exclude the borough justices (*Reg. v. Williamson*, 7 Times L. Rep. 534), and the county justices can, if they please, sit with the borough justices in petty sessions for the borough and dispose of borough business. This brings me to the consideration of the exception. I observe that the sub-section begins by giving precedence and the right to take the chair, while the exception specifies precedence only, and I do not forget that under the Act 5 and 6 Will. 4, c. 76, it was held that words giving precedence only applied to social and not to magisterial precedence, e.g., *Ex parte Mayor of Birmingham* (30 L. J. 2, Q. B.), but I do not think that it is possible so to limit the exception,

having regard to the reference to business. The next question, to my mind, is, "What is meant by 'the business of the borough?'" The facts in the present case, and on which alone I express an opinion, are as follows: On the 9th Dec. 1903 the county justices for the petty sessional division of Highgate sat at Hornsey in petty sessions. The business of the court included an information laid against Gerald Herman for throwing stones within the borough on a summons against Herman signed by a county justice. On the case being called on the mayor claimed the right to take the chair on the ground that he was entitled so to do on all cases in which the offence had been committed within the borough. His right was not admitted, and this action is brought to establish such right. I am of opinion that the mayor has no such right. The court was sitting as a petty sessional division, not as petty sessions. The summons was granted by a county justice, and the county justices had full jurisdiction to deal with the case. The fact that if there were a mayor and ex-mayor, so as to constitute a quorum, they could have sat in petty sessions (see *Reg. v. Whittles*, 1849, 13 Q. B. 248, at p. 254) and have granted a summons to bring the prisoner before them does not make the trial of this offence business of the borough. It was, in fact, business of the county, and not the less so because it might in certain events have been dealt with as business of the borough. Even if there were a quorum of borough justices, they could not as such try the case after the jurisdiction of the county justices had attached. When a case has once been earmarked as county business or borough business by the issue of a proper summons to appear before the county or the borough tribunal, as the case may be, the county justices or the borough justices, as the case may be, have seisin of it, and the other body of justices, although having concurrent jurisdiction, cannot intercept the case. The question before me is governed, in my opinion, by the decision of the Court of King's Bench in *R. v. Sainsbury* (4 T. R. 451), that where two sets of magistrates have a concurrent jurisdiction and one appoints a meeting to grant ale licences, their jurisdiction attaches so as to exclude the others, although both might sit together. In that case the mayor and some of the aldermen of the City had by charter jurisdiction in Southwark, but as the charter contained no non-intromittant clause the justices of Surrey had a concurrent jurisdiction. Lord Kenyon, at p. 456, says: "But another question has arisen and which is proper should be settled, whether it be legal (for whether it be decent or decorous no person can doubt) for two sets of magistrates, having a concurrent jurisdiction to run a race in the exercise of any part of their jurisdiction? It is of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous. The facts in this case are shortly these: Some of the justices for the county of Surrey, having before them the statute of 26 Geo. 2, and knowing that the licences ought to be granted on a certain day and time, appointed a day, the 4th Sept., for licensing alehouses in this division, on which day they accordingly held their meeting; and certain of the magistrates of the City of London, who in general are competent to this purpose, appointed another

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meeting on a subsequent day. But the jurisdiction of the justices who had appointed the first meeting had attached before this time; not, indeed, so as to exclude the City justices from acting at the first meeting, for they might all have acted together; but it excluded the City justices of their jurisdiction to act on the subsequent day. On the general question, therefore, I am clearly of opinion that the Surrey justices and the magistrates for the City have a co-ordinate jurisdiction within this district; and that the meeting of the City justices in this case was illegal, the jurisdiction of the other magistrates having first attached." In my opinion the mayor in the case before me could not issue a summons against, or hold a petty sessions for the borough on, a prisoner already summoned before the county justices, because the jurisdiction of the latter had already appropriated it as county business, and by parity of reasoning he cannot be heard to intervene and say that it is borough business for the purpose of founding upon it a claim to take the chair at a meeting of the county justices sitting for the petty sessional division to try it. It was, in fact, *ab initio* and remained throughout county business. In the same way, if there were a borough petty sessions and the summons had required the prisoner to attend there, the county justices could not have intercepted it, and if they had chosen to sit at the borough sessions the mayor would have taken the chair. The result is that the action fails and is dismissed with costs.

Solicitor for the plaintiff, *L. J. Tatnam*.

Solicitor for the defendants, *Richard Nicholson*.

Wednesday, Jan. 20.

(Before EADY, J.)

Re KING; TRAVERS v. KELLY. (a)

Will—Construction—Settlement estate duty payable on personalty—Direction to pay testamentary expenses—Finance Act 1896 (59 & 60 Vict. c. 28), s. 19, sub-s. 1.

A testator who died in 1899, by his will made in 1895, bequeathed legacies to three sons "free of all duties," and then bequeathed legacies of larger amounts to his daughter and two younger sons without adding the words "free of all duties," and directed his daughter's legacy to be retained by the trustees and held upon the same trusts as her share of residue thereafter given to her. He then gave his residuary real and personal estate to his trustees upon trust for conversion, and directed that out of the proceeds of sale the trustees should pay his funeral and testamentary expenses and debts and legacies and the legacy duty thereon, and should stand possessed of the residue in trust for his daughter and his two younger sons. He afterwards settled the daughter's share upon trusts for the benefit of herself and issue.

Upon an originating summons taken out by the trustees for the determination of the question whether the settlement estate duty payable on the daughter's settled legacy and settled share of residue was payable out of that legacy and share of residue or out of the general residuary estate: Held, that the settlement estate duty was not a

testamentary expense, and was payable out of the settled property and not out of the general residuary estate.

JOHN KING, who died on the 26th March 1899, by his will made on the 11th Nov. 1895 gave certain pecuniary and specific legacies, and then gave to each of his sons, John W. King and Henry M. King, a legacy of 12,000*l.* "free of all duties," and to his daughter Annie M. C. Kelly, then and therein described as Annie M. C. King, and two younger sons, Arthur Herbert King and Alfred Philip King, the legacy of 20,000*l.* each, the expression "free of all duties" not being repeated in the case of the last-mentioned legacies. The will then settled the two legacies of 12,000*l.* each upon certain trusts for the benefit of the legatees and their respective families; and the legacy of 20,000*l.* given to his daughter was directed to be retained by the trustees and held upon the same trusts as the daughter's share of residue. The testator devised his residuary, real, and personal estate upon trusts for conversion, and directed that out of the proceeds of sale the trustees should pay his funeral and testamentary expenses and debts and legacies, and the legacy duty thereon, and should stand possessed of the residue in trust for his three younger children, the said Annie M. C. Kelly, Arthur H. King, and Alfred P. King, in equal shares. The will then contained a settlement of the daughter's share of residue for the benefit of herself and issue.

This was an originating summons taken out by the trustees of the will for the determination of the question whether upon the true construction of the will the settlement estate duty payable on the settled legacy of 20,000*l.* and on the settled share of the residuary estate thereby bequeathed on trusts for the benefit of Annie M. C. Kelly and her children, ought to be paid out of the testator's general residuary estate, or whether such duty was payable out of such settled legacy and settled share of the residuary estate.

The settlement estate duty in question had already been paid by the trustees in pursuance of the provisions of the Finance Acts 1894 to 1900.

The testator's daughter Annie M. C. Kelly married on the 28th July 1900, and had issue one child, a daughter.

Stuart Bevan, for the trustees, stated the facts.

George Lawrence for Mrs. Kelly and her child.—The settlement estate duty on the settled legacy of 20,000*l.* bequeathed to Mrs. Kelly, and on the settled share of residue given to her and her children, is payable out of the testator's general residuary estate. The will directs the trustees to pay his testamentary expenses out of the proceeds of sale of his residuary estate, and settlement estate duty is a testamentary expense and is included in that direction. A direction to pay estate duty includes the payment of settlement estate duty:

Re Leveridge; Spain v. Lejoindre, 85 L. T. Rep. 458; (1901) 2 Ch. 830.

And a direction to pay testamentary expenses includes payment of estate duty on personalty, which must be paid before a grant either of probate or administration is obtained:

Re Clemow; Yeo v. Clemow, 82 L. T. Rep. 550; (1900) 2 Ch. 182;

Re Treasure; Wild v. Stanham, 83 L. T. Rep. 143; (1900) 2 Ch. 648.

(a) Reported by J. TRUSVAM, Esq., Barrister-at-Law.

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In *Re Sharman; Wright v. Sharman* (84 L. T. Rep. 859; (1901) 2 Ch. 280) it was decided that estate duty payable in respect of real estate was not a "testamentary expense" within a direction contained in a will of a testator, who died after the Land Transfer Act 1897, for payment of his debts, funeral and testamentary expenses, out of his personal estate, but Kekewich, J. said in his judgment that the argument was that "on the principle of *Re Clemow* (*ubi sup.*) the estate duty on real estate is not a testamentary expense, because it is not required to be paid by the executor in order to obtain probate," and "applying, therefore, the principle of *Re Clemow* (*ubi sup.*) to this case, I think, on this part of the argument, that the expression 'testamentary expenses' does not include estate duty payable in respect of real estate." But in *Sharp v. Lush* (10 Ch. Div. 468), Jessel, M.R. gives testamentary expenses a wider meaning, stating that he could not distinguish between "executorship expenses" and "testamentary expenses," and that the former were expenses incident to the proper performance of the duty of an executor in the same way as testamentary expenses were, neither more nor less. In *Re Prince; Godwin v. Prince* (78 L. T. Rep. 790; (1898) 2 Ch. 225) Stirling, J. referred to the fact that since the Land Transfer Act the Probate Division has jurisdiction to deal with realty as well as personalty. In *Re Dixon; Penfold v. Dixon* (85 L. T. Rep. 622; (1902) 1 Ch. 248) it was held that estate duty on a reversionary fund appointed by a testator under a power was not payable by his executors. In *Re Maryon-Wilson; Wilson v. Maryon-Wilson* (82 L. T. Rep. 171; (1900) 1 Ch. 565) the settlement estate duty was decided to be payable out of the settled fund; but that does not alter the principle that settlement estate duty is a testamentary expense. It is now made payable out of the settled property unless the will contains an express provision to the contrary; and is payable within six months after the testator's death, or such further time as the commissioners may allow:

Finance Act 1896, s. 19.

Roll for Arthur H. King and Alfred P. King, the other residuary legatees.—The question is whether there is in this case express provision to the contrary under sect. 19 (1) of the Finance Act 1896 so as to prevent the duty from being payable out of the settled property. Settlement estate duty is not a testamentary expense like estate duty, as estate duty must be paid in order to obtain probate, while settlement estate duty is not paid until after probate has been taken out. This is the distinction made in

Re Maryon-Wilson; Wilson v. Maryon-Wilson (*ubi sup.*);

Re Clemow; Yeo v. Clemow (*ubi sup.*).

There are two other authorities on the question, *Re Lewis; Lewis v. Smith* (82 L. T. Rep. 291; (1900) 2 Ch. 176) and *Re Duke of St. Albans; Loder v. Duke of St. Albans* (1900) 2 Ch. 873, in which settlement estate duty was distinguished from estate duty and not treated as a testamentary expense. The testator has shown an intention that the legacy of 20,000*l.* is not to be paid free of duty, and the onus lies on the legatees to prove that the settlement estate duty on their legacies is payable out of residue. It is not a testa-

mentary expense, but in the same position as legacy duty under the Legacy Duty Act.

George Lawrence in reply.—The case of *Re Lewis; Lewis v. Lewis* (*ubi sup.*) is not an authority on the question whether settlement estate duty is a testamentary expense, and that point was not raised in *Re Duke of St. Albans* (*ubi sup.*). The question here is: Is it part of the executor's duty, as executor, to pay settlement estate duty? The right answer is yes, and therefore settlement estate duty is a testamentary expense.

Cur. adv. vult.

Jan. 26.—EADY, J. stated the facts as above set out, and continued:—Mrs. Kelly contends that the executors and trustees ought to pay out of residue the settlement estate duty on the 20,000*l.* legacy and share of residue settled on her and her issue. The owners of the other two third shares of residue contend that the duty must be borne by the settled property. Having regard to the provisions of sect. 19, sub-sect. 1, of the Finance Act 1896, the settlement estate duty must be paid out of the legacy and share of residue unless the will contains an express provision to the contrary. The gift "free of all duties" does not apply to the 20,000*l.* legacy. Reliance was, however, placed upon the direction contained in the will to pay "testamentary expenses" out of residue, and it was urged that the case of *Re Leveridge; Spain v. Lejoindre* (85 L. T. Rep. 458; (1901) 2 Ch. 830) decided that settlement estate duty was estate duty, and that *Re Clemow; Yeo v. Clemow* (82 L. T. Rep. 550; (1900) 2 Ch. 182) decided that estate duty was included in a direction to pay testamentary expenses, and therefore that settlement estate duty was a testamentary expense, and ought in the present case to be paid out of residue. It was, however, pointed out by Kekewich, J. in *Re Clemow* that estate duty takes the place of probate duty, and in *Re Treasure; Wild v. Stanham* (83 L. T. Rep. 142; (1900) 2 Ch. 648) the same learned judge stated (at p. 653) that the previous decision was based entirely on the reasoning that as payment of estate duty was essential to obtaining a grant of probate, that duty must be considered as much a testamentary expense as any other payment necessarily or properly incurred by the executors for that purpose. It is clear that probate duty was a testamentary expense: (*Davies v. Fowler*, 29 L. T. Rep. 285; L. Rep. 16 Eq. 308). On the other hand, it has been held that estate duty on real estate is not a testamentary expense, as executors are not bound to pay it in order to obtain probate: (*Re Sharman; Wright v. Sharman*, 84 L. T. Rep. 859; (1901) 2 Ch. 280). Settlement estate duty is not payable in order to obtain probate, sub-sect. 2 of sect. 19 of the Finance Act 1896 allowing in every case six months after the death within which it may be paid, and in my opinion it has no analogy to probate duty. Then how can the settlement estate duty be considered a "testamentary expense"? In *Sharp v. Lush* (10 Ch. Div. 468) Sir George Jessel said that he could not distinguish between "executorship expenses" and "testamentary expenses," and that executorship expenses were expenses incident to the proper performance of the duty of the executor, in the same way as testamentary expenses were, neither more nor less. After burying the deceased, the

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first duty of the executor is to prove the will, and formerly the probate duty was, and now the estate duty is, a payment which must be made before probate can be obtained, as it must be paid on delivering the Inland Revenue affidavit, or affidavit made for probate. The settlement estate duty is not then payable. The executor is made accountable for the settlement estate duty, and he must accordingly see that the duty is paid before parting with the legacy or share of residue, or assenting to the bequest; but in like manner the executor is also accountable for and liable to pay legacy duty, on retaining or paying legacies, and certainly it cannot be contended that a direction in a will to pay "testamentary expenses" would extend to legacy duty on legacies not otherwise expressed to be given free of legacy duty. In *Re Lewis; Lewis v. Smith* (82 L. T. Rep. 291; (1900) 2 Ch. 176) it was held that a direction in a will to pay "testamentary expenses, including all duties payable by law out of my estate," did not include settlement estate duty. Again, in *Re Duke of St. Albans; Loder v. Duke of St. Albans* (1900) 2 Ch. 873, where the will contained a direction to pay funeral and testamentary expenses and debts, legacies, and annuities out of residue, and charged the real estate with any deficiency, it was held by Stirling, J. that the settlement estate duty on certain contingent legacies, which were to be treated as settled, must be borne by the legatees, in accordance with the decision of the Court of Appeal in *Re Maryon-Wilson* (82 L. T. Rep. 171; (1900) 1 Ch. 565). In my judgment a direction to pay "testamentary expenses" does not extend to settlement estate duty, and therefore the will in question does not contain any express provision within the meaning of sub-sect. 1 of sect. 19 of the Finance Act 1896. The duty must be borne by the settled property.

Solicitors: *Sole, Turner, and Knight; Arthur H. King.*

Wednesday, Jan. 27.

(Before EADY, J.)

Re CLAYTON ENGINEERING AND ELECTRICAL CONSTRUCTION COMPANY LIMITED. (a).

Company—Debenture-holders' action—Insufficient assets—Cost of second mortgage debenture-holders made defendants.

In an action by first mortgage debenture-holders of a limited company, in which the company and the second mortgage debenture-holders were made defendants, the assets proved insufficient to satisfy the claims of the first mortgage debenture-holders.

On the further consideration of the action the question was raised whether the second mortgage debenture-holders made defendants ought to be allowed their costs.

Held, that the second mortgage debenture-holders made defendants were not entitled to costs.

THE action was commenced in April 1902 by the plaintiff George Boddington, on behalf of himself and all other the holders of an issue of 20,000l. first debentures of the company, against the company and the holders of second mortgage debentures thereof, claiming: An account of what was due to the plaintiff and all other holders of the

first mortgage debentures; a declaration that such first mortgage debentures constituted a charge on the undertaking and property of the company; that the security of the first mortgage debentures should be enforced; a receiver and manager; and further relief.

On the 8th Nov. 1902 judgment was obtained in accordance with the plaintiff's claim, and on the 8th Dec. 1903 the master made his certificate stating the result of the proceedings under the judgment.

The company had entered into voluntary liquidation in Oct. 1901, and a liquidator was then appointed for the purposes of such winding-up.

On the 15th Dec. 1903 a summons was taken out by one of the defendants to vary the master's certificate, which summons came on to be heard with the further consideration of the action on the 27th Jan. 1904.

It then appeared that the assets of the company were insufficient to satisfy the claims of the holders of the first mortgage debentures; and the question was raised whether the holders of the second mortgage debentures who were made defendants were entitled to any costs.

Sargant for the plaintiff.—The second mortgage debenture-holders made defendants are not entitled to any costs, but must look to the surplus (if any):

Palmer's Company Precedents, 9th edit., vol. 3, p. 710;

Mortgage Insurance Corporation v. Canadian Agricultural, &c., Company Limited, 84 L. T. Rep. 861; (1901) 2 Ch. 377;

Percy Wheeler for the first mortgage debenture-holders other than the plaintiff.—The first mortgage debenture-holders attending are admittedly entitled to their costs.

Errington for the second mortgage debenture-holders made defendants.—The second mortgage debenture-holders made defendants ought to be allowed their costs. The rule as stated in *Palmer's Company Precedents* is not established by the case of

Mortgage Insurance Corporation v. Canadian Agricultural, &c., Company Limited (*ubi sup.*)

EADY, J.—The rule is correctly stated in *Palmer's Company Precedents*, 9th edit., vol. 3, p. 710, that "The defendant company in a debenture or debenture stock action is not entitled to costs unless, indeed, the action fails: *Mortgage Insurance Corporation v. Canadian Agricultural, &c., Company Limited*, 84 L. T. Rep. 861; (1901) 2 Ch. 377). The company must look to the surplus; nor are second debenture-holders made defendants entitled to costs; they also must look to the surplus" is correct. This is similar to the rule which applies to actions respecting mortgages where subsequent incumbrancers are made defendants; but when subsequent incumbrancers are plaintiffs different considerations arise. In the present case the second debenture-holders are made defendants and are not entitled to costs.

Solicitors: *Beale and Co.; Jacques and Co., for Ridd, Miller, and Fletcher, Holmfirth; E. W. Oliver.*

(a) Reported by J. TROSBY, Esq., Barrister-at-Law.

Tuesday, Feb. 9.

(Before EADY, J.)

APLIN v. STONE. (a)

Will—Construction—Gift to daughter or her children—Attestation by daughter's husband—Failure of gift to daughter's children—Wills Act 1837 (1 Vict. c. 26), s. 15.

A testator who died in 1886 by his will, which was attested by the husband of one of his daughters, directed that after the death of his wife, which happened in the lifetime of that daughter, half of his freehold estate should go to that daughter or her children.

Held, that as the gift to that daughter was void by virtue of sect. 15 of the Wills Act 1837, the gift to her children also failed.

WILLIAM GRANGER by his will, dated the 20th Aug. 1885, after giving to his wife Mary Ann Granger an annuity of 40*l.* for life, charged on his freehold estate in Surrey, and providing that the remainder should be divided between his daughter Hannah Doble's children until the decease of his wife, proceeded as follows:

And after the decease of my wife Mary Ann Granger the whole of the freehold estate shall be equally divided, one half to my daughter Hannah Doble's children and one half to my daughter Ellen Norton or her children. I also give, devise, and bequeath unto my said wife, the said Mary Ann Granger, her executors, administrators, and assigns, my leasehold property consisting of all furniture and the full benefit of the policy of insurance effected upon my life and all other property that I may be possessed of at the time of my decease: and on and after the decease of my wife Mary Ann Granger, whether before or after me, her property shall fall to my daughter Ellen, but subject to the payments of my just debts, funeral and testamentary expenses, and I appoint my said wife and my said daughter Ellen executors of this my will.

One of the attesting witnesses to the will was John Norton, the husband of the testator's daughter Ellen, who was married to him on the 10th Jan. 1884, and by whom she had four children, all infants.

The testator died on the 31st Jan. 1886, and the will was proved on the 23rd Feb. 1886 by the testator's widow, Mary Ann Granger, and his daughter Ellen Mary Norton, in the will described as Ellen Norton, the executrixes therein named.

Mary Ann Granger died on the 26th Jan. 1903.

An action for partition or sale of the testator's freehold estate was commenced on the 14th Dec. 1903, the plaintiffs and defendant being persons claiming under the gift to the children of the testator's daughter Hannah Doble; and on the 6th April 1903 judgment was given directing (*inter alia*) inquiries as to the persons entitled to the testator's freehold property, and the estates, interests, shares, and proportions to and in which they were respectively entitled.

By the master's certificate, dated the 14th Dec. 1903, made in pursuance of the judgment in the action, it was certified that Ellen Mary Norton was entitled to one half of a moiety of the testator's freehold property in fee simple as co-heiress at law of the testator, and that Robert Doble was entitled to the other half of such moiety in fee simple as co-heir at law of the testator.

This was a summons taken out by Ellen Mary

Norton and her children, who had been served with notice of the judgment and had appeared in the action, asking that the master's certificate might be varied by striking out the finding that Ellen Mary Norton was entitled to one half of one moiety of the fee simple of the testator's freehold property as co-heiress at law of the testator, and that Robert Doble was entitled to the other half of such moiety as co-heir at law of the testator, and by inserting a finding or statement that the said Ellen Mary Norton was entitled to the whole of such moiety as devisee under the testator's will, or (alternatively) that the infant applicants were entitled to such moiety as devisees under the said will.

Austen-Cartmell for Ellen Mary Norton and her children.—The gift must be read as a gift to Ellen Mary Norton, or, if for any reason the gift to her fails, then to her children. Therefore, as the gift to Mrs. Norton is blotted out by the effect of sect. 15 of the Wills Act, her children take. The cases of *Jull v. Jacobs* (35 L. T. Rep. 153; 3 Ch. Div. 703) and *Lainson v. Lainson* (18 Beav. 1) show that this applies to the real estate, and *Evestaff v. Austin* (19 Beav. 591) shows that the same rule prevails with respect to personalty. The decision in *Lainson v. Lainson* (*ubi sup.*) was approved by Chitty, J. in *Re Townsend's Estate; Townsend v. Townsend* (55 L. T. Rep. 674; 34 Ch. Div. 357). [EADY, J.—These decisions all refer to reversionary gifts, and do not apply to the present case.] In *Re Clark* (53 L. T. Rep. 591; 31 Ch. Div. 72) the rule was applied to an alternative gift.

Gatey for the parties to the action.—This is the case of an immediate alternative gift, and the cases of *Jull v. Jacobs* (*ubi sup.*), *Lainson v. Lainson* (*ubi sup.*), *Evestaff v. Austin* (*ubi sup.*), and *Re Townsend's Estate; Townsend v. Townsend* (*ubi sup.*), which are cases of reversionary gifts, have no application; and *Re Clark* (*ubi sup.*) is the case of a gift to a life tenant and remainderman. The gift must first be construed as it stands, and must be construed as a gift to Mrs. Norton, if living, or to her children if she is not living. Therefore, as Mrs. Norton is living, she is, on the right construction of the will, the absolute devisee; and the fact that the gift to her is void by virtue of sect. 15 of the Wills Act does not entitle her children to take under the gift.

EADY, J.—The effect of sect. 15 of the Wills Act is that the devise to Ellen Norton is null and void. It is argued that the effect is that the gift to Ellen Norton must be treated as blotted out, so that the alternative gift to her children takes effect immediately. The first answer to this argument is that the Wills Act does not say it is to have this effect. The second answer is that if the words containing the gift are blotted out, there is nothing to identify the children who are to take. *Jull v. Jacobs* (*ubi sup.*) merely decided that where there was a gift to a daughter for life, and a direction that after her death the money should be equally divided among her children, the daughters attesting the will accelerated the gift to the children. Malins, V.C. referred to *Lainson v. Lainson* (*ubi sup.*), a decision of Lord Romilly, who said: "Although the expression used is that the estate to the son of John Lainson is only to take effect from and after John Lainson's decease, I am of opinion that the meaning is from and

(a) Reported by J. THURSTON, Esq., Barrister-at-Law.

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after the determination of his estate by death or otherwise." In *Re Townsend* (*ubi sup.*) Chitty, J. expressly approves of this decision. In the particular case before him the tenant for life had no children, and Chitty J. held that under these circumstances there was an intestacy. Neither of these cases is any authority for the proposition that if there is an absolute gift to A. if then living, but, if A. is not living, to B., B. would take though A. was living, because A.'s interest failed. The case before Chitty J. is rather an authority the other way. In *Re Clark* (*ubi sup.*) Bacon, V.C. construed the gift as to the daughter for life with remainder to her children. The gift in the will being to Ellen Norton if living absolutely, but, if she is not living, to her children, I am asked to treat this as a gift to her children although she is living. The proper way is first to construe the will and ascertain what interests are given, and then to apply sect. 15 of the Wills Act. I am not at liberty to disregard the gift to Mrs. Norton. She takes absolutely in the events which have happened, and there is an intestacy as to her share. The result is her children do not take.

Solicitors: Arthur Price; Church, Rendall, and Co., for Kite, Broomhead, and Kite.

KING'S BENCH DIVISION.

Tuesday, Jan. 19.

(Before WILLS and KENNEDY, JJ.)

OLIVER AND ANOTHER v. CAMBERWELL BOROUGH COUNCIL. (a)

Public Health (London)—Nuisance—"Intimation" notice by inspector to abate—Compliance with "intimation" without statutory notice—Work which sanitary authority ought to have done—Compulsion—Right of owner to recover expenses as for work done under compulsion—Public Health (London) Act 1891 (54 & 55 Vict. c. 76), ss. 3, 4.

An owner of premises received a written intimation under sect. 3 of the Public Health (London) Act 1891, duly signed by the officer of the sanitary authority, making known to him the existence of a nuisance at his premises and requesting him to abate the same within seven days otherwise the sanitary authority would commence proceedings against him by the service of a statutory notice. The owner, without waiting for the service of the statutory notice under sect. 4 of the Act requiring him to abate the nuisance, did the necessary works to abate the nuisance, in the course of which he discovered that the work was a sewer and not a drain, but without communicating with the sanitary authority he completed the work, and brought an action against the sanitary authority to recover the expenses as for work done by him under compulsion which the sanitary authority were legally compellable to do.

Held, but only on the authority of *Thompson and Norris Manufacturing Company v. Hawes* (59 J. P. 580), that work done under an "intimation" given under sect. 3, is not work done under compulsion, and that as the owner had not waited for the statutory notice under sect. 4, but had done the work under the "intimation" notice,

the work was not done by him under compulsion, and he was not entitled to recover the expenses of the work.

Quere, whether, if an owner wrongfully converts that which is properly a drain, for the repair of which he would be liable, into a sewer, he could recover from the sanitary authority the expenses of work done by him to the sewer under compulsion of the sanitary authority.

APPEAL by the plaintiffs from the Lambeth County Court.

The action was brought to recover a sum of 17l. 13s. for work done by the plaintiffs on a sewer, and the plaintiffs sought to recover that sum from the Camberwell Borough Council, on the ground that they were compelled to do certain work which the council were legally liable to do, and that therefore there was an implied undertaking on the part of the council to repay the plaintiffs for the work so done.

The inspector of the borough council had given to the plaintiffs, as owners of the premises No. 117, High-street, Peckham, a notice to abate a nuisance at those premises. This notice was an "intimation" notice under sect. 3 of the Public Health (London) Act 1891.

The notice was as follows:

The Vestry of Camberwell—Public Health (London) Act 1891—Intimation—Public Health Department, Vestry Hall, Camberwell—18th March 1903—To the owner, 117, High-street, Peckham,—Take notice, that I, the undersigned, having visited the above premises, find that the nuisances numbered, nine, twelve, twenty-one, thirty-eight, and forty, in the schedule at the back hereof which are liable to be dealt with summarily, exist thereon. I therefore now by this written intimation, make the existence of the said nuisances known to you, as being the person who is required to abate them. And I have to request that the same be abated within the period of seven days. At the end of this time I shall again visit the premises, and if the necessary works have not then been completed, the vestry, as the sanitary authority for the parish, will commence proceedings against you by the service of a statutory notice.—I am your obedient servant, EDWARD HOMER, the officer appointed by the vestry of the said parish to take proceedings under the above-named Act.

The notice was a printed notice, with the numbers of the nuisances complained of written in. On the back of the notice was a "schedule of nuisances," and the nuisances complained of in the notice were:

The water-closet so defective as to be a nuisance; insufficient external ventilation to water-closet; the waste-pipe of sink directly connected with the drain; the drain defective: the drain unventilated.

The plaintiffs did the works required, and in the process of executing the works discovered that the work was a sewer and not a drain, and that therefore the liability to repair it was upon the local authority, and not the plaintiffs, and that the local authority were liable for the expenses of carrying out the repairs.

The plaintiffs then sued the defendants for the recovery of the expenses, upon the ground that they were by the above notice compelled by the defendants to execute works which the defendants themselves, as the local authority, were legally compellable to do.

The County Court judge found as a fact that the plaintiffs knew that the work was a sewer and that they did not raise the question in

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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proper way to the borough council, and he also found that the council did not know that it was a sewer until after the work was done.

The judge held that the notice was a mere intimation, and not a statutory notice such as the section requires; that this intimation gave the person receiving it a chance to raise the question whether the work was a drain or a sewer, but that that question was not raised by the plaintiffs; that an intimation of this character, to give an opportunity of raising the question of drain or sewer, was a very different matter from a statutory notice of compulsory steps to be taken; that the intimation was a mere statement, and could not be considered a statutory notice, and that that being so there was no compulsion on the plaintiffs to do this work, but on the contrary it was their duty to raise the issue whether the work was a sewer or a drain, and that it was impossible to hold that under those circumstances the plaintiffs could afterwards come to the court and compel the borough council to pay for these repairs.

He therefore gave judgment for the defendants upon that ground.

There was a further question raised by the defendants, namely, that the predecessors in title of the plaintiffs had, by their own wrongful act, converted that which was properly a drain into a sewer, and as that had been done the drain did not become a sewer so far as concerned the liability of the sanitary authority to keep it in repair.

As to this the judge said that there was the further question of wrongdoers; he found as a fact that plans were submitted to construct these drains in a certain way; that these plans were wilfully disregarded, and drains were deliberately constructed of an entirely different kind. It was alleged that the plaintiffs were not the representatives of the wrongdoers; but on the evidence the inference was that the plaintiffs were the representatives of the wrongdoers; that there was not sufficient evidence before him on this point, and he therefore could not give judgment upon it.

The plaintiffs appealed.

The Public Health (London) Act 1891 (54 & 55 Vict. c. 76) provides:

Sect. 3. Information of a nuisance liable to be dealt with summarily under this Act in the district of a sanitary authority may be given to that authority by any person, and it shall be the duty of every officer of that authority and of every relieving officer, in accordance with the regulations of the authority having control over him, to give that information; and it shall be the duty of the said authority to make the said regulations, and also the duty of the sanitary authority to give such directions to their officers as will secure the existence of the nuisance being immediately brought to the notice of any person who may be required to abate it, and the officer shall do so by serving a written intimation.

Sect. 4 (1). On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act, the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice, and to execute such works and do such things as may be necessary for that purpose, and, if the sanitary

authority think it desirable (but not otherwise), specifying any works to be executed. (4) Where a notice has been served on a person under this section, and either—(a) the nuisance arose from the wilful act or default of the said person; or (b) such person makes default in complying with any of the requisitions of the notice within the time specified, he shall be liable to a fine not exceeding ten pounds for each offence, whether any such nuisance order as in this Act mentioned is or is not made upon him.

Naldrett for the plaintiffs.—The question is whether the notice of the 18th March, which was served on the plaintiffs as owners of the premises, was a sufficient compulsion on the plaintiffs to do this work on a drain which was found to be a sewer, so as to make the work so done work done under compulsion. The nuisances section is sect. 2 of the Act of 1891, which in sub-sect. 1 (a) provides generally that any premises in such a state as to be a nuisance, or injurious or dangerous to health, and (b) that any drain, &c., in the same condition, shall be liable to be dealt with summarily as nuisances. Sects. 3 and 4 deal with the giving of notice of nuisances to the sanitary authority and of serving notice on the owner to abate the same; and the definition of drain and sewer for these purposes is given in sect. 250 of the Metropolis Management Act 1855. If the notice is given under sect. 3, then sect. 4 specifies what is to take place if the notice is not complied with. The authorities go sufficiently far to cover the case of a notice given under sect. 3. There is no doubt that, when a notice is given under sect. 4 to abate the nuisance, there is a sufficient compulsion to entitle the person doing the work to recover the expenses of doing work which the sanitary authorities were themselves bound to do.

Andrew v. St. Olave's Board of Works, 78 L. T. Rep. 504; (1898) 1 Q. B. 775.

That case followed *Gebhardt v. Saunders* (67 L. T. Rep. 684; (1892) 2 Q. B. 452), in which the notice was under sect. 4, and the court there held that the work was done under compulsion, and that therefore the plaintiff could recover. [WILLS, J.—The question is whether a notice under sect. 3, with the liability to be proceeded against under sect. 4, which *prima facie* follows, is a sufficient compulsion.] The decision in *Gebhardt v. Saunders* (*ubi sup.*), which was under sect. 4, has to be carried further, so as to make it apply to an intimation notice given under sect. 3. In *Proctor v. Islington Metropolitan Borough* (67 J. P. 164), where an intimation notice was served, in consequence of which the plaintiff carried out works, some of which afterwards turned out to be repairs to a sewer which it was the defendants' duty to maintain, Wright, J. seems to have held that the plaintiff could not recover because she had not carried the work out under compulsion, but the Court of Appeal intimated an opinion—though they did not decide the point—that the works carried out under this intimation notice were done under compulsion, and the notice in that case was under sect. 3 and in very much the same terms as the present notice. The principle is very clearly dealt with by Channell, J. in *North v. Walthamstow Urban Council* (67 L. J. 972, Q. B.), which came under the Public Health Act 1875, in which there is no provision similar to this intimation notice in sect. 3 of the Act of 1891. The notice there was a notice by the sanitary inspector,

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but it was not a statutory notice. Channell, J. there says (at p. 976): "I may add that I am inclined to think that there was no statutory notice in this case, and to agree with the defendants' contention that the document in question was only an intimation of what they proposed to do." Notwithstanding that he held that work done under that intimation notice was work done under compulsion, and that the plaintiff was entitled to recover upon that ground. Again, if a wrongful act was done by the builder of this house, whereby what ought to have been a drain was turned into a sewer, the plaintiffs are not estopped by the wrongful act of their predecessors in title from alleging that this drain was a sewer.

Kershaw v. Taylor, 73 L. T. Rep. 274; (1895) 2 Q. B. 471.

The onus rests on the local authority to show that the plaintiffs knew of any fraud. The whole point is whether the intimation notice was a sufficient compulsion. It is submitted that from the terms of the notice it was a sufficient compulsion and that the plaintiffs are entitled to recover the expenses of the works.

Courthope-Munroe for the defendants.—The learned judge has found that the plans of these drains which had been submitted were wilfully disregarded, and drains of an entirely different character were constructed. That was a fraud on the local authority, and that wrongful act does not make this pipe, which is properly a drain, a sewer, and it is not conceded either that this pipe is a sewer or that the local authority are liable for the repair of it. In *Butt v. Snow* (89 L. T. Rep. 302), Channell, J. said that he knew of no authority which went so far as to say that a person who had himself wrongfully turned a drain into a sewer could thereby throw the burden of repairing it on the local authority. The drain remained a drain, and did not really become a sewer at all: (*Butt v. Snow*, *ubi sup.*; *Gorringe v. Mayor of Shoreditch*, 112 L. T. 576). But even if this was a sewer the plaintiffs cannot recover, as the work was not done under compulsion—the notice being an intimation only under sect. 3. In *Harris v. Hickman* (89 L. T. Rep. 722; (1904) 1 K. B. 13), the very point arose before Wright, J. under these two sections (sects. 3 and 4) of the Act of 1891. The notice there, as in this case, was an intimation under sect. 3, and not the statutory notice under sect. 4, and there it was held that the work was not work done under compulsion. Wright, J. said: "It appears that the only notice with respect to this nuisance that was issued to the plaintiffs was a mere intimation of the existence of the nuisance under sect 3 of the Act of 1891. That notice could not operate as a notice under sect. 4, for it was only signed by the inspector, and did not purport to be issued by the sanitary authority at all. This distinguishes the present case from *Andrew v. St. Olave's Board of Works* (*ubi sup.*). There a notice was served under sect. 4. . . . He was consequently practically compelled to do the work. Here there was no compulsion at all." So that the very point which arises in this case was there decided. Sect. 4 applies to the whole of London, and is in the same terms as the corresponding section (sect. 94) of the Public Health Act 1875; but in addition there is for London this intimation

notice under sect. 3, which has nothing corresponding to it in the Act of 1875. Assuming that the notice went beyond sect. 3, then, in so far as it did so, it was merely a notice by the officer and not by the sanitary authority: (*St. Leonard Vestry v. Holmes*, 50 J. P. 132). There are three cases which support the view that on the notice under sect. 3 there is no compulsion—namely, *Harris v. Hickman* (*ubi sup.*) and *Proctor v. Mayor of Islington* (18 Times L. Rep. 505), being the decision of Wright, J., that the notice being an intimation, the work was not done under compulsion, and that the plaintiff could not recover the expenses; and when this case went to the Court of Appeal (*ubi sup.*) the court really did not decide the point in the opposite sense, as what was done there was done by consent of the parties. The third case is *Thompson and Norris Manufacturing Company v. Hawes* (59 J. P. 580), where the Court of Appeal (Lindley, Lopes, and Rigby, L.J.J.) held that the notice then in question, which was under sect. 3, was, as Lindley, L.J. expressed it, a warning notice, and did not place the party receiving it under any compulsion to do the work, and that consequently the expenses could not be recovered. There are no decisions against the defendants on this notice under sect. 3. The decisions against them are decisions on the statutory notice under sect. 4. *Gebhardt v. Saunders* (*ubi sup.*) and *Andrew v. St. Olave's Board of Works* (*ubi sup.*) were both decisions under sect. 4, and are distinguishable upon that ground, being based entirely on the notice under sect. 4. The other cases referred to, such as *North v. Walthamstow Urban Council* (*ubi sup.*), are based on the Act of 1875, which has no provision corresponding to sect. 3 of the Act of 1891. The form of the notice under the Act of 1875 is given in sched. 4 (form A), and the form of notice under sect. 4 of the Act of 1891 is given in sched. 3 (form A), and these forms are wholly different from the notice in the present case. As long as this was a notice under sect. 3 the plaintiffs were not bound to do anything. What they ought to have done when they found that this was a sewer was to have stopped work and to have gone to the local authority and have said to them that the work was not a drain but a sewer, and that they were not liable to repair it. In *Ellis v. Bromley Rural District Council* (63 J. P. 711), which was under the Act of 1875, it was held that, where there was no notice but where work was done under the verbal instructions of the surveyor, there was no compulsion and no right to recover expenses. With regard to the question that this pipe was not a sewer, but was still a drain, it is not raised. The work not having been done under compulsion, the plaintiffs are not entitled to recover. He also referred to

Self v. Hove Commissioners, 72 L. T. Rep. 234; (1895) 1 Q. B. 685;

Kershaw v. Taylor (*ubi sup.*).

Naldrett in reply.—The notice itself is in such terms that it leaves no doubt that this was the kind of compulsion that is referred to by Channell, J. in *North v. Walthamstow Urban Council* (*ubi sup.*), a decision which covers this case absolutely, so that so far as this court is concerned there would seem to be a conflict of authority. *Self v. Hove Commissioners* (*ubi sup.*) is distinguishable, as there there was no legal liability on the local

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authority to do the work, as, the work being a drain, the legal liability to do the work was on the owner.

WILLS, J.—I confess to giving the decision I am about to give with some reluctance, because I do not agree with it, and, if I were free from authority I should not agree with it. But I can hardly think that the decision of this question is really open to us after the decision in the Court of Appeal in *Thompson and Norris Manufacturing Company v. Hawes* (*ubi sup.*). It is quite true that decision does not go entirely upon the point now in question, but the point now in question was distinctly raised and is distinctly dealt with in the judgment of Lindley, L.J., because there can be no doubt that he had before him a notice which was substantially in the same form as the notice in the present case. I have already pointed out in the course of the argument the passages in his judgment which led me to that conclusion, and it is not necessary now to repeat them; but it is quite clear he had before him a notice substantially the same as in the present case. Notwithstanding that, he held that a notice under sect. 3 of the Act of 1891 is not equivalent for the purpose of compulsion to a notice under sect. 4. My brother Wright has twice decided the same thing upon exactly the same point, and although sitting here as a divisional court, we are not bound by his judgment, still it is an important factor in considering what our judgment ought to be. Inasmuch as these three cases, to which I have referred, deal with the very point in question, and there is really no substantial difference of any kind to be drawn between the notice which was in question in those cases and the notice which is in question in the present case, I think we are bound to follow those decisions, and to say that there was no legal compulsion in this case upon the plaintiffs to do the work, and therefore they cannot recover against the defendants. I cannot give this judgment without saying at the same time that I do so with great reluctance, and only because I am compelled to do it. To my mind, a perfectly different view of sect. 3 and sect. 4, taken together, might have been taken, and I think it might very well have been held that sect. 3 was intended to be a notice with which a person might comply, if he was so disposed, without waiting for the more formal notice to be given under sect. 4. I will say in a moment why in this case I think it is the intimation of the council and not merely of the inspector of nuisances, and where a person obeys the intimation of the council, which they accompany with a threat that they will make it compulsory upon him to do the work, if he does not do it voluntarily, it seems to me contrary to natural justice that he should stand in a worse position than if he refuses to do what they have told him to do, and waits for a further compulsory order. I think the fact also has been overlooked that in that section there are words which seem to point to the fact that the notice is something more than a mere intimation, because what is said is that the sanitary authority shall give such direction to their officers as will secure the existence of the nuisance being immediately brought to the notice of any person who "may be required" to abate it. That seems to me to indicate that when a person gets that notice he is required to abate the nuisance. It seems to me

a very thin distinction indeed to say that if a notice is given, which has been given in this case, the consequences of which it is admitted and it has been decided, are that it amounts to a compulsion to do the thing, there is less compulsion because he is told if you do not do it within a week we, the sanitary authority, will take proceedings against you. It is not like the case of an ordinary litigant or individual saying that, but it is the case of persons saying it who have charge of this matter and whose duty it is to see that all proper steps are taken for the carrying out of the notice. But counsel for the defendant council says that that is only the language of the inspector. With great respect that seems to me to be nonsense. An inspector does not use forms of this kind, which are used all over the district, without the knowledge of his employers, and the sanitary authority which give him these forms to distribute and which allow him to make use of them are, in my opinion, legally as well as morally liable for their contents. If they allow a man to sign himself as the officer deputed by them to take proceedings under this Act, and to state that unless the notice is complied with within a week proceedings, which will be compulsory, will be taken without any further decision of the sanitary authority and without anything beyond what has already taken place, I think they must be bound by such a statement, and that that notice must be taken as their notice that they will proceed to make it compulsory. As I have said, the distinction is a very thin one, and it is not one which commends itself to my judgment. I am far more disposed to take the view in this question which was taken by my brother Channell in the case of *North v. Walthamstow Urban Council* (*ubi sup.*) than I am to take the view taken by my brother Wright and by Lindley, L.J., certainly in the Court of Appeal in the case of *Thompson and Norris Manufacturing Company v. Hawes* (*ubi sup.*), to which I have referred. However, I am bound by the authority of that case and I adopt it loyally; but, at the same time, inasmuch as this question probably, either in this case or some other, will not rest here, I think there is, and can be, no objection to my expressing what my individual opinion would have been if I were not fettered by authority. I do so the more because I think many of the considerations which I have dealt with both in this judgment and in the course of the argument have not really been before the courts which have decided the question in the way in which it has been decided so as to bind us. It appears also that a question was raised before the learned County Court judge with which we cannot deal, because he has given no judgment upon it. But it is a very important question, and, had our judgment been that the case must go down for a new trial, that question would have had to be dealt with. If it really be the fact that a pipe which ought to have been a drain was, by the fraudulent act of a builder (because that is what counsel for the defendants really suggested), made into a sewer within the definitions applicable to this case, by joining it on to another drain and sending it somewhere else than where the sanitary authority allowed it to go, if that kind of thing had been practised upon the sanitary authority and that was only found out, as on the present occasion, when the investiga-

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tion came on the opening of the ground, then in that case there would have been a great deal to be said in favour of the view—though I give no judgment upon it—that neither the person who was actually responsible for such misconduct nor those who claimed under him could take advantage of it. But as to that I express no opinion. I do not think, upon the evidence in this case, it has been made out, because the evidence seems to me to be singularly meagre and unsatisfactory on the point, and the learned judge so felt it, because he has given no judgment upon it. I only desire to say that it has not escaped us, but we feel the seriousness of the question which might have to be decided, and which apparently has not yet been decided, although there are expressions used by Channell, J. which indicate the trend of his opinion on the matter. I think that disposes of the case, and that I have said all that is necessary for me to say, as I do not remember any point which has been seriously dwelt upon during the argument which has been omitted by me. I think therefore for these reasons we are bound, however much I feel that if I had been unfettered by authority I should not give this decision myself, to follow the decision which has been cited, and we must dismiss this appeal. I should like to add that I hope, in common fairness, the sanitary authority will alter the form of their intimation notice, because as it is they are taking advantage of a threat, and, when the party comes and says he was induced by the threat to act, they say he had no business to act upon it.

KENNEDY, J.—I have come to the same conclusion, and I think I may without impropriety join in the expression of the feeling of reluctance with which we should pronounce this decision if our own judgment in the matter had been independent and entirely unfettered. The only point which we really have to decide is the question whether or not this was, on the evidence of fact and on the document, a voluntary work on the part of the plaintiffs, whether they incurred the expense of the work voluntarily or not. If they incurred it voluntarily, then, on finding that they need not have gone to the expense of doing the work and that some other person ought to have borne a portion of it, they cannot go to that other person and say, "We have paid what you ought to have paid." If, on the other hand, the payment has been made by them, not voluntarily, but under pressure, and under pressure of the very person who ought to have done the work and incurred the expense, then it is not doubted but that they are entitled to recover the money from that other person. Therefore, shortly put, it is this: Is the fact that the plaintiffs in this case did the work causing the expense, after receiving the document and in consequence of the document of the 18th March 1903—which I call an "intimation" because it is so called by the statute and also in large letters at the head of the paper—sufficient to deprive the conduct of the plaintiffs of its voluntary character for the purpose of saying whether they can get the money back on finding that the work ought to have been done by the sanitary authority and not by them? That it is not an easy question is obvious from the different decisions that have been given and the different views expressed—for they are different in my judgment—in the two decisions of my

brother Wright, on the one hand, in *Harris v. Hickman* (*ubi sup.*) and *Proctor v. Mayor of Islington* (*ubi sup.*), and the decision of my brother Channell, on the other hand, in *North v. Walthamstow Urban Council* (*ubi sup.*). But having had the great advantage of full argument of counsel in this case, and having given it consideration, I am entitled to say that I should feel great difficulty in coming to the conclusion to which I have been obliged to come if it had not been for the decision of the Court of Appeal in *Thompson and Norris Manufacturing Company v. Hawes* (*ubi sup.*). It seems to me difficult to say whether this notice is under sect. 3 or under sect. 4. If my judgment had been unfettered, I should have found it difficult to say that it really mattered, as regards the voluntariness of what was done by the plaintiffs, whether they did the work on receiving this intimation in this form, or on receiving the statutory notice under sect. 4, sub-sect. 1. Who can say that the work was voluntary? It is not compulsion in the sense of duress or in the sense of having any penalty imposed if they had not complied with the intimation *per se*. But was it not done, not in the slightest degree because they wished to do it for anybody else or because they were willing to do it for themselves, but because a public authority came to them and intimated to them, to use the exact words, that it was their bounden duty to do it, or if they did not do it legal proceedings would be taken against them before a magistrate? I cannot say, with great respect, that I concur in the illustration given by my brother Channell in the course of his judgment in *North v. Walthamstow Urban Council* (*ubi sup.*). In the course of the argument I have already pointed out that the rights of indemnity which may arise where agents of any sort, whether commercial or otherwise, or on the Stock Exchange, are employed, do not seem to me strictly analogous to this question. Here is the duty of a citizen to obey the authority *prima facie* of a public body governing his district in an urgent matter and a matter of public health which is alleged to be affected by that citizen's want of care or wrongdoing in the management of the premises. In a form, which is the form recognised by the local authority, an intimation is conveyed to the plaintiffs that if they do not do this work actual proceedings will be taken against them. Is not what they do under that notice involuntary? I should have been inclined myself to come to that conclusion, and while, no doubt, it is true that this is an intimation under sect. 3, and not a notice under sect. 4, I am bound to say that it is in either case a notice which emanates from the local authority. It is as if in an action a party were to try to cut his personality into two because he deposes a solicitor or representative to act for him in all the stages of the action as well as in the letter-writing which precedes the action. If we look at the third schedule to the Act of 1891, we shall see that the form of notice requiring the abatement of a nuisance is to have the "signature of officer of sanitary authority." In the intimation which was sent in this case, the person signs himself as "Edward Homer, the officer appointed by the vestry of the parish to take proceedings," and he in effect says, "I am the person through whom the vestry is going to act." So again, under

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sect. 4, which is admitted by counsel for the vestry to be the section dealing with the act of the vestry, the notice in the form in the schedule to which I have referred is to be signed not by the vestry, but with the signature of the officer of the sanitary authority. In other words, it would be again signed: "Your obedient servant, Edward Homer, the officer appointed by the vestry." It is to be in either case the signature of the same person—the officer of the sanitary authority. In each matter, so far as that goes, whether the notice is signed by the officer or not, the same person who is to constitute what is done afterwards an involuntary act if he signs the notice under sect. 4, signs the intimation in exactly the same way, only calling it an intimation to the person as to what he ought to do under sect. 3. In my view, however, whatever we might have thought on the present argument and the authorities now cited, I feel it is impossible not to do what we are bound to do—that is, loyally to follow the decision of a superior court. It may be that the only report of the case produced to us, which is evidently a summarised report, may not have fully represented in their right proportion the views of the learned Lords Justices. It may be that there was much more stress than appears in the report laid upon the fact that the plaintiffs in that case had taken upon themselves to treat a notice addressed to somebody else as addressed to them. But I am bound to say that, reading that report fairly and in its natural meaning, I think, at any rate, the majority of the court did base their decision upon a distinction between a document served under sect. 3 as an intimation, and a document which is a notice requiring an abatement of a nuisance under sect. 4, as if the one under sect. 4 would constitute a proceeding compliance with which would be an involuntary act, whereas an intimation under sect. 3 would leave the person who received it so far free that he could not say he was acting otherwise than voluntarily. If that case was decided upon that ground, as well as on the other ground there taken—namely, that the person who did the work was not the person who was required by the notice to do it—it binds us and we cannot go behind it. The third Lord Justice no doubt based his judgment on the other ground, but there is no expression of dissent on his part, and, at any rate, the view of the majority is the view of the court, and is binding on us. Therefore it seems to me that we must decide this case as my brother Wills has decided, whatever otherwise might have been our own view. With regard to the other point in this case, it is clear that the learned County Court judge has not decided the matter, as to which I will say no more than that it may be of importance. But as all the facts have not been brought out as to that point, we should at the most have sent the case back for a new trial, if we had taken a different view on the other question, which is the main question to be decided.

Appeal dismissed. Leave to appeal.

Solicitors for the plaintiffs, *Mead and Sons*.

Solicitors for the defendants, *Marsden and Son*.

KING'S BENCH DIVISION, IN BANKRUPTCY.

Monday, Feb. 29.

(Before BUCKLEY, J.)

Re ROWE; Ex parte DERENBURG. (a)

Bankruptcy—Proof—Withdrawal before admission—Substitution of fresh proof—Voluntary payment to creditor by stranger—Right of proof for whole debt—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), sched. 2, r. 22—Bankruptcy Rules 1886, rr. 225, 229.

If the trustee has neither admitted a proof nor given any intimation of an intention to do so, the creditor is entitled to withdraw his proof and present a fresh proof without leave; and it makes no difference that the twenty-eight days limited by rule 228, within which the trustee is required either to admit or reject the proof, has elapsed.

A creditor who has received from a stranger a voluntary payment, not tendered or accepted as part of the debt due from the debtor, is not bound to give credit for such payment in his proof.

APPEAL by creditors against the rejection of their proof.

Messrs. Derenburg and Co., the appellants, were stockbrokers, and in Jan. 1903, when the receiving order against the bankrupt Rowe was made, the bankrupt was indebted to them to the extent of 20,368*l.* in respect of advances on the security of share certificates, which were subsequently discovered to have been forged by the debtor.

On the 3rd June 1903 Messrs. Berwick and Moreing, in whose firm the bankrupt had been a partner, but who were in no way liable for the criminal acts of the bankrupt, sent Messrs. Derenburg and Co. a cheque for 6500*l.* inclosed in a letter which stated (*inter alia*) as follows:

Although you admit that we are not liable we have pleasure in sending you 6500*l.* This we understand will cover all the losses you have sustained except those for which you hold an insurance policy.

On the 3rd July Messrs. Derenburg and Co. presented a proof in the bankruptcy for 13,863*l.*, giving credit for the amount received from Messrs. Berwick and Moreing. This proof was not formally admitted till the 1st Dec.

In the meanwhile Messrs. Derenburg and Co. having been advised that Messrs. Berwick and Moreing would probably be unable to prove for the 6500*l.*, and that they were entitled to prove for the full amount lent to the bankrupt without giving credit for the sum paid them by Messrs. Berwick and Moreing.

On the 6th Nov. they accordingly sent in a fresh proof for 20,368*l.*, and requested the trustee to substitute it for the proof of the 3rd July.

On the 1st Jan. 1904 the proof of the 3rd July was filed by the trustee, with a note on it to the effect that it had been admitted in full on the 1st Dec.

The trustee rejected the proof of the 6th Nov. on two grounds—firstly, that the sanction of the court was necessary before a creditor could withdraw one proof and substitute another; secondly, that the appellants were bound to

(2) Reported by J. ANWYL THOMAS, Esq., Barrister-at-Law.

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give credit for the 6500*l.* received from Messrs. Berwick and Moreing. The Bankruptcy Rules provide as follows:

228. Subject to the power of the court to extend the time, the trustee, other than the official receiver, within twenty-eight days after receiving a proof which has not been previously dealt with by the official receiver, shall, in writing, either admit or reject it wholly or in part or require further evidence in support thereof. Provided that where the trustee has given notice of his intention to declare a dividend he shall, within seven days after the date mentioned in such notice as the latest date up to which proofs must be lodged, examine and in writing admit or reject every proof which has not been already admitted or rejected, and give notice of his decision rejecting a proof wholly or in part to the creditor affected thereby.

229. Where a creditor's proof has been admitted the notice of dividend shall be sufficient notification to such creditor of such admission.

Sched. 2 of the Bankruptcy Act 1883, r. 22, enacts:

The trustee shall examine every proof and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection.

H. Reed, K.C. and *Bannerman* in support of the appeal.—This proof was wrongly rejected on both grounds. A creditor can withdraw his proof before it has been adjudicated on by the trustee, and he can present a fresh proof:

Re Rhoades; Ex parte Rhoades, 80 L. T. Rep. 493; (1899) 1 K. B. 905;

Re Matro Clark; Ex parte Buenos Ayres Company, 84 L. T. Rep. 208; (1901) 1 K. B. 655.

A creditor is not obliged to give credit for a voluntary payment made by a stranger. A debtor could not plead such a payment, for a payment has to be at the request and on behalf of the debtor, and the trustee in bankruptcy is in no better position:

Kemp v. Balls, 10 Ex. 607;

James v. Isaacs, 22 L. J. 73, C. P.;

Lucas v. Wilkinson, 1 H. & N. 420.

A payment by a stranger must also be on account of the debt, and must be ratified by the debtor:

Belshaw v. Bush, 11 C. B. 191.

This was a mere voluntary payment, not on account of the debt, but made to cover a loss, for which the payors considered themselves in some way morally responsible, and it was not ratified by the debtor.

Muir Mackenzie for the trustee.—The trustee not having rejected the proof within twenty-one days limited by the rule, he must be deemed to have admitted it, and the creditor cannot withdraw it without the leave of the court. There is no inherent right in a creditor to amend his proof, and the court has the discretion to prevent him from so doing:

Re Safety Explosives Limited, (1904) W. N. 9;

Ex parte Vaughan; Re Dodds, 62 L. T. Rep. 837; 25 Q.B. Div. 529;

Re Deerhurst (No. 2), 8 Mor. 258.

The payment was on account of the debt, and the amount was ascertained by reference to the amount of the debt:

Ex parte Holland; Re Rogers, 8 Mor. 243.

H. Reed, K.C. replied.

BUCKLEY, J.—The first point taken by the trustee in this case is that the first proof must be deemed to have been admitted, on the ground that it was not rejected within the twenty-eight days limited by rule 228, and that therefore it could not be withdrawn without the leave of the court. Rule 229, however, seems to me to contemplate some notice of admission being given to the creditor, and I think the creditors in this case, not having received any notice, were entitled to take the view that their proof had not been adjudicated upon, as was the fact, and to withdraw it and present a fresh proof. On the second point, in my opinion, this was not a case of a stranger offering to pay a part of the debt due to a creditor. The payment was not tendered or accepted as part of the debt, but was made in consideration of the fact that the creditors had sustained loss by the acts of a person for whom Berwick and Moreing considered themselves to some extent morally responsible. It was a voluntary payment, made, not on account of the debt, but in consideration of the debt turning out a loss through the inability of the debtor's estate to meet it. The proof must therefore be admitted for the full amount of the debt.

Appeal allowed.

Solicitors: *Cecil F. Dunn; Morley and Shireff.*

Monday, Feb. 29.

(Before *BUCKLEY, J.*)

Re BROWNE; Ex parte MARTINGELL (a)

Bankruptcy — Proof — Gambling debt — Bills in consideration of withdrawing letters to clubs complaining of nonpayment — Gaming Act 1892 (55 & 56 Vict. c. 9).

M. had acted as B.'s agent in the making of bets. M. sued B. to recover money paid for B. in respect of bets, and B. successfully pleaded the Gaming Act 1892. M. wrote to B.'s clubs complaining of B.'s conduct, and thereupon an arrangement was made by which, in consideration of M. withdrawing the letters of complaint, B. gave him bills for the amount due. Before all the bills were met B. became bankrupt.

Held, that the bills were not given in consideration of the gambling debts, but on the consideration of withdrawing the letters to B.'s clubs, which was not an illegal consideration, and that M. could prove on the bills in B.'s bankruptcy.

Re Deerhurst; Ex parte Seaton (64 L. T. Rep. 273) distinguished.

APPEAL by creditor from the rejection of a proof.

The appellant had acted as the debtor's agent in the making of bets, and in 1900 the debtor owed him 800*l.* for losses paid on his behalf. The appellant brought an action to recover that amount, but the debtor successfully pleaded the Gaming Act 1892 both in the King's Bench Division and in the Court of Appeal.

The appellant subsequently wrote to the secretaries of the debtor's clubs and informed them of the defence set up in the action. Thereupon the debtor approached the appellant, and a settlement was arrived at by which the debtor paid 100*l.* in cash, and gave bills for the remainder. In accordance with this settlement the appellant withdrew the letters to the secretaries of the

(a) Reported by J. ANWYL THEOBALD, Esq., Barrister-at-Law.

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debtor's clubs. The debtor became bankrupt, and the appellant tendered a proof on the bills which had not been paid, which was rejected by the trustee on the ground that they had been given for an illegal consideration.

H. Reed, K.C. and Simmonds in support of the appeal.—The gambling debt was disposed of in the action, and was not the consideration for the bills. The consideration for the bills was a new one—namely, the withdrawal of the letters sent to the secretaries to the clubs—and that was not an illegal consideration.

Muir Mackenzie for the trustee.—Although it may be that the debtor would have had no answer to the claim on the bills, the trustee in bankruptcy representing the other creditors can enquire as to the real consideration. The consideration alleged by the appellant is not such as can stand against the rest of the creditors:

Re Deerhurst; Ex parte Seaton, 64 L. T. Rep. 273.

BUCKLEY, J.—In this case the trustee has rejected the appellant's proof on the ground that it was founded on an illegal consideration. The material facts are that the appellant brought an action against the bankrupt to recover what is called "a debt of honour," and he failed, with the result that the debt is at an end. After that, for a new consideration altogether—namely, the withdrawal by the appellant of certain letters he had written to the secretaries of the bankrupt's clubs—the bankrupt agreed to pay 100l. and to give bills for the remainder. That was a wholly new transaction. It was said that this was merely a fresh agreement to pay the gaming debt, and *Re Deerhurst; Ex parte Seaton* (*ubi sup.*) was cited, but that case was the contrary of this. In that case the creditor had obtained by default a judgment on a gaming debt, and the debtor had agreed, in consideration of not being posted as a creditor as a defaulter, to bear the bad judgment as if it were a good one. In this case the bills were given for a new consideration altogether, which was not an illegal consideration, and the trustee wrongly rejected the proof on that ground. The rejection must therefore be reversed, but without prejudice to his setting up within fourteen days other grounds of rejecting.

Appeal allowed.

Solicitors: *J. J. Hands; Andrew Wood, Purves, and Sutton.*

Monday, March 7.

(Before BUCKLEY, J.)

Re BURNAND: *Ex parte* THE TRUSTEE. (a)

Bankruptcy—Books kept by bankrupt as agent for several principals—Right to retain—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 50, sub-s. 1, 2—Bankruptcy rule 349.

The bankrupt had been an underwriter at Lloyd's, and, in addition to his own business, had as agent underwritten policies for others. The agency agreements were in writing, and provided that the bankrupt should keep proper books, which should be open to his principals, and that they should be audited by accountants at the expense of the principals.

Held, that the books were the property of the bank-

rupt, and that the accountants had no right against the trustee in bankruptcy to retain them on behalf of the principals.

MOTION by the trustee in bankruptcy of P. G. C. Burnand, for an order for the delivery to him of all the books kept by the bankrupt in his business as an underwriter at Lloyd's. The books were in the possession of the respondents, Messrs. Baker, Sutton, and Co., chartered accountants, who had declined to deliver them up except on terms refused by the trustee.

The bankrupt, in addition to his own business, had since 1885, as agent, underwritten policies for other persons, who were known as "names."

The agreements made by the bankrupt and his "names" provided (*inter alia*) as follows:

1. The said P. G. C. B. shall, until the 1st day of Jan. next, and for such longer period as is hereinafter mentioned determinable, nevertheless as hereinafter provided, act as the agent of the said A. B. for the purpose of underwriting policies of insurance at Lloyd's, and carrying on the ordinary business of an underwriter at Lloyd's, in the name and on behalf of the said A. B., in accordance with the usual custom of Lloyd's, and upon the terms and conditions hereinafter contained.

2. That the said P. G. C. B. shall, during the said period, have the sole management of the underwriting, and all risks shall be taken and all losses, averages, and returns shall be settled by him in the name and on account of the said A. B., and in accordance with the usual custom of Lloyd's.

5. Proper underwriting and account books shall be provided and kept in the usual manner, and shall at all times be open to the inspection of the said A. B. or his agent thereunder appointed in writing, and the said P. G. C. B. shall at all times give to the said A. B. such information or explanation as to the books or the state of the account as he may require. The said books and accounts, if required by the said A. B., shall be periodically audited by a professional accountant, and the expense of such audit shall be an outgoing within art. 3 hereof (*i.e.*, payable by A. B.).

6. The said A. B., so long as the underwriting is carried on under this agreement, shall pay to the said P. G. C. B. while he shall duly perform the engagements on his part herein contained, as a remuneration for his services in conducting the said underwriting business for keeping and providing books and papers, and for providing a proper office and clerical assistants, and all other outgoings and expenses connected with the underwriting business, save and except the said A. B.'s annual subscription to Lloyd's, and the expenses of auditing the accounts in accordance with art. 5 hereof, the sum of 260l. per annum, which sum shall be payable quarterly and treated as outgoings of the said business. The said A. B. shall also pay to the said P. G. C. B. in respect of the underwriting of each year during the continuance of the underwriting, as a remuneration for his services in conducting the same, such a commission or further sum as shall be equal to 20 per cent. of the net gains or profits, if any, of each year, to be ascertained and paid at the times and in manner hereinafter mentioned.

The bankrupt kept the usual books of an underwriter, which showed his liabilities and those of his "names." These books were audited by the respondents, who were paid by the "names."

The receiving order was made on the 30th Sept. 1903 on the debtor's own petition, and the trustee was appointed on the 5th Nov., at which date the books were in the respondents' possession.

On the 18th Nov. the trustee applied for the books, but the respondents, on the instructions of the "names," refused to give them up, except

(a) Reported by J. ANWYL THEOBALD, Esq., Barrister-at-Law.

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on an undertaking to return them on demand, and on other conditions to which the trustee refused to consent. The respondents claimed that the books were "equally the property of the various names."

Subsequent to the adjudication in bankruptcy the "names" determined their agreements.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 50, provides as follows:

(1) The trustee shall, as soon as may be, take possession of the deeds, books, and documents of the bankrupt, and all other parts of his property capable of manual delivery.

(2) The trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the bankrupt, be in the same position as if he were a receiver of the property appointed by the High Court, and the court may, on his application, enforce such acquisition or retention accordingly.

Rule 349 of the Bankruptcy Rules is as follows:

No person shall, as against the official receiver or trustee, be entitled to withhold possession of the books of account belonging to the debtor or to set up any lien thereon.

S. G. Lushington for the trustee in support of the motion.

Muir Mackenzie for the respondents.

BUCKLEY, J.—In my judgment the respondents have neither any property in these books nor any right to their possession. They have set up a *jus tertii*, and admit that the bankrupt had a joint right of property with the "names" to these books. As to the right between the bankruptcy and the "names," it appears to me that bankruptcy makes no difference. The books were provided and kept under contracts between the bankrupt and the "names," and by the terms of these contracts they were to be open for inspection by the "names," and there could have been no object for that contractual right of inspection if the books were the property of the "names." These books show the sums receivable by the names and the amounts for which they were severally liable. As between the names not one could have demanded the books as against the others or as against the bankrupt. They were not the books of any one of the "names" as against the others, but they were the bankrupt's books which, under his contracts with the "names," he was obliged to provide and keep.

Order in terms of the notice of motion.

Solicitors: *Parker, Garrett, Holman, and Howden; Ward, Howie, and Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 14, 16, and 17, 1903.

(Before BARNES, J. and TRINITY MASTERS.)

THE HAWTHORNBANK. (a)

Collision—Vessel "not under command"—Duty to keep course—Regulations for Preventing Collisions at Sea, art. 4 (a) (c) (d).

A vessel exhibiting two red lights under art. 4 (a) of the Collision Regulations as a signal that

she is "not under command" ought to keep her course when approaching another vessel so as to involve risk of collision.

A collision occurred between the brigantine R. and the barque H. The R. was at the time close-hauled on the starboard tack; the H. was sailing free, but, having been recently in collision with a steamship, was exhibiting "not under command" lights. The helm of the R. was put up in order to pass ahead of the H., while the helm of the H. was ported.

Held, that the H. ought to have kept her course and let the R. get out of her way.

ACTION for damage by collision brought by the owners of the brigantine Ringleader against the owners of the barque Hawthornbank.

The collision occurred about midnight on the 16th Oct. 1903, in the English Channel, some five miles S.W. of Dover.

The *Ringleader* was a brigantine of 162 tons register, and at the time was on a voyage from the Tyne to Folkestone with a cargo of coals, and manned by a crew of seven hands all told. She also had a pilot on board. The *Hawthornbank* was a steel barque of 1369 tons register, and was on a voyage from Antwerp to San Pedro, U.S.A., with a cargo of rails, and with a pilot on board, and manned by a crew of twenty-two hands all told.

She had been in collision with the mail steamship *Orinoco*, and had received considerable damage. Her foretopmast and headstays and sails and gear had been carried away, and her bows had been stove in. The services of a tug had been engaged accordingly, and she was putting back to the Thames for repairs.

The weather at the time was clear but overcast, the wind was a strong breeze from W.N.W., and the tide was running to the westward with the force of about a knot an hour.

The plaintiffs' case was that under these circumstances the *Ringleader* was sailing close-hauled on the starboard tack, heading about S.W. $\frac{1}{2}$ W. magnetic, and making from two to three knots an hour with jib, foretopmast staysail, two topsails, two mainstay sails, and single-reefed mainsail, when a red light was seen nearly ahead, but on the starboard bow withal, and distant one or two miles. The *Ringleader* kept her course, and shortly afterwards another red light was seen a little broader on the starboard bow, and, after a further interval, a third red light appeared about a quarter of a mile off. Those in charge then came to the conclusion that the vessel approaching, which proved to be the *Hawthornbank*, was not under command, and the helm of the *Ringleader* was starboarded, as she was unable to port owing to the presence of a steamer showing her masthead and green lights on the starboard bow, and nearer to her than the vessel exhibiting the three red lights. The *Hawthornbank*, however, still keeping her port light open, continued to come on with considerable speed, and with her stem struck the *Ringleader* on the starboard side of the bowsprit, carrying it away and doing so much damage that she sank shortly afterwards, and her pilot was drowned.

The plaintiffs then charged the defendants (*inter alia*) with proceeding at an improper rate of speed for a vessel carrying "not under command" lights, with failing to keep her course and speed,

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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THE HAWTHORNBANK.

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and with improperly porting. They also charged them with the breach of arts. 4 and 21 of the Regulations for Preventing Collisions at Sea.

The defendants' case was that the tow-line of the tug that had been engaged to tow the *Hawthornbank* had slipped before it was hauled on board, and the tug was following and hauling in the tow-line, while the barque, under her lower main topsail, was moving through the water, making about three knots an hour, and heading about E.N.E. magnetic. The regulation side lights and a stern light and the red lights for a vessel not under command were being duly exhibited.

Under these circumstances the red light of the *Ringleader* was seen about two miles off, and bearing about three or four points on the port bow of the *Hawthornbank*. The *Ringleader* approached, with her red light open, on the port bow of the *Hawthornbank*, and, as she approached, the helm was ported a point and steadied. The *Ringleader*, however, shut in her red light and opened the green light, and appeared to be attempting to cross the bows of the *Hawthornbank*, and, coming on as if under a starboard helm, with her jibboom and stem struck the port bow of the *Hawthornbank*.

The defendants charged the plaintiffs (*inter alia*) with improperly starboarding and attempting to cross the bows of the *Hawthornbank*. They also charged them with breach of art. 29 of the regulations.

Arts. 4 and 21 of the Regulations for Preventing Collisions at Sea are as follows :

Art. 4. (a) A vessel which from any accident is not under command, shall carry at the same height as the white light mentioned in art. 2 (a), where they can best be seen, and if a steam vessel in lieu of that light, two red lights, in a vertical line one over the other, not less than six feet apart, and of such a character as to be visible all round the horizon at a distance of at least two miles. . . (c) The vessels referred to in this article, when not making any way through the water, shall not carry the side lights, but when making way shall carry them. (d) The lights and shapes required to be shown by this article are to be taken by the vessels as signals that the vessel showing them is not under command, and cannot therefore get out of the way.

Art. 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

Aspinall, K.C. and *Nelson* for the plaintiffs.—The *Hawthornbank* was in fact under command, and was proceeding at a considerable speed. If she was in fact not under command under her lower main topsail only, she had brought herself to this condition by improperly reducing sail, and art. 4 (a) did not apply. The red lights were exhibited too late and not at a proper time. In any event the "not under command" lights are a signal to other vessels to get out of the way; and it is therefore the duty of a vessel to keep her course and speed. The *Hawthornbank* must be found to blame for porting her helm. There was a bad look-out on board the *Hawthornbank*, and the light of the *Ringleader* was not reported to the pilot.

Pickford, K.C. and *Adair Roche*, for the defendants, *contra*.—The *Hawthornbank* was making sufficient way through the water to justify her

in exhibiting "not under command" lights. See

The P. Caland, 68 L. T. Rep. 469; 7 Asp. Mar. Law Cas. 317; (1893) A. C. 207.

There was a bad look-out on board the *Ringleader*, and hence the collision. The steamer alleged to have hampered the movements of the *Ringleader* was the tug, which was much further astern, so that she was not really in the way.

Nelson in reply.

BARNES, J.—This is an action by the owners, master, and crew of the brigantine *Ringleader*, and the owners of her cargo, against the owners of the barque *Hawthornbank* in respect of a collision which occurred at about midnight on the 16th Oct. 1903, in the English Channel, off Dover. The result of it was that the *Ringleader* was so damaged that she sank shortly afterwards and was lost with the cargo and crew's effects, and the pilot which she had on board was unfortunately drowned. The case of the *Ringleader* is in substance that those in charge of her noticed the red light of the *Hawthornbank* nearly ahead, but slightly on the starboard bow, about a mile and a half off; that afterwards a second red light was seen about in the same position; and that afterwards a third red light was seen in the same position, or thereabouts; that when the third red light came into sight the vessels were about a third of a mile apart. The plaintiffs also say that they saw the lights of a steamer a little broader on the starboard bow than the lights of the *Hawthornbank*; and, according to the evidence of the master of the plaintiffs' vessel, the lights of that steamer seemed to him to be about the same distance off as those of the barque. On that point there was a conflict of evidence, because the defendants sought to make out that the lights of this steamer, which proved to be the tug of the *Hawthornbank*, were really a good deal further away from the brigantine than the plaintiffs' witnesses put them. However that may be, the case for the plaintiffs is that, when they got all those three red lights of the barque in sight, pretty close to, they came to the conclusion that she was a vessel not under command, and that they must act; and thereupon they acted by starboarding their helm, in the hope of getting across the barque's bows, being unable, according to the view of the master, who was the responsible man to act, to do anything else, because, if they had luffed by porting, they would have thrown themselves under the bows of the steamer, and, if they had kept on their way, they would have gone into the barque, and so he starboarded. The case of the *Hawthornbank*, shortly stated, is that she had, the day before, received damage by collision in the English Channel, and was putting back in distress with the object of making the Thames, and, no doubt, procuring the repairs rendered necessary by the first collision, which had, according to her master, damaged her stem, forcing it across to starboard, carried away all the headgear and foretopmast, stove in her bows, and done some other damage. The *Hawthornbank* had taken a pilot, had engaged a tug, and was endeavouring to make fast to that tug. There had been two attempts to get a tow line on board. The first attempt failed just as the line was about to be made fast, and the second attempt also

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failed, and the tug had again to occupy itself in hawling in the steel hawser. From that time up to the collision the *Hawthornbank*, which, when they first tried to take a tug, had brouched to, was proceeding with only the lower maintopsail set; that is to say, for about two hours before the collision she sailed under the lower maintopsail, and during those two hours the tug was getting in the tow rope after the first attempt, and was making the second attempt to get fast. There is no doubt that two red lights, in addition to the side lights, were put up, and the case for the *Hawthornbank* is that those two red lights were put up at about 10 p.m. in the mizzen rigging, on the starboard side, at a proper height, so as to show that the vessel was not under command. They then say that they saw the red light of the *Ringleader* something like two miles, or thereabouts, away, three or four points on the port bow. That is the pleaded case; but the master of the *Hawthornbank* said a mile or two miles off. It is then stated that the red light of the *Ringleader* kept open and gradually broadened on their port bow, and that, after they saw the light, when the *Ringleader* was a considerable distance off, they ported about a point, and then steadied, so as to give, according to the master of the defendants' ship, more room, and to enable the *Hawthornbank* to steer better. Then their case is that the *Ringleader* shut in her red light, when about four or five ships' lengths off, and about six points on the port bow, and showed her green light, as if attempting to cross the bows of the *Hawthornbank*, and shortly afterwards the collision happened. Now, those two cases present certain difficulties. The first question is, what were the manœuvres of these two vessels, involving the further questions, at what time were the lights put up on the *Hawthornbank*—the plaintiffs contending that these extra red lights were only put up at the last moment before the collision, and the defendants contending that they were put up about two hours before—and what was the relative position of the two vessels to one another at the material time. I think that the weight of the evidence is in favour of the view, which I adopt, that the two extra red lights were put up somewhere about 10 p.m. I think it is probable that was so from the fact that that seems to have been about the time when the vessel was in difficulties with her tug; and they seem to have had those lights up from that time onwards to the collision. With regard to the manœuvres of the two ships, I accept the plaintiffs' view that the vessels were green to red—that is, that the *Ringleader* had the other vessel slightly on the starboard bow—whereas the defendants' case is that the two vessels were red to red; but I cannot see how the defendants' story can be correct on this point. In the first place, the courses on which the vessels were favours the view which the plaintiffs present. In the second place, if the vessels were red to red, as the defendants suggest, there could be no reason for the plaintiffs starboarding in the way it is said by the defendants they did; because, if they were red to red, the *Ringleader* had only to keep her course and avoid the two difficulties in her way—namely, the *Hawthornbank*, which they would pass easily, and the steamer, which would have to keep out of her way. Again, I cannot see how the collision—which undoubtedly took

place between, in the first instance, the starboard side of the *Ringleader's* bowsprit and afterwards her bows, and the port bow, near the stem, of the *Hawthornbank*—could have occurred on the story told by the defendants; because, if it were correct to say that the plaintiffs' vessel got six points on the port bow of the defendants' vessel and then starboarded, and the ships were proceeding at the same speed as they had been going, I do not see how it is possible to bring about a collision with the bows of the *Hawthornbank*, and at an angle leading aft. I therefore accept the view of the position of the ships and the general outline of the story of the navigation told by the plaintiffs. There are still left some questions of difficulty. The first relates to the charge against the plaintiffs that their helm was improperly starboarded. That involves, I think, bad look-out, because it is said that, if these two extra red lights were up, those in charge of the *Ringleader* ought to have seen them; but I think a good look-out was being kept on the *Ringleader*. I think the men were doing their duty and looking out as well as they could. They saw the first red light—that is, the side light—of the *Hawthornbank* at a considerable distance, although they did not see the other two lights at the same time. They first saw one and then they saw another, and I think it is quite possible that the lights may have had some obscuration from the masts or rigging of the *Hawthornbank*, because they were hung three or four feet to starboard of the mizzen mast. It is obvious that anybody on the port bow, fine on the bow, might have something between them and those lights, especially if the vessel were not keeping quite steady on her E.N.E. course. The exact obscuration would depend upon how the vessel was moving. Then, again, the lights were globular, which would not necessarily come into view so readily or so brightly as the side light which was first seen. I am satisfied that those on board the *Ringleader* saw the two extra side lights as soon as they reasonably could be expected to do so. The question whether those in charge of the *Ringleader* were wrong in starboarding depends very much on the opinion of the nautical assessors who are assisting me. If the plaintiffs are right in saying that the steamer which they saw appeared to be about the same distance off as the ship, there certainly was a position of very considerable difficulty, because there was the *Hawthornbank* intimating by her signals that she was out of command, a little ahead of the *Ringleader*, and the steamer on the starboard bow. The master of the *Ringleader* did not know that it was a tug at the time. It might be any steamer coming up. It might be a large steamer, and, if he luffed, it would throw him right under the bows of that steamer. To get rid of that difficulty the defendants try to make out that the tug was farther away. My view is that the master of the *Ringleader* was justified, from what he saw, in thinking that the steamer was pretty close to him, in the same way as the barque was, when he made out that the barque was not under command. It must not be forgotten that the tug's side lights may have been showing more brilliantly than those of the barque, and therefore may have produced the appearance of being closer. I am not prepared to accept the defendants' view of this case, that the tug was so far astern as they make out. Some time had elapsed since the last

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attempt to get the tow rope fast, and I see no reason why the tug would not make up to the barque again as fast as she could. That being my view, I have consulted the Elder Brethren, and they agree that the plaintiff's vessel cannot reasonably be expected to have done differently—in other words, there was no negligence or breach of any rule on her part in starboarding in the circumstances. The reasons appear to be these: As her master says, it would have been risky to have gone about and ported under the steamer's bows; it would have been a very serious danger if the steamer had been close up; he could not keep straight on with safety, because the vessels were approaching, and so he starboarded and tried to get across the bows of the barque. The only point that can be made against him for doing that is that he said something to the effect that sub-sect. (c) of art. 4 (1) was not properly in his mind; but I think that, when his evidence is fairly considered, what he meant to convey was very much what he said in his evidence in chief—namely, that he had made up his mind that the vessel showing the three red lights was a disabled vessel, scarcely having any way through the water, and if he had thought that she was going at any great speed he would not have starboarded. That seems to me very much a nautical question, and the Elder Brethren take the view that the plaintiffs' master could not reasonably have done in the circumstances other than what he did do. I think, therefore, he cannot be considered to blame. Now, the other side of the case is also a matter of considerable difficulty. The broad points taken by counsel for the defendants are that the barque was not under command, that she had her proper lights showing in the circumstances, and that she did nothing wrong. Was the barque under command? Or was she not? She was proceeding in the damaged condition which I have already described, with only the lower maintopsail set, for something about two hours before the collision, and she was put into that position with the object of getting her tug and getting safely into the Downs. The question is, Was she at this time under command, or not under command from any accident? There is no doubt that her condition was due to the previous collision, which was an accident, and I have asked the Elder Brethren—it is a matter purely for them—whether she was under command or not. Their view is that the defendants' ship was, in the circumstances, not under command, having regard to all the conditions of the traffic and the action which she might be called upon to take—to act promptly and properly for other vessels. I understand by that, that although it would be possible for a vessel going, as she was, to alter her course slowly, or to take action in some way for the purpose of altering her course for a vessel which she might meet, and so get out of the way, she had not only one vessel to consider when she put up these lights. She had to consider the traffic in the Channel, and all the vessels out of the way of which she might have to keep. I may add these observations. Either she would pay off very slowly indeed, or she might, if she tried to come up, come up very quickly, and then she would not be in a position, certainly not in the latter case, to act for other vessels. That is the answer to the first broad point in connection with

the defendants' case. Then another point was made—namely, that she was proceeding negligently, having regard to the circumstances of the case, in reducing herself only to this sail that she had set at the time. I have asked the Elder Brethren a further question about this, and they advise me that the circumstances were not such as to justify the court in holding that she was proceeding in an improper manner. There is positive evidence from the defendants' master, and from the surveyor, to the effect that she could not set her headsails, and it must not be forgotten that what she was doing was being done with the object of proceeding to the Thames, and she was, it seems to me, acting reasonably in endeavouring to take a tug to proceed to the Downs. A further point was taken—namely, that if the defendant vessel says, in effect, "Here I am in a crippled condition, and not under command," and exhibits "not under command" signals, she should act accordingly, and leave other vessels to get out of the way; but the evidence is that she, some time before this collision actually happened, ported her helm. I have already said that I do not accept the view that they ported because of a position of lights such as they contend for, but they ported their helm to a green light. The Elder Brethren take the view, and I agree, that that was a material cause in bringing about this collision. The helm was ported, the vessel paid off, and I think, but for that having taken place, there was a great probability that the plaintiffs' ship would have got across the bows of the barque. My view, therefore, is that, having signalled that she was not under command, and that the other vessel must act for her, she ought not to have acted in the way she did, but should have kept her course and let the brigantine get out of the way. She did not do so, and the result is that the *Hawthornbank* must be held alone to blame. There is one other matter. As I have already said, the story told by those on the *Hawthornbank*, that they ported to a red light in order to give more room and to steer better, I do not accept as regards the light that was seen. I think the vessels were green to red. I think, therefore, that the look-out was defective on board the *Hawthornbank*, and that the pilot was not properly informed that there was a green light in sight, which light really must have been visible at the time the helm was ported. It seems to me that, if that is so, the *Hawthornbank* must be held alone to blame, and her owners liable, because the look-out was defective—perhaps because they were looking after the tug and not paying sufficient attention to the navigation ahead. That disposes of the question of compulsory pilotage.

Solicitors for the plaintiffs, *Lowless and Co.*

Solicitors for the defendants, *Thomas Cooper and Co.*

Friday, Nov. 20, 1903.

(Before BARNES J. and TRINITY MASTERS.)

THE GERMANIA. (a).

Salvage—Stranding of salvaged vessel—Value for purposes of award.

A steam trawler towed a disabled steamship into Aberdeen Bay, and signals were made for a

(a) Reported by CHRISTOPHER BEAD, Esq., Barrister-at-Law.

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pilot and a tug. A tug came up in response and offered to pilot and tow the vessel into harbour, but the offer was refused by her master, and the tug sent back for a pilot. In the meanwhile the hawser parted, and the vessel drifted ashore. Her value at the time the services of the tug were offered was 8500*l.* The costs of re-floating were 1150*l.*, and of the repairs in consequence of the stranding 5600*l.* In an action for salvage by the owners, master, and crew of the trawler:

Held, on the facts, that they were entitled to salvage, and to an award of 750*l.*, and that, for the purposes of arriving at a proper award, the value of the salvaged property must be taken at 8500*l.*

Held, further, that the steamship ought to have taken the services of the tug when offered.

ACTION for salvage.

The plaintiffs were the White Star Fishing Company Limited, the owners of the trawler *Waago*, and her master and crew. The defendants were the owners of the German steamship *Germania*.

The *Waago* was a steam trawler of 155 tons gross register, fitted with engines of 350 horsepower effective, and was at the time on a voyage from the Faroe fishing grounds to Grimsby with fish, and manned by a crew of ten hands all told.

The *Germania* was a steamship of 2607 tons gross register, and was bound for Kratzwick to Newcastle-on-Tyne in water ballast.

About 7.30 a.m. on the 3rd Dec. 1902, the *Waago* was about thirty miles E.S.E. of Girdlestone Light, in Aberdeen Bay, when the *Germania* was seen flying signals of distress. On coming up to her it was found that she had broken her tail-end shaft and lost her propeller the day before, and was drifting to the N.N.W. with two anchors down. The master of the *Germania* hailed the *Waago*, and it was agreed that she should render assistance. After three attempts, during one of which the hawser parted and the *Germania* collided with the quarter of the *Waago*, a connection was made, and towing commenced about noon for Aberdeen, and a W.N.W. course was shaped. About 5 p.m. Aberdeen Bay was reached, and the *Waago* held the *Germania* head to wind while flares were exhibited for a tug and a pilot. A tug came alongside, and, after signalling the *Germania*, told the master of the *Waago* that there was too much sea for a pilot boat to cross the bar. The tug then left to fetch a pilot. Between 8 and 9 p.m. the master of the *Germania* hailed the *Waago* to slack away the warp, and the *Waago* accordingly dropped astern to do so, but as she did this the *Germania* drifted to leeward, and, on the *Waago* being again hailed to go ahead, the hawser parted. The *Germania* then dropped anchor, and steps were taken to make the *Waago* fast again, but before this could be done the *Germania* drifted ashore. She was eventually floated off at a cost of 1150*l.*, and the subsequent repairs due to the stranding cost 5600*l.*

The value of the *Waago* was 5000*l.*, and of her cargo 254*l.* after allowance had been made for deterioration of the fish owing to the delay caused in rendering the services. The value of the *Germania* at the time the services were rendered was 8500*l.*

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It was contended by the defendants that no salvage was due to the plaintiffs, as the *Waago* had not completed the services she had agreed to render. They also contended that, if any salvage was due, the cost of floating her off and the repairs due to the stranding ought to be deducted from her value.

Aspinall, K.C. and *Batten* for the plaintiffs.—The master of the *Germania* was unwilling to avail himself of the services of the tug at once. It was an error on the part of the master to order the *Waago* to be slacked away, and in consequence of his mistake the hawser parted and the *Germania*'s anchor dragged, and she drifted ashore. It is submitted that the value of the vessel before she stranded—viz., 8500*l.*—must be taken as her value for the purposes of the award.

Laing, K.C. and *Stubbs* for the defendants *contra*.—The plaintiffs are not entitled to any salvage award. The *Waago* ought to have towed the *Germania* into Aberdeen Harbour, and it was owing to unskilful towing that the hawser parted and the *Germania* drifted ashore. Assuming, however, that the plaintiffs are entitled to some award, it is submitted that the value on which the award is based must be what she was actually worth to her owners—namely, 1750*l.*

Batten in reply.—The services of the *Waago* came to an end when signals were made by the master of the *Germania* for a pilot and a tug. The intention of the master was to employ others to take him into harbour, and, as far as the *Waago* was concerned, her services were then completed.

BARNES, J.—The question is whether any salvage is to be given in this case, and, if so, upon what basis. The plaintiffs contend that they ought to be treated as having brought into safety, at the time they finished their services, property to the value of 8500*l.*; whereas the defendants contend that there was no salvage at all, and that, in any event, the value of the *Germania* can only be taken at 1750*l.*, as 6750*l.* has to be deducted, made up of 5600*l.*, the cost of repairs, and 1150*l.*, the cost of the salvage operations to get her off. The *Germania* had met with bad weather, in which she had broken her tail-end shaft and lost her propeller. When she was found by the *Waago* she had two anchors down, but they did not prevent her drifting generally in a north-westerly direction. The *Waago* was asked to assist her, but there was some confusion as to the exact words used by the English master of the *Waago* and the German master of the *Germania* in connection with the arrangement made for the towage. It has, however, been practically agreed by counsel that the matter, so far as salvage is concerned, must be treated as an open arrangement—to render salvage services with the object of getting into a place of safety—and on that basis I propose to treat the case. The *Waago* was made fast to the *Germania* about midday on the 3rd Dec., and started to tow her. It took her a long time—I think some four hours—to make fast, and afterwards the vessel was towed in the direction of Aberdeen. They appear to have reached Aberdeen Bay at about 5 p.m., or a little later, in the afternoon; and, so far, matters went fairly well. It had been bad weather, with a strong wind and sea from the

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S.E., and I think—and the Elder Brethren agree—that if the vessel had not had assistance from towing she would have been in danger of going on the coast further to the northward than she did. When the vessels came near to Aberdeen, according to the master of the plaintiffs' vessel, a white flare was burnt for a tug and a pilot, and I think it is fairly obvious that the master of the trawler is right in saying that he would not like to have taken such a large vessel as the *Germania* by himself into Aberdeen, but that he could take her where she would be in a position to get tugs, and I think his statement is correct that signals were made for tugs. In response a tug came out and came alongside the *Germania*, and a conversation ensued between the two masters. The master of the tug said that he told the master of the *Germania* that he could not have a pilot, because it was too rough for a pilot to come out; but he himself had a licence for Aberdeen for the tug and could take the *Germania* safely in, and get a pilot afterwards; that he could go ahead, and the trawler, if wanted, might make fast astern, and the remuneration could be settled ashore. Then there was a discussion, according to his evidence, as to the price; but the master of the *Germania* said he would not give more than 10*l*. There the negotiations, such as they were, broke off, without anything further being done. There is one point which it is material to mention here. The master of the tug said that it was not safe for the trawler alone to take the *Germania* in, and that he told the master of the *Germania* he must dismiss the trawler from ahead, but she could work astern. Now, the master of the *Germania* says that when he had this conversation he understood the master of the tug to say, "Clear out the trawler altogether; I will bring you into a safe place"; and that he himself said to the master of the tug, "You had better let one of your men go on board the trawler, and you can go astern, inside." Then he went on to say that the tug went to the trawler, but came back and "asked if I would pay him if he brought out a pilot. I said he had better bring two, and that I would pay him 6*l*. to 7*l*. He asked 200*l*. for going astern, and I offered him 10*l*., and he laughed at that and went to the trawler." It seems to me that there may have been some confusion between what these men understood each other to say; but one thing I do not think is established by the defendants, and that is that any stipulation was made by the tug that the trawler should be absolutely dismissed. The general inference I draw is that there was bargaining going on, and that the defendants' master had the offer of a tug; but that he seems to have thought that if he could obtain a pilot he could get in with the trawler, and probably would have to pay but a very little more for a tug astern. My view is that the trawler's master was right in saying that he would not like to take the big ship in alone, but would bring her to a place where she could get a tug, and that those in charge of the ship should have recognised that position and never have allowed the tug to go. The master of the *Germania* should have taken that tug, and then this disaster would not have happened. However, the two vessels remained out in this weather, and the hawser near the steamer began to chafe. Those on the steamer started to get it

in, but could not, because it was weighted between the two vessels by a chain cable. The master of the trawler seems to have thought, from their calling constantly to him to go astern, that he must take the weight off somehow, and that there might be some risk in doing it, but that he must, as they were drifting nearer the shore, get a tant hawser between them. I have consulted the Elder Brethren about this, and they do not see that there is any ground for suggesting that the master of the trawler was doing anything wrong in the circumstances at all. Their view is that it was not his fault that the hawser parted and that this misfortune happened. I think the evidence of the master of the trawler must be accepted, and that he tried to make fast again and could not. Unfortunately the steamer's anchor did not hold, and she went ashore. What is the general result? It seems to me that the plaintiff trawler had done what she could to bring the defendants' vessel into a place of safety, and that if the tug had been taken there would have been no difficulty. I regard it as a case in which there ought to be a salvage award made on the basis of the plaintiffs' vessel having assisted the *Germania* from where she was taken in tow to a place in Aberdeen Bay, close to Aberdeen. Looked at from that point of view, it is a case of towage, though for a very short time, of a very valuable character, because it was from a position where the vessel, if unassisted, would have been in danger of going ashore at a spot more northerly than Aberdeen, to a place where she could get a tug. I have considered the case very carefully, with the assistance of the Elder Brethren, and I am of opinion that the plaintiffs are entitled, on a value of 8500*l*., to an award of 750*l*.

Solicitors for the plaintiffs, *Deacon, Gibson, Medcalf, and Marriott*, for Grange and Wintringham, Great Grimsby.

Solicitors for the defendants, *Stokes and Stokes*.

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 29 and March 1.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

TOWERS v. AFRICAN TUG COMPANY LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Payment of dividend out of capital—Ultra vires—Bonâ fide mistake of directors—Knowledge of shareholders—Action by them against directors—Retention of dividend by plaintiffs—Right to maintain action.

Where a company had, by a bonâ fide mistake of its directors, illegally paid a dividend out of capital, and an action was brought against the company and the directors by shareholders (purporting to sue on behalf of themselves and all other the shareholders of the company) who had received—and still retained—their shares

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

of that dividend with full knowledge of all the circumstances, it was held that the plaintiffs, having the dividend in their pockets which they knew was wrongfully there, ought not to be allowed to complain, and could not obtain any greater right of complaint because in form their action was an action by themselves and all other the shareholders of the company.

Dictum of Brett, L.J. in Re Exchange Banking Company Limited; Flitcroft's case (48 L. T. Rep. 86; 21 Ch. Div. 519, at pp. 534, 535) applied.

Decision of Byrne, J. reversed.

THE above-named company was a company limited by shares and was incorporated in 1896 under the Companies Acts 1862 to 1893 with the object (amongst other things) of carrying on the business of steam-tug owners, with a nominal capital of 4000*l.* in eighty shares of 50*l.* each, of which the sum of 2550*l.* was duly subscribed for.

Art. 36 of the articles of association of the company authorised dividends to be paid to "the members according to their rights and interests in the profits"; and art. 37 empowered the directors from time to time to "pay to the members such interim dividends as in their judgment the position of the company justifies."

Thomas Norne Alexander, James Ambrose Wood, and Joseph Lawson were the first directors of the company; and at a meeting of the directors, held on the 7th Sept. 1896, at which Alexander, Wood, and Lawson, as directors, and William Hunter Towers, as secretary of the company, were present, Alexander was appointed chairman of the company, and Towers was appointed its manager and secretary.

At the same meeting it was resolved that the quorum of directors of the company for the transaction of business should be two.

Subsequently Lawson retired from the board and Paskel Wedlake was appointed a director in his place.

Up to the 20th March 1900 the business of the company was carried on at a loss of its capital of about 700*l.* subject to profits made in the company's business which for the year ending the 31st July 1899 amounted to 245*l.* 18*s.* 4*d.* (on the footing that no part of such profit was applied in reduction of such loss) and up to the 13th March 1900 no dividend on the company's capital had been declared or paid except a dividend of 5*l.* per cent. paid in the year 1897, of which the sum of 36*l.* 17*s.* 11*d.* was improperly paid.

On the 13th March 1900 Alexander wrote a letter to Towers (as secretary of the company) stating that the shareholders in the company were much disappointed that no dividend was being paid on their shares and adding:

I talked the matter over with Mr. Wood in London yesterday and, considering that we have made over 500*l.* (at least 300*l.*) last year, we think you could with safety pay 5 per cent. dividend which would swallow up about 100*l.* and so satisfy them.

On the 16th March 1900 Towers replied by letter as follows:

I do not know much about limited liability law; but at the same time it appears to me that paying a dividend in our present position is tantamount to paying it out of capital, which, I believe, is illegal. If, however, Mr. Wood and yourself as a majority of the board will send me a joint letter instructing me to pay a dividend at the

rate of 5 per cent. I will, of course, be pleased to follow your instructions.

On the 17th March 1900 Alexander wrote a letter to Towers (as secretary of the company) asking whether the company "made any money last year or not?" to which letter, on the 19th March 1900, Towers replied by letter as follows:

The figures I have given you as to the profits are perfectly correct, our profit from the 1st Aug. to the end of Dec. amounting to a little over 300*l.* exclusive of what we recovered from Mr. Lawson. I was under the impression that before we could pay a dividend it would be necessary to wipe off the debit balance amounting to about 700*l.*; but, if you think otherwise, if you will let me have the joint letter from Mr. Wood and yourself I shall be pleased to at once issue cheques for the dividends.

On the 20th March 1900 Alexander and Wood wrote a letter to Towers (as secretary of the company) as follows:

It is resolved that you send out a dividend of five per cent. to the shareholders of this company and that this resolution be entered into the minutes of next directors' meeting.

Cheques on the company's banking account signed by Wood for sums to be paid as a dividend of five per cent. on the company's subscribed capital of 2550*l.* and amounting altogether to the sum of 127*l.* 10*s.* were shortly afterwards paid by the company to its shareholders.

At a meeting of the directors of the company held on the 5th July 1900 at which only Alexander and Wood, as directors, and Towers, as secretary, were present, a resolution was passed by those two directors of which the following minute appeared in the company's minute-book:

Dividend.—The secretary reported that, acting on the directors' instructions, he had on the 23rd March sent out a dividend at the rate of 5*l.* per cent. His action in so doing was confirmed.

Wedlake was never consulted as to or took part in the declaration or payment of the 5 per cent. dividend.

A balance-sheet correctly showing the state of the company's affairs on the 31st July 1900 was prepared by the company's auditor, and was on the 28th Aug. 1900 signed and sent by him to the directors of the company.

In that balance-sheet it was stated, as was the fact, that a dividend not earned to the amount of 127*l.* 10*s.* (being the dividend hereinbefore referred to) had been paid by the company, and that sum was inserted in the assets or credit side under the item "Debtors."

It further appeared by the balance-sheet, as was the fact, that up to the 31st July 1899 the company had lost 756*l.* 10*s.* 11*d.* of its capital, but as against this had made for the year ending the 31st July 1899 a profit of 245*l.* 18*s.* 4*d.*

With the balance-sheet the auditor sent a letter, dated the 28th Aug. 1899 and addressed to the chairman and directors of the company, in which, after stating that he had completed the audit of the company's books up to the 31st July, and inclosed certified balance-sheet, which showed the position of the company at that date, stated as follows:

The dividend paid in March last not having been earned, I have added the amount and dividends overpaid some time ago, which makes the total on the asset side 164*l.* 7*s.* 11*d.* I should like to point out that

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it is illegal to pay dividends unless they are earned, and the directors are liable in such cases, as it amounts to paying dividends out of the capital.

On the 12th March 1903 Towers' engagement as manager and secretary of the company was terminated.

A few days later he and Wedlake commenced this action against the company and Alexander and Wood, purporting to sue on behalf of themselves and all other the shareholders of the company other than those who were defendants, and claiming (*inter alia*) a declaration that the resolution purporting to have been passed by the defendants Alexander and Wood as directors of the company, and dated the 20th March 1900, and the payment of the dividend therein referred to were respectively *ultra vires* and illegal; and also a declaration that the defendants Alexander and Wood were jointly and severally liable to make good to the company the sum of 127*l.* 10*s.* on account or in respect of the dividend with interest thereon; and judgment against them jointly and severally for payment of such moneys and interest accordingly.

Subsequently to the commencement of the action all the other shareholders of the company obtained an order joining them as defendants to the action to oppose the plaintiffs' claims therein.

By their defence the defendants objected that the action could not be maintained, inasmuch as the company was not plaintiff, and the action was brought by two shareholders only, and not in fact on behalf of any other shareholder of the company.

They alleged that the dividend paid on the 20th March 1900 was an interim dividend; that in fact in the half-year profits had been made to more than double the amount of the interim dividend; that both plaintiffs accepted payment of the dividend, and had ever since kept the same without question; that it was paid in good faith, and in the honest exercise of the directors' discretion, and in the reasonable belief that it was properly payable; that all the shareholders of the company had had all the contentions and facts relied on by the plaintiffs placed before them, and were satisfied that in the circumstances it was proper to declare such a dividend, inasmuch as repairs had been debited to revenue account that might properly be debited to capital account, and the company was under no obligation to make good any such loss as was alleged of its fully paid share capital, but such loss was necessarily incident to the inevitable depreciation of the company's property; that in any case all the shareholders of the company acquiesced therein and accepted payment of the dividend, and no creditor was or had been in any way affected thereby; and that in the circumstances the plaintiffs were estopped from putting forward the claims which they made, and in any case were barred by their own laches and acquiescence, and were not entitled to the relief claimed contrary to the wishes of the company and of all the other shareholders.

The defendants counter-claimed that in the event of the plaintiffs being declared entitled to any such relief as was claimed by them in respect of the dividend the sums paid to the plaintiffs on their then holdings amounting to 15*l.* and 17*l.* 10*s.* respectively, which the plaintiffs took and had

ever since retained with full notice of all the facts relating thereto, should, if the same were illegally paid, be repaid by the plaintiffs respectively with interest and costs.

On the 6th Nov. 1903 the action came on for trial before Byrne, J., when the following judgment was delivered:—

BYRNE, J.—This case is regretful in some respects; but I have to deal with it as it stands. I have dealt with one branch of the case, and that has failed. Now, this is the second branch of the case. It is an action by Mr. Towers and Mr. Wedlake on behalf of themselves and all other the shareholders of the defendant company, other than those who are defendants against the company, and two of the directors of the company. Subsequently the other shareholders came in by arrangement, because they asked to be joined as defendants not coinciding in their views with the plaintiffs. Now, what is sought is to get paid into the company's coffers by the defendants, as the trustees, is a sum of 127*l.* 10*s.*, which represented, as stated in the balance-sheet for the year 1890, the amount of a dividend paid, but not earned at the time it was paid. Now, the company had carried on business from the year 1896, and there were three directors of the company—Mr. Alexander, one of the defendants, Mr. Wedlake, one of the plaintiffs, and Mr. Wood, another of the defendants. Two were a quorum. The plaintiff Towers was the secretary of the company. In the month of March 1900 the state of the accounts of the company was this: That there had been a debit of, in round figures, about 700*l.* at the date of the previous balance-sheet. Mr. Towers, the secretary, first of all had an interview with Mr. Alexander, and afterwards in writing to him recognised the fact that they had made a profit during the month since the last balance-sheet and the month of March 1900 of from 300*l.* to 500*l.* Mr. Alexander and Mr. Wood had had the situation pointed out to them by Mr. Towers in a letter, in these words: "I do not know much about limited liability law, but at the same time it appears to me that paying a dividend in our present position is tantamount to paying it out of capital, which I believe is illegal." Mr. Alexander took another view. He, as he said in the witness-box, was under the impression that a company might pay dividends out of profits earned for the year irrespective of the fact that there was a debit balance in the books. That is how I understood the effect of his evidence. The dividend was paid upon the faith of the signatures of Mr. Alexander and of Mr. Wood, Mr. Wedlake refusing to sign. Then comes at a subsequent meeting the balance-sheet, which was the 14th Sept. 1900, which, with a letter or report from the auditor, was considered. At all events, the balance-sheet was there produced and read. Mr. Alexander moved and Mr. Wedlake seconded that the same be adopted, and that was agreed to. Then there was a general meeting of the company, and that is bringing the matter down to date—the 31st July 1900. Then there was a subsequent general meeting at which the balance-sheet was passed, and the report was before the meeting. Now, that balance-sheet shows on the face of this sum, as I have mentioned, as having been paid out of profits not earned 127*l.* 10*s.* There had been a previous over-

payment in respect of dividend which is brought in as the amount of 36*l.* 17*s.* 11*d.* The total result of the profit and loss account, taking the deficit as of the previous year at 756*l.* 10*s.* 11*d.*, taking off profit for the year 245*l.* 18*s.* 4*d.*, leaves still a deficiency of 510*l.* 12*s.* 7*d.* All this is in accordance with the balance-sheet, and in accordance with the method of keeping the accounts which the company had practised. They had not, it is true, written off as for depreciation something which might, in some years, have been written off as for depreciation. In the report to which I have referred of the 28th Aug. the auditor says: [His Lordship read it, and continued:] Now, these two gentlemen who are suing have allowed a very long time to elapse, and the suggestion was that there was no evidence on the subject, but disputes had arisen between them at a subsequent date. They now come to have this sum made good. Now, this is a question of doing an act *ultra vires* and in respect of which, as it appears to me, the directors must be liable as to the company to recoup the capital. Being illegal, the fact that individuals have received dividends under it would not operate so as to prevent an order directing the return of the amounts illegally paid, although it may be as against every one of the shareholders the directors paying the money will have the right against the shareholders to get back the money paid to them. That, I take it, depends upon special circumstances. As regards Mr. Towers, he certainly knew, when he received the dividend, not only that it was a payment, but knew also that in his view it was a wrongful payment. Therefore whatever order is made against the two directors, the order will also have to be made against him to make good his share to them to recoup to them what they have had to pay—that is, the sum of some 7*l.* odd. Now, the argument on behalf of the directors has been put in this way: There was power under the articles to declare the dividend, for by clause 36 the company in general was authorised to declare a dividend to be paid to the members according to their rights and interests in the profits. And by clause 37 the directors were empowered from time to time to pay to the members such interim dividends as in their judgment the position of the company justified. There is no question in this case about honesty or *bona fides*. There is no doubt that these two gentlemen were acting perfectly *bona fide* and perfectly honestly, and they thought that they were justified in making payment of this interim dividend. But I am bound to say that, having carefully listened to the arguments, I must accept the argument of the plaintiffs' counsel with reference to this matter. The directors knew that from the books there was no amount in respect of profit available for an interim dividend. They did know this that for some months previously there had been certain profit made, and they hoped that at the end of the year the future profit which they should make would be more than sufficient to wipe out the old deficit and to justify this interim dividend. I confess I do not think that that justifies it. The money at the time of the interim dividend must be there before it can be paid in one form or another. Of course, if the money is there at the time, or something to represent it is there at the time, the interim dividend is paid, it will matter not, as

I am at present advised, that subsequently during the year there were losses or other events had happened, so that it turned out at the end of the year there were no profits as for the whole year justifying even such a payment as had been made. It could not then be possible I mean to attack the directors. The plaintiffs in the present case do not appeal much to my sympathy. They rested under this a long while. They have accepted their own dividends, but they come insisting on a legal right, and I cannot say that Mr. Wedlake having declined to join in the payment of this dividend (although he subsequently accepted payment of it) is not entitled to sue as on behalf of the company and as on behalf of the other shareholders to have this money replaced. Therefore I shall make an order for the replacing of the money. But I think that I shall be right in doing this, and I do not know that it will be opposed. The company has had what is termed a windfall, and there will be on the making up of the accounts for the present year more than sufficient to make good the whole of the debit balance. And that being so, unless the plaintiffs' counsel give me some good reason to the contrary, although I make the order for the repaying of this money, I think I shall be justified in saying that the order is not to be enforced until after the next general meeting, when the balance-sheet is produced. I am not now saying in what form it may be done; but I can very well see that the accounts may be put in such a form as that the court need not go through the farce of making these gentlemen pay up the money, and then let them go again to the different shareholders and ask for payment from such of those as they can recover it from, having regard to the circumstances of the accounts. Therefore, so far that is with reference to the order I propose to make. That leaves only one point, and that would be as to the interest upon the amount. Of course, I assume that the directors would be liable to repay with interest but then I take it that possibly that may be made good too. The interest, Mr. Norton reminds me, would be profit. Then the right thing would be to make an order for payment of it with interest at 4 per cent. up to the date of payment. But the order is not to be acted upon until after the next general meeting of the company; and not then if legal matters are put straight. Then with reference to costs of the action. On a very large part of the case the plaintiffs have most undoubtedly failed—on by far the largest claim. I think that the right form of order will be for the plaintiffs to pay the defendants' costs, except so far as increased by that part of their claim which failed. I think I must do that, and then the one can be set off against the other; unless the parties can come to some sort of terms now with regard to costs. I said what I have said advisedly, because, supposing I made the order in another phraseology that might lead to this, having regard to the effect of a case in the Court of Appeal where the point was very much considered. It was thought that the true view really was that if the plaintiff succeeded in his action, if it was only as to part although the court might sometimes make a difficulty as a general rule he could not get that which he was entitled to without incurring what might be called the general costs of the action

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except so far as they are increased by the claim upon which the defendants have failed. Then there will be judgment on the counter-claim with costs to be dealt with in the same way, and there will be liberty to apply.

From that decision the defendants now appealed.

Eve, K.C. and Ashton Cross for the appellants. —There are two points raised by this appeal: First, whether the action can be maintained by the plaintiffs at all; and secondly, whether if the action be maintainable there is any liability on the part of the defendant directors to repay to the company the interim dividend declared by them. On the first point they referred to

Re Exchange Banking Company Limited; Flitcroft's case, 48 L. T. Rep. 86; 21 Ch. Div. 519, at pp. 534, 535;

Mozham v. Grant, 80 L. T. Rep. 356; (1899) 1 Q. B. 480; on appeal, 81 L. T. Rep. 431; (1900) 1 Q. B. 88;

Russell v. Wakefield Waterworks Company Limited, 32 L. T. Rep. 685; L. Rep. 20 Eq. 474.

On the second point they referred to

Re Alexandra Palace Company Limited, 46 L. T. Rep. 730; 21 Ch. Div. 149;

Ramskill v. Edwards, 53 L. T. Rep. 949; 31 Ch. Div. 100.

Norton, K.C. and Frank Evans for the respondents, *contra*, referred to

Alexander v. Automatic Telephone Company Limited, 82 L. T. Rep. 400; (1900) 2 Ch. 56.

No reply was called for.

WILLIAMS, L.J.—On the whole I do not think that the plaintiffs are entitled to any relief here. It would not be very satisfactory if we had to determine this case ultimately upon the pleadings. I quite feel the force of what the respondents' counsel said as to there being the allegation in the statement of claim in the action that, "The plaintiff Wedlake was never consulted as to or took part in the declaration or payment of the said 5 per cent. dividend." I quite agree that when you come to look at the defence there is no denial of that allegation in the statement of claim. But it does not seem to me that that disposes of the whole case. I mean that it does not dispose of the whole of the case even if you take that allegation as having been admitted by the defendants, because the truth of the matter is that that allegation is quite consistent with the plaintiff Wedlake having received this dividend with full knowledge of all the facts. If that is so, the matter referred to in the allegation does not in any way negative the incapacity of the plaintiff Wedlake to sue in this action. But that is in all probability the true state of things. I mean that it is, in all probability, true that although the plaintiff Wedlake may not have been consulted as to the declaration and payment he was perfectly well aware of all that was being done. And that is strongly confirmed by the fact that the counter-claim alleges in so many words: "The dividends paid to the plaintiffs on their holdings amounted to" so-and-so, giving the figures, "which the plaintiffs took and have ever since retained with full notice of all the facts relating thereto." I believe that that is true, not only because the plaintiffs when they come to

plead to the counter-claim seem to me, on the face of the pleadings, to admit the truth of that, but also because when I turn to the minute-book and see the minutes which were there—and in particular the minute of the meeting of the 14th Sept. 1900 at which the plaintiff Wedlake was present—I cannot doubt that he must have been perfectly well aware of all the facts connected with the declaration and payment of this interim dividend and the state of the accounts at the time. In that state of things, what ought to be done with this action? There is no doubt that the payment of this interim dividend was an *ultra vires* payment. I start with the assumption that one is bound to make, that if an act done is by a company which is *ultra vires*, no confirmation by shareholders—not even by every member of the company—can convert that which was *ultra vires* into something *intra vires*. It always must be *ultra vires*. As has been pointed out in one or two of the cases, the result of that is that if the company are plaintiffs, no amount of acquiescence or resolutions by the shareholders can form an answer to the action by the company for the reinstatement of things in the state in which they would have been but for the *ultra vires* act complained of. But, to my mind, it is a different thing where the action is brought by a shareholder on behalf of himself and other shareholders. I am assuming in this case that this was one of those cases in which the facts were such that the plaintiffs ought to be able to sue in a representative action for the purpose of preventing acts from being done in reference to the company in which they are interested, and which might damnify the company by reason of the acts being *ultra vires*. I assume that an action not only to prevent but to remedy matters that have been done *ultra vires* is an action which can be brought in the form in which the present action is brought. But although that is so, my own judgment is that this is an action which has to be brought by all the shareholders, as the plaintiffs, personally. It is an action which the plaintiffs cannot bring without having an interest. It is an action which a stranger could not bring. Under these circumstances what is it we have to ask ourselves here? If it be the fact, as I think it is, that these plaintiffs knew of all these things which have been done, received the dividends with knowledge of all the facts, and then brought this action with the money still in their pockets, ought they to be allowed to bring this action, which, as I have pointed out, to my mind is an action which they can bring in consequence of their personal interest in the matter? I think not. I think that an action could not be brought by an individual shareholder complaining of this matter which is *ultra vires* if he himself had in his pocket, at the time he brought the action, the proceeds of that very *ultra vires* act. I think, in the same way, that it does not alter matters that the plaintiff says that he is suing on behalf of himself and others. I think that that which ought to make us say he ought not to bring the action ought equally to make us say that he ought not to be the peg upon which the action is to be hung for the benefit of others. Assuming that to be so, what answer is sought to be made here? I think that the respondents' counsel were disposed to put the only logical answer that

could be put, and to say that they were bound to contend that the very wrongdoer himself, who had got the proceeds of the wrongdoing in his own pocket, might, if the matter was a matter which was *ultra vires*, sue as a plaintiff to have put it right, and bring his action against the other shareholders who had benefited by it, and compel them to restore the capital which had been wrongfully paid out to them. But I do not think that that is right, and if that is not right I think that the return of the capital in the course of the trial after the action has been brought does not make things any better. Admittedly these dividends were still in the pockets of these plaintiffs when they brought this action. The dividends were still in their pockets when this action came to be tried. It is quite true that in the course of the trial the plaintiffs said they were prepared to pay this money back. I think that the form is that they were content that judgment should go against them personally in respect of it. But I do not think that would make an action good which was not otherwise a good action in its inception. I must say in this particular case that there is a strong inclination in my mind not to give the plaintiffs the relief which they ask, because, starting with the fact that capital had been distributed in the payment of this interim dividend, that fact had been recognised by the company and by the shareholders. It appears on the face of the balance-sheet, and they were minded to replace this capital and had every prospect of doing so, even out of the very current year's profits. Under these circumstances this action was wholly unnecessary and wholly uncalled for. It seems to me that the court is not bound, when it sees that this *ultra vires* act is in course of being put right, and will very shortly be put right, to give relief to a plaintiff of this sort who has acquiesced in the wrong, and who has got part of the proceeds of the wrong in his pocket. Under those circumstances I think that this appeal ought to succeed. The only part of the order of the court below which stands is that which relates to the counter-claim. The defendants to the counter-claim (that is, the plaintiffs) will have to pay the costs of that, but in the action and on the appeal there will be no costs at all on either side.

STIRLING, L.J.—I also think that this appeal ought to succeed. I desire to rest my decision on the particular facts of this case, and to abstain from laying down, so far as possible, any general rule on the question whether a shareholder, who has been party to the payment of a dividend out of capital, or who has taken his dividend with knowledge of all the facts, can or cannot come to the court afterwards and complain that the dividend has been paid out of capital, and seek to make either the directors or his fellow shareholders restore what they have paid or received with notice that the dividend had been improperly paid. Now, the facts of the present case are these: According to the balance-sheets of the company down to the 31st July 1899 there was a debit to the company—a loss—of 750*l.* odd. In March of the following year, that is 1900, the company had made a certain amount of profit, but not enough to wipe out the debit balance of the 31st July 1899. In these circumstances the directors thought fit to pay an interim dividend,

the amount of which was 127*l.* 10*s.*, a small sum. On the 31st July 1900 it appeared that the profit for the year amounted to 245*l.* 18*s.* 4*d.* That, of course, was not nearly enough to wipe out the debit balance of the previous year of over 750*l.* The auditor made his report on the 20th Aug., and pointed out by his report that they had no right to pay this dividend, and he, in drawing up the balance-sheet, put on the face of the balance-sheet an entry which showed this—for we find these entries in the balance-sheet—over-paid dividend, 36*l.* odd; dividend not earned, which is the dividend in question, 127*l.* 10*s.* That balance-sheet is submitted to the shareholders, and is approved by them. Therefore it stands recorded on the face of the transactions of the company that a dividend had been improperly paid, and in any future dealing, supposing it was honest, the credit against the company has to be wiped out before any dividend can be properly paid. That being so, in July 1901 a further profit is made, which amounts to 510*l.* odd, and on the 31st July 1902 the debit balance was completely wiped out, but not enough was made to pay a dividend. Then this took place in March 1903: Mr. Towers, who was one of the plaintiffs, and who had been secretary and manager of the company, is dismissed from his office. Thereupon, on the 20th March following, he and one of the directors—Mr. Wedlake—bring this action, and they charge that an *ultra vires* act had been committed, and that the 127*l.* 10*s.* which had been made and had been lost by the company ought to be brought back into the coffers of the company, and that is the object of the action. Now, it is proved beyond all contradiction by documents under the hand of Mr. Towers that he was perfectly well aware of the circumstances in which the dividend was paid. It is not true that he was in the same position as Mr. Wedlake; but, I think, having regard to the admissions which he made by not denying the allegation in the counter-claim that he received his dividends with full notice of all the facts relating thereto, and submitted to judgment against himself on that footing, and also the high probabilities of the case, that, inasmuch as he did not choose to go into the box and deny it, we ought to assume that he, like his co-plaintiff Mr. Towers, knew the facts under which the dividends were declared. Now the form of the action is one by the plaintiffs against the company and other shareholders. Originally all the shareholders were not made parties, but at the request of the other shareholders they ultimately were made defendants to the action. So that we have here all the shareholders of the company. I think this is a form of action which, no doubt, in certain circumstances may be maintained. That a shareholder who had received a dividend without knowing anything of the illegality of it might maintain such an action I do not doubt. Whether he ought not to return what he had received in respect of dividend is another question; and that may depend upon whether he had notice, at the time when he took it, of the acts complained of. Why is it that this form of action is allowed? The proper plaintiffs *prima facie* where it is sought to bring back the property of the company into its own coffers, is the company itself. But there are exceptions to that rule—and what is

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the reason or meaning of the exceptions? Sir George Jessel, M.R., in the case which has been referred to, of *Russell v. Wakefield Waterworks Company Limited* (32 L. T. Rep. 685; L. Rep. 20 Eq. 474), says this: "The exceptions turn very much on the necessity of the case, that is the necessity of the court doing justice." Now this is a case, to begin with, in which no one suggests any fraud or dishonesty on the part of the directors or anyone else. The directors who paid this dividend made a mistake, but no one charges anything more than a mistake. Everything was perfectly open. The fact was disclosed by the balance-sheet of 1900, the first balance-sheet which was submitted to the shareholders after the making of the dividend. The fact appeared. Further, the subsequent dealings seemed to show that the company did not intend to overlook the fact that this dividend had been improperly paid, or that there was an intention on the part of anyone to do anything other than that which was right, and to make good the deficiency in the capital of the company which had been created by the payment of that dividend. That seems to me to have been the result of the subsequent balance-sheets. Moreover, what do we find the plaintiffs themselves doing? They acquiesce in this course being taken by the company from the 14th Sept., when they certainly knew it, down to March 1903, when this action was brought. It does not seem to have ever been suggested by any one party that an action should be brought by the company to recover this deficiency of the capital, and I think that we ought to infer that what commended itself to the plaintiffs, as well as to the other shareholders, was to go on. The company was prosperous, it was wiping out year by year a great part of the deficiency, and ultimately, when the whole deficiency, including this deficiency in capital, had been replaced, the intention was to pay a proper dividend, and not until then. I do not think that there was any necessity shown, looking at all the circumstances of the case, for the intervention of the court to compel the payment of this small sum—for such it was really—in the way in which the plaintiffs seek to throw the duty upon the court. In truth Byrne, J., although he gave a judgment in favour of the plaintiffs, was so far from desiring to press that that he directed it not to be enforced, in order to see what might be the result of the further trading, and whether the deficiency in capital would not be wiped out in the ordinary course. I think, on the whole, that justice would have been met if this action had been dismissed on the ground of the personal conduct of the plaintiffs.

COZENS-HARDY, L.J.—I am of the same opinion. In my view there is no question really here which admits of argument on one part of it—namely, that this was an illegal payment because it was a payment out of capital. Nor do I think that it can be contested, and it certainly was not contested by Mr. Eve, that a transaction of that kind cannot be ratified by the shareholders. But, in order to constitute what is relevant in this case, one must go further. An action in respect of or arising out of an *ultra vires* transaction ought properly to be brought by the company. But it has been long well established that there are cases in which such an action may be maintained by a shareholder suing on behalf of himself and all

other shareholders against the company as defendants. I will not pause to consider under what particular circumstances such an action may be maintained; but I assume that this is one of those cases in which such an action may be maintained. I mean in point of form. I think, however, it is equally clear that the action cannot be maintained by a common informer. A plaintiff in an action of this form must be a person who is really interested. When you get that fact clearly established it seems to me impossible to avoid taking the next step, that all personal exceptions against the individual plaintiff must be gone into and considered before relief can be granted. Here I have no intention of going through all the facts again. I think it is clearly proved, as it is certainly admitted by the counter-claim, that both the plaintiffs took this dividend with full notice of all the facts relating thereto. It is also clear that they had the dividends, which they took with full notice that it was payment out of capital, in their pockets at the date when this action was commenced. Now, can a shareholder who has, with full notice of all the material facts received, part of the capital by way of dividend, and who still retains that money in his pocket, maintain an action against the directors who have paid the dividend? I think the true answer to that question is, he cannot. It may be that there is no direct authority on the point, but the dictum of Brett, L.J. in *Re Exchange Banking Company Limited*; *Flitcroft's case* (48 L. T. Rep. 86; 21 Ch. Div. 519) is really, I think, very nearly in point. That was a case of the winding-up of a company. It was a case where there had been an illegal payment of capital, and Brett, L.J. there says (at pp. 534, 535 of 21 Ch. Div.): "I think that there was no ratification at all, because the assent of the shareholders was procured by improper accounts, the untruthfulness of which the shareholders did not know. But suppose they had known it, I think that what was done was a breach of trust which they could not ratify. If they had with full knowledge assumed to ratify what was done, they could not individually have complained, but the shareholders are not the corporation." The view of Brett, L.J. was that shareholders who assumed to ratify could not have individually complained. And it seems to me to follow that a shareholder, having the money in his pocket which he knows is wrongfully there, ought not to be allowed to complain; and he cannot obtain any greater right of complaint because in form his action is an action by himself and all other the shareholders in the company. In fact he must succeed by his own merits, and not by the merits of the other shareholders. Whether this action could have been maintained by these plaintiffs if, before action brought, they had repaid the amount of the dividend which they had received, it is not necessary for us to decide. Speaking for myself, I doubt whether that payment could have sufficed to put the plaintiffs in the right. Here, however, nothing of the kind happened. There is actually a judgment against the plaintiffs upon the counter-claim for payment of these sums. In my view the judgment in the action of the learned judge in the court below ought to be set aside, the judgment on the counter-claim, with costs, being the only part of the order which can stand.

Appeal allowed.

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BARRETT v. KEMP BROTHERS.

[CT. OF APP.]

Solicitors for the appellants, *Gibson and Weldon*, agents for *Hannay and Hannay*, South Shields.

Solicitors for the respondents, *Smith, Rundell*, and *Dods*, agents for *H. Wilson Paton*, Swansea.

Dec. 19, 1903, and Jan. 13, 1904.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

BARRETT v. KEMP BROTHERS. (a)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—Employment—"Factory"—"Wharf"—"On or about"—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), s. 7.

Every wharf is a "factory" within the meaning of sect. 7 (2) of the Workmen's Compensation Act 1897.

Hall v. Snowden, Hubbard, and Co. (80 L. T. Rep. 554; (1899) 2 Q. B. 136) is overruled by the decision of the House of Lords in Raine v. Jobson and Co. (85 L. T. Rep. 141; (1901) A. C. 404).

APPEAL by the defendants from the award of the County Court judge at Sittingbourne in proceedings for compensation under the Workmen's Compensation Act 1897.

The plaintiff was a workman in the employment of the defendants, who were builders and contractors, and he was injured by accident arising out of and in the course of his employment.

The defendants were the lessees and occupiers of a wharf on the river Medway, which was used by them for loading and unloading goods and materials for the purpose of their business.

There was no machinery or plant upon the wharf; and anyone was allowed to use the wharf upon payment of wharfage charges to the defendants.

A private road, of which the defendants were the lessees and occupiers, led from the high road to the wharf. This private road was about 250 yards long; it was entered from the high road through a high gate; the gate was always kept locked, except when the private road was being used by the defendants or their servants, and the key was kept by the defendants; the defendants' name was upon the gate; and the private road was bounded on both sides by a hedge.

The plaintiff was employed upon the private road, breaking stones for its repair, at a point about thirty yards from the gate and 220 yards from the wharf, when his eye was injured and destroyed by a piece of stone. He had never been employed upon the wharf itself.

The defendants did in fact give notice of this accident to the inspector of factories, and they entered it in a book which they kept for the purpose.

The plaintiff claimed compensation under the Workmen's Compensation Act 1897. The defendants contended that the wharf was not a "factory" within the meaning of the Act, and that the plaintiff was not employed "on, in, or about" the wharf.

It was admitted that, if the wharf was a

"factory" within the meaning of sect. 7 (2) of the Act, the defendants were the "undertakers" within the meaning of the Act.

The Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides:

Sect. 7 (1). This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory. . . . (2). In this Act "factory" has the same meaning as in the Factory and Workshop Acts 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895.

The Factory and Workshop Act 1901 (1 Edw. 7, c. 22), which consolidates and amends the previous Factory Acts, provides:

Sect. 104 (1). The provisions of this Act with respect to (i.) power to make orders as to dangerous machines (section seventeen); (ii.) accidents; (iii.) regulations for dangerous trades; (iv.) powers of inspectors (section one hundred and nineteen); and (v.) fines in case of death or injury (section one hundred and thirty-six) shall have effect as if every dock, wharf, quay, and warehouse, and all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour, or canal were included in the word "factory," and the purpose for which the machinery or plant is used were a manufacturing process.

The County Court judge found that the plaintiff was employed, at the time of the accident, on, in, or about the wharf; and he held that the wharf was a "factory" within the meaning of sect. 7 of the Act; and he made an award in favour of the plaintiff.

The defendants appealed.

G. A. Scott for the appellants.—The learned County Court judge was wrong in holding that this wharf was a "factory" within the meaning of sect. 7 (2) of the Workmen's Compensation Act 1897. A wharf is a "factory" within the provisions of that section only if it is a wharf to which some "provision of the Factory Acts is applied by the Factory and Workshop Act 1895"—that is, now, to which some provision of the Factory and Workshop Act 1901 is applied. Every wharf is not made a "factory," but only a wharf to which some provision of the Factory and Workshop Act 1901 is applied:

Hall v. Snowden, Hubbard, and Co., 80 L. T. Rep. 554; (1899) 2 Q. B. 136.

The facts of that case were very like the facts of the present case. It was there held that a wharf, used much in the same way as this wharf, was not a "factory" because no provision of the Factory Acts was applied to it. No machinery was used on this wharf, and no provision of the Factory Act 1901 was applied to it. There is no distinction between the present case and that of *Hall v. Snowden, Hubbard, and Co.* (*ubi sup.*), and the decision therein is conclusive of the present case. The decision of the House of Lords in *Raine v. Jobson and Co.* (85 L. T. Rep. 141; (1901) A. C. 404) did not overrule the decision of the Court of Appeal in *Hall v. Snowden, Hubbard, and Co.* (*ubi sup.*). The decision of the House of Lords was only that a dock in which a ship was being repaired was a "factory," and that an accident which happened to a workman on the ship was an accident which happened in a "factory." That decision proceeded upon an

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.
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admission made by counsel for the employers that every dock was a "factory," but the grounds of the decision in *Hall v. Snowden, Hubbard, and Co.* (*ubi sup.*) were not dealt with, and the House of Lords did not purport to overrule that decision. It was not in any way a decision that every dock is a "factory." Some evidence must be given that some provision of the Factory and Workshop Act applies to the wharf in order to show that it is a "factory" within the meaning of the Workmen's Compensation Act, and there was no such evidence in the present case. The accident in this case did not happen on the wharf itself, and therefore the provisions of sect. 104 of the Factory and Workshop Act 1901 as to notice of accidents do not apply. Further, even if this wharf was a "factory," the accident did not happen "on or about" the wharf. This accident happened at such a distance from the wharf that it cannot be said to have happened "on or about" the wharf:

Powell v. Brown, 79 L. T. Rep. 631; (1899) 1 Q. B. 157;

Fenn v. Miller, 82 L. T. Rep. 284; (1900) 1 Q. B. 788.

Cecil Walsh, for the respondent, was not called upon to argue.

Jan. 14.—COLLINS, M.R.—This is an appeal from the decision of the learned judge of the Sittingbourne County Court, who held that the plaintiff was entitled to compensation under the Workmen's Compensation Act 1897. The plaintiff was injured by accident while engaged in breaking stones upon a private road within the curtilage of a wharf. The learned County Court judge found that the employment on the road leading to the wharf was employment on or about the wharf, and he held that the wharf was a "factory" within the meaning of the Act. It was admitted that, if the wharf was a "factory," the defendants were the "undertakers," within the meaning of the Act, in respect of the wharf. Upon the hearing of the appeal we took time to consider our judgment in order to see what is the true bearing of the decision of the House of Lords in *Raine v. Jobson and Co.* (85 L. T. Rep. 141; (1901) A. C. 404), and what effect it has upon the earlier decision of the Court of Appeal in *Hall v. Snowden, Hubbard, and Co.* (80 L. T. Rep. 554; (1899) 2 Q. B. 136). Upon considering that case, I think that the House of Lords in *Raine v. Jobson and Co.* (*ubi sup.*) has overruled the decision of this court in *Hall v. Snowden, Hubbard, and Co.* (*ubi sup.*). It is true that in the House of Lords the case was not argued upon the question which arose for discussion in this court in *Hall v. Snowden, Hubbard, and Co.* (*ubi sup.*); and the decision proceeded upon an admission made by counsel on behalf of the employers that, by the combined effect of the Workmen's Compensation Act 1897 and the Factory and Workshop Act 1895, every dock was a "factory" within the meaning of the Workmen's Compensation Act 1897. That admission would, of course, equally apply to the case of a wharf as to the case of a dock. That case, therefore, was decided without there being any evidence whether any of the provisions of the Factory Acts were applied by sect. 23 of the Factory and Workshop Act 1895 to the dock there in question. It is true that an admission made by counsel cannot alter the law or make

a decision; but the decision is that of the court. In *Raine v. Jobson and Co.* (*ubi sup.*) the House of Lords adopted that admission as the basis of their decision, and they decided the case without any evidence that any of the provisions of the Factory Acts had in fact been applied to the dock. It seems to me, therefore, that the decision in the House of Lords was contrary to the decision of this court in *Hall v. Snowden, Hubbard, and Co.* (*ubi sup.*), and is decisive of the present case. I think that we should not be properly respecting the decision of the House of Lords if we were to hold otherwise, although, indeed, the grounds of the decision of this court in *Hall v. Snowden, Hubbard, and Co.* (*ubi sup.*) were not dealt with in the House of Lords in *Raine v. Jobson and Co.* (*ubi sup.*). I know that the Court of Session in Scotland, in *Jackson v. Rodger and Co.* (2 Ct. of Sess. Cas. 533, 5th series), has not taken the same view as that taken by this court in *Hall v. Snowden, Hubbard, and Co.* (*ubi sup.*). I must confess, however, that I am still unable to see any answer to the argument of Mr. Bray in *Hall v. Snowden, Hubbard, and Co.* (*ubi sup.*). The Legislature in defining a "factory" have not said in clear language that every dock and wharf is to be a "factory." On the contrary, sect. 7 (2) of the Workmen's Compensation Act 1897 only says that "factory" includes every dock, wharf, . . . to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895," and thereby seems to assume that there may be a dock or wharf which is not a factory. The decision of the Court of Session in Scotland, which coincides with the opinions expressed in the text-books upon the subject, seems to me to entirely ignore the *prima facie* limitation placed upon the definition of "factory," in relation to a dock or wharf, in sect. 7 (2) of the Workmen's Compensation Act 1897. It is not necessary, however, now to go into that question, because the House of Lords, in *Raine v. Jobson and Co.* (*ubi sup.*), have adopted the view that sect. 7 (2) of the Act of 1897 must be construed as if the limiting words were not introduced at all. The decision of the learned County Court judge upon that point is therefore correct. It seems to me that he was right also upon the other question. He has found that the accident happened while the workman was employed on or about the "factory"; that was a question of fact, and there was ample evidence to justify his finding. This appeal, therefore, fails, and must be dismissed.

MATHEW, L.J.—I am of the same opinion, and for the same reasons.

COZENS-HARDY, L.J.—I agree.

Appeal dismissed.

Solicitors for the appellants, *Smiles and Co.*

Solicitor for the respondent, *F. J. Berryman*, for *W. A. Watson*, Chatham.

[CT. OF APP.]

CARYLL v. DAILY MAIL PUBLISHING COMPANY.

[CT. OF APP.]

Monday, Feb. 22.

(Before COLLINS, M.R. and ROMER, L.J.)

CARYLL v. DAILY MAIL PUBLISHING COMPANY. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Discovery—Interrogatories—Action for libel—Defence of fair comment—Interrogatories as to previous statements concerning plaintiff—Leave to administer—Order XXXI., rr. 1, 2.

In an action for damages for libel in respect of a criticism, published in the defendants' paper, of an opera composed by the plaintiff, the defendants pleaded that the words complained of were fair and bona fide criticism of and comment on the opera, and were published without malice.

The plaintiff applied for leave to deliver interrogatories to the defendants asking them whether they had not previously published an incorrect statement about the plaintiff, what information they had which induced them to believe that statement was true, from whom they derived such information, whether it was derived from the same source as the article complained of, and what steps they had taken to verify it.

Held (dismissing the appeal), that leave to deliver the interrogatories had been properly refused as not being relevant to the question of malice.

APPEAL of the plaintiff from an order of Bucknill, J. at chambers refusing leave to deliver interrogatories for the examination of the defendants.

The plaintiff brought this action to recover from the defendants damages for an alleged libel published in their newspaper.

The plaintiff was a musical composer, and was also the conductor at a theatre in connection with his own musical compositions.

The alleged libel was a very severe criticism of an opera called the "Duchess of Dantzic," composed by the plaintiff, and was published in the newspaper on the 19th Oct. 1903.

The defendants set up the defence that the words complained of were fair and bona fide criticism of and comment on the opera, and were published without malice.

On the 24th Jan. 1903 there had been published in the defendants' newspaper the following article:

Theatrical Changes.—Several interesting changes are about to be made in connection with the musical directorships of West-end theatres. Of these perhaps the most important is that of Mr. Ivan Caryll, of the Gaiety Theatre, who will take up the baton at the Empire when the conductor's chair there is vacated by Mr. Wenzel. To present-day patrons of the Gaiety Mr. Ivan Caryll is as closely associated with that theatre as Herr Meyer Lutz was in years gone by, while Mr. Wenzel's ballet music has for years been a distinct feature at the Empire. It is understood that Mr. Howard Talbot will succeed to the Gaiety chair.

After the publication of that article the defendants published in their newspaper a letter from the plaintiff's solicitors as follows:

A paragraph has been published stating in effect that our client, Mr. Ivan Caryll, was about to sever his connection with the Gaiety Theatre in order to conduct at the Empire. The statement so made was inaccurate, as Mr. Caryll has never contemplated accepting a permanent position as a conductor except in connection with

his own pieces. As a matter of fact he has recently entered into a new contract for three years to conduct at the old and new Gaiety Theatre.

The plaintiff applied for leave to deliver interrogatories for the examination of the defendants, first asking them whether they had published the article on the 24th Jan. 1903, and then asking: "What information, if any, had you that induced you to believe that the said statement relating to the plaintiff was true? From whom was such information derived? Was the said information, if any, derived from the same source as that from which the article set out in the statement of claim was derived? Did you take any and, if so, what steps to verify it?"

The master refused leave to deliver these interrogatories, and his order was affirmed by Bucknill, J. at chambers.

The plaintiff appealed.

Lush, K.C. and George Elliott for the appellant.—The plaintiff ought to be allowed to administer these interrogatories. Since the decision of this court in *McQuire v. Western Morning News* (88 L. T. Rep. 757; (1903) 2 K. B. 100) it is settled that, where an article which is complained of as defamatory appears upon its face to be a criticism only, unless there is extrinsic evidence of malice, there is no case to go to the jury. The plaintiff is entitled to give extrinsic evidence of malice, and these interrogatories are directed to obtaining that evidence. The previous article published by the defendants was calculated to injure the plaintiff, and was untrue. It was in reality an attack upon the plaintiff. If the plaintiff can show that it emanated from the same source as the article complained of in this action, that will be evidence that the defendants without due inquiry have allowed their newspaper to be used for the purpose of attacking the plaintiff, and so will be evidence of malice. These interrogatories are strictly relevant to the question whether the defendants published the article complained of without malice. Similar interrogatories were permitted, for the purpose of showing malice, in *Elliott v. Garrett* (86 L. T. Rep. 441; (1902) 1 K. B. 870), where the defendant in an action for slander pleaded that the words were spoken on a privileged occasion in good faith and without malice, and the Court of Appeal held that an interrogatory, asking the defendant what information he had and what inquiry he had made, ought to be allowed.

Hugh Fraser, for the respondents, was not called upon to argue.

COLLINS, M.R.—I think that both the master and the learned judge have properly exercised their discretion in this matter. This court stands in a somewhat peculiar position with regard to appeals of this kind. We have not to deal with such questions as those relating to the delivery of interrogatories upon our own judgment, as if we were deciding the matter in the first instance; but we have only to see whether the discretion vested in the judge has been properly exercised. It seems to me that we cannot reasonably hold in this case that these interrogatories were so relevant to the question of malice that they ought to be allowed. They set out, in the first place, what seems *prima facie* to be a laudatory notice of the plaintiff, and then proceed to ask what steps (if any) the defendants took to verify the

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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statements in that article, what information they had which induced them to believe that it was true, and whether it came from the same source as the article complained of in this action. The master and the judge came to the conclusion that there was no such indication of malice on the face of the earlier article as to make it relevant to inquire as to its source. A newspaper is not always bound to disclose the secrets of its office, unless the interests of justice make it right that it should do so. The master and the judge have decided that it was not right in this case to make the defendants give this information, and I am not prepared to differ from them. I think, therefore, that this appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. It does not follow that, because the issue of malice is raised, therefore all matters which might be the subject of cross-examination at the trial are proper matters for interrogatories. It is noticeable that the matter about which the plaintiff seeks to interrogate the defendants has nothing to do with the subject-matter of the present action. Upon its face the earlier article is merely a statement of fact and not defamatory. I agree with the Master of the Rolls that the master and judge have exercised a wise discretion, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Leggatt, Rubinstein, and Co.*

Solicitors for the respondents, *Lewis and Lewis.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Feb. 10, 11, 12, 13, 15, and 17.

(Before FARWELL, J.)

ATTORNEY-GENERAL V. MAYOR, &C., OF NOTTINGHAM. (a)

Public and private nuisance—Smallpox hospital—Injunction—Public convenience—Public health—Scientific evidence as to the effects of similar hospitals.

A quia timet action was brought by the Attorney-General on the relation of certain owners and occupiers in a district near a populous city, and by the same owners and occupiers as plaintiffs to restrain the use by the corporation of the city of certain buildings as a smallpox hospital, both as a public and a private nuisance.

Held, that to succeed in such a case it is necessary for the plaintiffs to show, not merely that inconvenience may be experienced or a sentiment of danger may exist; but a strong probability, amounting to a moral certainty that the hospital, if established, will be an actionable nuisance, and that the plaintiffs having failed to show this, that their action must be dismissed.

In the course of the trial the plaintiffs adduced scientific evidence to show from the experience of other smallpox hospitals that such hospitals tended by aerial convection to spread the disease; and rebutting scientific evidence was adduced by the defendants. At the desire of the parties his lordship heard the evidence; but expressed considerable doubt as to its admissibility.

(a) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

WITNESS ACTION.

The corporation of Nottingham, who were the local sanitary authority for the city, determined in the early part of 1903, under their statutory powers, to establish a new smallpox hospital for the accommodation of smallpox patients in their city, the existing accommodation being insufficient.

For this purpose, after much consideration, they acquired a piece of land in the parish of Bulwell, Nottingham, containing four acres of land or thereabouts, and commenced to erect buildings thereon.

About August in the same year the buildings were opened for the reception of smallpox patients, and for the accommodation of a medical staff and nurses.

The buildings stood on a piece of land, triangular in shape, the base being about 350 yards long, and abutting on an old forest road, which was at present used as a highway, and adjoining on another side a private road leading to the pumping station of the Bestwood Coal and Iron Company Limited, and lying between the main line of the Midland Railway and a branch line of the Great Northern Railway, 152 yards from the former and twenty-seven yards from the latter.

The plan of the institution was that every building which was to contain infected persons or things should be placed 40ft. distant from the boundary.

There was an inner fence of barbed wire round the premises; and an outer fence, 6ft. 6in. in height, with barbed wire at the top, inclosed the grounds except in one place, where they were separated from the adjoining properties by a precipitous bank and a wide stream.

The old forest road or highway which led from Bulwell to a place called Papplewick, on which the premises abutted, was used by the public (but only to a small extent) for pedestrian, vehicular, and bicycle traffic.

On either side of the road near the hospital there were only a few dwelling-houses. The nearest was a cottage occupied by a man named Barrow, a servant of the Bestwood Coal and Iron Company Limited, who lived there with his family—five in number altogether.

The nearest residences after Barrow's cottage were six cottages with twenty-three inmates, 157 yards distant.

The village of Bestwood was situate half a mile or thereabouts from the hospital; there was there a parish school, and the headmaster, William English Robinson, resided in a school house attached to the school.

Thomas Asken Loeth, a miller and farmer in the neighbourhood, was owner of a house and three cottages adjoining his mill, all of which premises were within 200 yards or thereabouts of the hospital.

The Bestwood Coal and Iron Company Limited were the owners and occupiers of a colliery, mines, and ironworks in the parish. They employed altogether a large number of workpeople, 230 being employed in the Bestwood Ironworks, part of which was within a quarter of a mile radius of the colliery; and 1280 in the colliery, which was without the quarter, but within the half-mile radius, but the majority of these worked underground.

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There was a resident population of 204 persons within the quarter-mile radius of the hospital, and of 510 persons within the half-mile radius.

The plans of the site and buildings had not been approved by the Local Government Board since the corporation did not require to raise any loan for the building.

It was, however, alleged that in the selection of the site and in the erection and laying out of the building and grounds the corporation had complied with the conditions upon which the Local Government Board insists in cases in which it sanctions a smallpox hospital.

The hospital, which was prepared to accommodate forty patients, appeared to be well managed. It seemed that a single patient had actually been seen in the grounds outside the inner fence, but he appeared at the time to be convalescent. There was no evidence that the hospital had tended to spread infection either in the neighbourhood, or among the school children, or among the men employed in the works.

An action was brought by the Attorney-General on the relation of the above-mentioned William English Robinson, Thomas Aken Loeth, and the Bestwood Coal and Iron Company Limited, also by these same individuals and company as plaintiffs against the mayor, aldermen, and citizens of Nottingham for (1) an injunction to restrain the defendants, their servants, and agents, from using the buildings known as the Bulwell Smallpox Hospital as a hospital for the reception of persons suffering from smallpox, so as to cause a nuisance to the inhabitants of the neighbourhood or to persons passing along the neighbouring highway; (2) an injunction to restrain the defendants, their agents, and servants, from using the building as a hospital for the reception of persons suffering from smallpox, so as to cause a nuisance to the relator plaintiffs as owners and occupiers in the neighbourhood.

Both sides at the hearing of the action relied to a considerable extent on scientific evidence, and both desired that it should be heard, the plaintiffs calling scientific experts, who insisted that smallpox is disseminated by aerial convection, and the defendants also calling scientists who substantially denied this theory.

Dr. John Clough Thresh, lecturer on public health at the London Hospital, examiner at the University of London, and medical officer of health for the Essex County Council, who gave evidence on behalf of the plaintiffs, gave as his opinion that the presence of hospital ships in the Thames had caused a great increase of smallpox in the district opposite to the place in the river where they were moored.

Dr. Thresh showed that in one year the smallpox cases in the Orsett Union (which included a parish West Thurrock, which parish had two centres of population, West Thurrock and Purfleet, Purfleet being opposite to the hospital ships) were fifty-three, and the outside cases in the same district 185, while the proper proportion would have been for the Orsett Union one-fiftieth of the whole. Of these fifty-three cases of infection, thirty-one arose in the parish of West Thurrock, and the greater the distance from Purfleet the less was found to be the infection.

In cross-examination the doctor stated that he had done his best to ascertain if there was any

communication between the ships and the Essex side of the river, and that he had not the slightest doubt but that there was very little. Public opinion in the district was, he stated, very strong on the subject.

Doctor McVail, examiner in medical jurisprudence and public health in the universities of Glasgow and Edinburgh, president of the Sanitary Association of Scotland, and of the State medicine section of the British Medical Association, who gave evidence on the same side, stated that the theory of the dissemination of smallpox by aerial convection over a considerable space was not a new theory in medical circles, it being found stated in medical books a hundred years old, and there being an instance of such infection across the Charles River, Boston, in North America, where the width of the river was 1500ft.

On the defendants' side Dr. Edward W. Hope, professor of health in the Victoria University, Manchester, and medical officer of the Port of Liverpool, gave evidence from his Liverpool experience to the effect that smallpox hospitals did not spread infection. In Liverpool every effort was made by patient, continuous, and painstaking observation to trace the origin of every case of smallpox, with the object of suppressing every outbreak of the disease. The largest smallpox hospital in Liverpool was the Park Hill Hospital, and he could not name a single case of smallpox in the neighbourhood which could be traced to the hospital. In his opinion the scientific theory of aerial convection was pressed much too far by some medical scientists. He disbelieved that particles of disease could be conveyed in this manner for a quarter or half a mile.

Similar evidence was given by other eminent scientists.

Witnesses were also examined on both sides as to the site and management of the hospital, the effect of which is summarised in the statement of facts in this report and in the judgment.

Among other witnesses called in this connection by the plaintiffs was Dr. Joseph W. R. Fletcher, who had examined the hospital premises on behalf of the Local Government Board. This gentleman produced a letter from the President of the Local Government Board, in which the President objected to the production of this report, and desired the doctor to represent to the court that the production would be injurious to His Majesty's service. He was further directed by the Local Government Board, subject to the directions of the court, to confine his evidence to matters of fact. In reply to his Lordship this witness stated that the inspectors of the Local Government Board were accustomed to visit all parts of the country, and to consult with the members of all sanitary authorities; that these gentlemen generally gave them full information, but in confidence, and that, if it became known that inspectors were liable to be examined in court in respect of information so obtained, confidence would not in future be reposed in them.

The witness was not examined; but his Lordship stated that in his opinion, as he had to protect the public health, he ought to have been assisted by the representatives of the Local Government Board, and that he respectfully protested against the refusal to allow him to see the document containing the report.

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Upjohn, K.C. and Llewellyn Davies for the plaintiffs.—The number of inhabitants in the district is sufficient to make this smallpox hospital a nuisance against which the court should grant an injunction. There is, further, no guarantee but that the hospital premises may be enlarged. The best scientific authorities agree that this disease may be disseminated by the air. The nuisance is here both public and private. When the Local Government Board allows smallpox hospitals, it insists on their being placed far from populous places and at a distance from traffic:

Hill v. Metropolitan Asylums Board, 40 L. T. Rep. 491; 42 L. T. Rep. 212; 47 L. T. Rep. 29; 6 App. Cas. 193.

It is certainly necessary for us in a *quia timet* action to show that there is a high probability that the nuisance will be of an irreparable character, but here it appears that it will be a great danger. With regard to the hospital as a public nuisance, they referred to

Ree v. Vantandillo, 1815, 4 M. & S. 73;

Ree v. Burnett, 1815, 4 M. & S. 272;

Reg. v. Lister, 1859, 3 Jur. N. S. 570;

Attorney-General v. Shrewsbury Bridge Company, 1882, 46 L. T. Rep. 687; 21 Ch. Div. 752.

Asquith, K.C., Macmorran, K.C., and R. J. Parker for the defendants.—The onus that lies on the plaintiffs to show that the hospital will be a cause of infection to residents in the district and persons passing along the road has not been discharged. Further, this is a matter in which the general public interest must be considered. Supposing that there were no smallpox hospital here and that persons suffering from the disease were treated in their own homes, the risk of infection would be greater. The arguments of the plaintiffs would render impossible the building of a smallpox hospital in any populous district; but the Public Health Act 1875 (38 & 39 Vict. c. 55) expressly empowers local authorities to provide hospitals: (sect. 131). In this case the site has been carefully selected, and the defendants have met the requirements of the Local Government Board. The plaintiffs' scientific evidence is fallacious. It rests entirely upon a mass of affirmative evidence, which a single negative instance is sufficient to destroy. They have, in fact, fallen into the fallacy which Lord Bacon describes as "*inductio per enumerationem simplicem, ubi non reperitur instantia contradictoria*." If it can be shown in a single instance that a smallpox hospital has not in fact spread contagion, the plaintiffs' case is gone; and more than sufficient evidence has been adduced by the defendants for this purpose. As to the authorities, *Hill v. Metropolitan Asylums District* was not a *quia timet* action. It was a case of a nuisance. The cases which the present resembles are

Fleet v. Metropolitan Asylums Board, 1886, 2 Times L. Rep. 361;

Attorney-General v. Guildford Joint Hospital Board, 1895, 12 Times L. Rep. 54;

Harrop v. Ossett Corporation, 1895, 14 Times L. Rep. 308;

Attorney-General v. Corporation of Manchester, 68 L. T. Rep. 608; (1893) 2 Ch. 87;

Attorney-General v. Rathmines, &c. (an Irish case as yet not reported).

Upjohn, K.C. in reply.—The plaintiffs have shown that there exists a considerable and well-

founded apprehension of danger, and this will justify the granting of an injunction. In the case of *Attorney-General v. Corporation of Manchester* the hospital was not intended to be permanent.

Cur. adv. vult.

FARWELL, J.—This is an action by the Attorney-General on the relation of several owners and occupiers of land and collieries in the parish of Bestwood, and by the same owners and occupiers as plaintiffs against the mayor and corporation of Nottingham to restrain them from using a building lately erected and for the last six months used as a smallpox hospital from so using it, on the ground that it is a nuisance, necessarily causing serious danger to the public health and causing special damage to the relator plaintiffs. No actual case of injury has arisen; and the action is *quia timet*. In order to succeed in such an action the plaintiffs must show a strong case of probability that the apprehended mischief will in fact arise (see *Attorney-General v. Corporation of Manchester* (68 L. T. Rep. 608; (1893) 2 Ch. 87), or, to quote FitzGibbon, L.J. in *Attorney-General v. Rathmines, &c.* (which is not yet reported), "to sustain the injunction the law requires proof by the plaintiffs of a well-founded apprehension of injury—proof of actual and real danger—the strong probability almost amounting to moral certainty that if the hospital be established it will be an actionable nuisance. A sentiment of danger and dislike, however natural and justified, certainty that the hospital will be disagreeable or inconvenient, proof that it will abridge a man's pleasure or make him anxious, the inability of the court to say that no danger will arise, none of these accompanied by depreciation of property will discharge the burden of proof which rests on the plaintiffs or justify a merely precautionary injunction restraining an owner's use of his own land upon the ground of apprehended nuisance to his neighbours." Further, the defendants are entitled in my opinion to ask the court to assume that the hospital will be properly managed and that all the precautions that scientific skill and knowledge usually require will be taken, and they are entitled in the present case to the benefit of the observation that the hospital has been open and has received patients for the last six months, during the last half of which it has been full, and that no mischief has at present arisen therefrom. The hospital stands on a piece of ground four and a half acres in extent, roughly triangular in shape, the base of the triangle being about 350 yards long and abutting on the highroad. It is inclosed on all sides except one with a close wooden fence 6ft. 6in. high, with barbed wire on the top, and there is an inside fence of barbed wire 20ft. distant. The hospital building is 51ft. from the highroad. On the side where there is no fence there is a stream nearly 20ft. wide with a steep bank 15ft. or 20ft. high sloping abruptly from the hospital grounds down to the river. There are 204 residents within a quarter-mile radius from the building and 510 within the half-mile radius. There are 230 men employed on the Bestwood Ironworks, part of which is within the quarter-mile radius, and 1280 on the colliery, which is without the quarter-mile radius but within the half-mile radius; but the majority of the latter work underground, and some forty-five men work

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at the bleach works outside the quarter-mile radius and within the half-mile radius. The hospital is some miles from the populous parts of Nottingham and has access to the city by means of a road which has few houses on either side and is not much used for general traffic. The nearest residence is Barrow's cottage, with five inmates, forty-eight yards distant, and the next nearest are six cottages, with twenty-three inmates, 157 yards distant. The plaintiffs' allegation that the hospital is a nuisance rests on the establishment as a general affirmative of the proposition that all smallpox hospitals necessarily constitute a serious danger to the health of persons resident, working, or passing by within a radius of at any rate 51ft. This is obviously a very serious question. Having regard to the impossibility of stamping out smallpox under the existing laws and to the practical impossibility of isolating an outbreak in crowded areas, the court ought not to come to any conclusion that would result in closing the majority of the smallpox hospitals in the kingdom unless the expert testimony is really conclusive. Now, it is clear from the evidence that I have heard in this case that the medical profession are divided into two camps on this question, each containing persons of eminence and experience. The first point of difference is on the theory of aerial convection for any considerable distance—say for more than 50ft. This is a purely scientific question, and I gratefully adopt Lord Bowen's statement in *Fleet v. Metropolitan Asylums Board* (1886, 2 Times L. Rep. 363) that "it would be most dangerous to form an independent opinion on a scientific question from the smatterings of science that might be picked up during the hearing of a case." The plaintiffs do not contend that there is a consensus of expert opinion upon the point, and it is enough for me to say that it is therefore not proven, and that I am not competent to form an opinion of my own on the question. If the plaintiffs could have established aerial convection for the requisite distance, they would have had a strong case in that they would have shown the reason why danger did exist; but, failing this, they are driven to the empirical opinions of the experts. This is, of course, a legitimate and usual mode of proof; and the court, in the case of a conflict of experts, may either say that the onus is on the plaintiff and has not been discharged, or it may examine the facts and the reasoning given by the experts as the ground of their opinion; and if and so far as that reasoning can be tested by ordinary rules independent of special scientific knowledge, I feel bound to test it and not to state simply that the conflict is such that the plaintiffs have not discharged the burden cast on them. I will take Dr. Thresh, who is the protagonist on the plaintiffs' side, as an example of the reasoning of the plaintiffs' witnesses. His opinion is based on his experience and knowledge of a large number of cases of smallpox and of several hospitals, and is a conclusion of logic, not of medical science. His train of reasoning seeks to extend an induction founded on cases observed by or known to him to all other cases; but the induction fails, for the conclusion that all hospitals are sources of danger does not necessarily follow from the premise that some hospitals are such; or, in other words, his cases are not sufficiently exhaustive, and his reasoning is a mere instance

of the method of the ancients described by Bacon as "inductio per enumerationem simplicem, ubi non reperitur instantia contradictoria." It is a mere ascription of the character of a general truth to all hospitals because in all hospitals known to the witness the fact is found to exist. There is the further difficulty that the cases are complicated by so many varying circumstances that the application of the methods of agreement and difference is impracticable. If the case had rested on the plaintiffs' evidence alone, I should have had great difficulty in adopting that conclusion as sufficiently proved; but the court is in possession of a number of other cases in which smallpox hospitals have been full during outbreaks of the disease, and no case has occurred within the quarter-mile radius which could not be accounted for by some means other than the hospital. Mr. Upjohn attempted to minimise the force of this evidence by criticising some of the witnesses and suggesting that Dr. Reid's instances only were trustworthy and asking me to treat the plaintiffs' affirmative cases as outweighing these. But this is a fallacy. The plaintiffs' case depends on the inference to be drawn from an unbroken series of facts. In all cases where A has occurred B has followed, therefore A causes B. But the conclusion depends on the universality of the premises, and a negative instance unexplained spoils the chain. The defendants' case does not, however, rest on Dr. Reid alone. It would serve no useful purpose for me to go through the evidence in detail, but with regard to the plaintiffs' historical instances, if I may so call them, they have already figured in former actions, and very recently in the Irish Court of Appeal in the *Rathmines* case, and have never been accepted as sufficient. It is important to remember that the Compulsory Notification of Diseases Act came into force only in 1899, and that before that it must obviously have been far more difficult, if not impracticable, to obtain trustworthy and sufficient data from which to generalise; and, indeed, I may well adopt FitzGibbon, L.J.'s comment in the *Rathmines* case on them. "Cases such as Fulham, Sheffield, Bradford, and Nottingham may be explained by reason of the character of a neighbourhood and their other circumstances." The defendants' evidence is very strong. It is not for them to prove the negative, but their instances—especially Dr. Reid with his large experience in Staffordshire, Dr. Hope with his three hospitals in Liverpool, and Dr. Boobyer in Nottingham—are amply sufficient to break the chain of the plaintiffs' affirmative cases, even if I were satisfied that they had proved them. There is, of course, some risk of infection wherever there is smallpox owing partly to the folly of bystanders and of friends and relations of the patients and partly to the human fallibility of doctors and attendants, however careful. But, in considering the question from the point of view of a public nuisance, one must bear in mind that it is necessary for the public safety that some provision should be made for isolation, that the difficulties in the way of isolating in the case of the poor living in one or two rooms or crowded together in a single cottage are very great, and that it is (as Dr. McVail put it) a choice of evils. This consideration is mentioned by Chitty, J. in *Attorney-General v. Corporation of Manchester* (loc. cit., at p. 92). "The apprehended future danger

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in the present case is danger to the public health. Now, undoubtedly, there are many cases of public nuisance—by interference with an unquestionable right of the public, such, for instance, as the permanent obstruction of a highway—where the court did decline at once to permit evidence to be given of any supposed public benefit arising from the wrongful act complained of, and would refuse to balance the good alleged to accrue to some portions of the public against the mischief to the public in general. But in the case where the health of the Queen's subjects in general is concerned, it may possibly be a question whether, if the evidence shows that the maintenance of a smallpox hospital is, on the whole, balancing the good against the evil, more beneficial to the health of the public at large, or to that portion of the public that inhabits or frequents the neighbourhood, than the leaving of the persons suffering from the disease scattered in their own homes, some weight might not be properly allowed to this circumstance. If Lord Hardwicke is rightly reported in the case of *Coldbathfields Smallpox Hospital; Baines v. Baker* (Amb. 158), he appears to have entertained some such question when he stated his opinion that the hospital was a 'charity like to prove of great advantage to mankind.' And the same consideration applies, though perhaps not to the same extent, to the private nuisance alleged by the plaintiffs. If the fact of a public nuisance were established, it would, of course, be no answer to the private owners to say that the hospital must be placed somewhere (see per Lord Blackburn in *Hill v. Metropolitan Asylums District*, 47 L. T. Rep. 29; 6 App. Cas. 207), but where the question is whether the nuisance in fact exists or not, all the circumstances must be taken into consideration; and, after all, the owners and occupiers of the adjacent lands have a far more effective prophylactic provided for them by medical science than any injunction of any court. I respectfully agree with the following passage in FitzGibbon, L.J.'s judgment in the *Rathmines* case: "It seems probable that the dread of smallpox is to a great extent the result of tradition. That scourge of the eighteenth century retains its terrors for those who do not realise that it has been deprived of most of its dangers. Vaccination is not only a preventive, but it also modifies the disease. The evidence of Dr. Thresh is that vaccination and re-vaccination at proper intervals confer practical immunity. In applying the maxim *Sic utere tuo ut alienum non laedas*, the duty of reasonable precaution for one's own protection is not to be ignored. An isolation hospital reduces the risk for every inhabitant of the district. It is, in fact, a necessity, and, though the individual must be protected, the public advantage should not be forbidden unless the danger and injury to the individual are clearly proved." In the present case I find as the result of the evidence that the site of the defendant's hospital was carefully chosen, is in a proper situation, and constitutes no appreciable danger to the public health and no nuisance to the relator plaintiffs' property. As I understand that this case is likely to go to the House of Lords, I desire to add an observation as to the evidence in the hope of obtaining some direction from a superior tribunal. Both parties concurred in asking me to accept evidence in chief of what had happened with other hospitals,

and I acceded to the request in deference to the opinion expressed in *Hill v. Metropolitan, &c.* (42 L. T. Rep. 212; 47 L. T. Rep. 29), and also because the same evidence of the same cases (with the same result) appears to have been admitted in the other reported cases relating to smallpox hospitals. The result is that the case has taken a week to try; and I venture to suggest that the admission of such evidence in chief is wrong in principle, as raising a number of side issues on which it is impossible for the court to adjudicate without injury to absent parties—e.g., how can I rely on the case of the hospital ships as a proved fact in the present case without injustice to them? In *Hill's* case in the Court of Appeal (42 L. T. Rep. 212) Pollock, B. rejected the evidence as to the facts of the Stockwell and Homerton Hospitals, and Bramwell, L.J. said he was wrong in so doing, and Cotton, L.J. agreed with him. (It is not easy to see how the point arose, as the plaintiffs, who succeeded, had tendered the rejected evidence.) If the assumption in Cotton, L.J.'s judgment were correct in fact, the evidence would be valuable; he says: "They might have shown what in fact was the effect in the neighbourhood of the only other hospitals under the same conditions." But now there are numbers of such hospitals and their conditions are infinitely various, and the extent and value of such differences are exceedingly difficult to estimate. In the House of Lords Lord Selborne appears to agree with Cotton, L.J. His Lordship says: "I am not prepared to say that the learned judge was wrong in rejecting the evidence, especially because of the non-fulfilment of the conditions on which he offered to receive it. Without proof as to the state and management of the other hospitals, so as to establish a substantive similarity, any inferences drawn from a comparison of their operation with that of the Hampstead asylum might have been quite fallacious and deceptive. But, even without regard to this, I am not quite satisfied that the evidence was admissible, whether such conditions were or were not fulfilled. It was not pertinent as to the issue tried as to Hampstead only. No notice had been given in the pleadings or otherwise that it would be offered. It would have involved the jury in a multitude of collateral inquiries calculated to confuse and embarrass them; and it might have been endlessly prolonged by an indefinite multiplication of objects of comparison. To keep such investigations within reasonable limits, and secure promptitude, precision, and satisfaction in the administration of justice, it seems to me that the courts should be very jealous of the admission of such proof." Lord Blackburn thought it unnecessary to decide the point. Lord Watson's opinion is stated at p. 35 of 47 L. T. Rep. His Lordship says: "There appears to me to be an appreciable distinction between evidence having an appreciable relation to the principal question in dispute and evidence relating to collateral facts, which will if established tend to elucidate that question. It is the right of the party tendering it to have evidence of the former kind admitted, irrespective of its amount or weight, these remaining for consideration when the case is closed; but I am not prepared to hold that he has the same absolute right when he tenders evidence of facts collateral to the main issue. In order to entitle him to give such evi-

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dence, he must in the first instance satisfy the court that the collateral fact, which he proposes to prove, will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute; and I am prepared to hold that he is also bound to satisfy the court that the evidence which he is prepared to adduce will be reasonably conclusive, and will not raise a difficult and doubtful controversy of precisely the same kind which the jury have to determine. It appears to me that it might lead to unfortunate results if the court had not the power to reject evidence of the collateral fact which does not satisfy both of the conditions. I have to indicate Lord Watson's opinion would certainly rule out all the history that I have heard in the present case. As Lord Bowen has pointed out in the *Fleet* case, it is no part of the functions of the court to qualify itself as an expert in science. The court acts on the authority of experts, whose qualifications can be tested by cross-examination, and weighs the evidence so given and tested." The result is that the action fails, and must be dismissed, as is the rule in such cases, with costs as between solicitor and client.

Action dismissed.

Solicitors: *Hind and Robinson*, for *Wells and Hind*, Nottingham; *Sharpe, Parker, and Co.*, for *Sir Samuel Johnson*, Town Clerk, Nottingham.

KING'S BENCH DIVISION.

Feb. 1, 2, and 5.

(Before BRUCE, J. without a Jury.)

ACME WOOD FLOORING COMPANY LIMITED v. MARTEN. (a)

IN THE COMMERCIAL COURT.

Fire insurance—Lloyd's policy—"Subject to average"—No average clause attached—Other policies on zones—Applying policies rateably—9 Geo. 4, c. 13, s. 3.

A timber yard, as a whole, was insured by a Lloyd's policy for 11,450*l.* and in three zones by various fire insurance companies for 25,500*l.* On zone B there was only one company's policy for 3000*l.* The value in the three zones was 36,500*l.*—viz., 1940*l.* in zone A, 13,260*l.* in B, and 21,300*l.* in C; and 12,850*l.*—viz., 1900*l.* in zone A, 9400*l.* in B, and 1550*l.* in C—was the value of the timber burnt.

The Lloyd's policy was expressed to be "subject to average," but had no average clause attached.

Held, that the system of marshalling the policies, so as to apply the Lloyd's policy and the company's policy for 3000*l.* rateably to the loss in zone B, and the then unexhausted portion of the Lloyd's rateably with the other policies on zones C and A respectively, could not be introduced by the words "subject to average" in a Lloyd's policy. On this policy the plaintiffs, being insured on only a portion of the goods at risk, must be considered as being their own insurers for the difference, and must bear a rateable share of the loss accordingly.

The underwriters were liable for $\frac{11450}{36500}$ of 12,850*l.* Whether the average clause is attached to a Lloyd's policy or not, if the policy is expressed to be

"subject to average," it is according to the usage of Lloyd's the same as if the clause were attached.

ACTION tried before Bruce, J. without a jury.

This was an action brought against an underwriter at Lloyd's on a Lloyd's fire policy, dated the 16th Dec. 1901, by which the plaintiff company was insured from loss or damage by fire on timber and (or) wood goods whilst on any portion of Jarrah Wharf Tidal Basin, Victoria Dock, London, in the sum of 11,450*l.* for twelve months, and subscribed by the defendant for 2000*l.* The policy was "subject to average," but no average clause was attached to the policy.

The plaintiff company's timber yard was also insured by various fire insurance companies, but in these cases the timber yard was divided into zones, which were insured separately.

In the centre of the yard was a steam sawmill, and zone A covered that space up to five yards from the mill; zone B from five to thirty yards; and zone C over thirty yards from the mill.

The North British and Mercantile Insurance Company had a line on zone A of 2000*l.*; on zone B, 3000*l.*; on zone C, 5000*l.*; the Scottish Alliance Insurance Company, on zone C, 3000*l.*; the Union Insurance Society, on zone C, 5500*l.*; the Liverpool and London and Globe Insurance Company, on zone C, 12,000*l.*

The value of the timber in all three zones was 36,500*l.*, of which 1940*l.* was in zone A; 13,260*l.* in zone B; and 21,300*l.* in zone C.

The timber, in the daily course of business, was moved from zone to zone.

During the currency of the policy a fire broke out in the timber yard, and in zone A the value of timber burnt was 1900*l.*; in zone B, 9400*l.*; and in zone C, 1550*l.* Thus the total value burnt was 12,850*l.*

The plaintiff company had paid premiums on 41,950*l.*, including the Lloyd's policy.

J. A. Hamilton, K.C. and Loshnis for the plaintiff company.—The plaintiffs, being fully insured and having paid the premiums, are entitled to an indemnity. The Lloyd's policy can be applied in the first instance rateably with the North British and Mercantile Insurance Company, for 3000*l.* to make good and pay in full the 9400*l.* lost on zone B. The unexhausted portion can then contribute rateably with the other policies to loss on zone C, and any then unexhausted portion rateably with the North British and Mercantile Insurance Company for 2000*l.* to loss on zone A. Alternatively zone A should be dealt with before zone C. The plaintiff is fully covered, and can marshal the policies. This is a question of construction. If the words "subject to average" referred to some extended clause, it referred to clauses 1 and 2, pp. 218, 219, Bunyon on Fire Insurance (1893 edit.): "1. Whenever a sum insured is declared to be subject to average, if the property covered thereby shall at the breaking out of any fire be collectively of greater value than such sum insured, then the assured shall be considered as being his own insurer for the difference, and shall bear a rateable share of the loss accordingly. 2. But if any of the property included in such average shall, at the breaking out of any fire, be also covered by any other more specific insurance—i.e., by an insurance which at the time of such fire applies to part only of the

(a) Reported by W. TRAVOR TURTON, Esq., Barrister-at-Law.

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property actually at risk and protected by this insurance, and to no other property whatsoever—then this policy shall not insure the same except only as regards any excess of value beyond the amount of such more specific insurance or insurances, which said excess is declared to be under the protection of this policy, and subject to average as aforesaid." Clause 2 restricts clause 1. A specific policy must be exhausted first, and then the general policy can be used. There is no uniform well-known meaning of the expression "subject to average" within the meaning of the principle laid down in *Leake on Contract*, 4th edit., pp. 128, 129, and the cases there cited.

Scrutton, K.C. and *Wood Hill* for the defendant.—As the policy was "subject to average" the underwriters were liable to pay only such a sum, a proportion of the loss as the sum insured by the policy bears to the value of all the property covered by it. The sum recoverable was therefore $\frac{12,850\text{L.}}{36,500\text{L.}}$ —viz., 4031*l.*—of which the defendant had paid into court his share on the 200*l.* underwritten by him. The plaintiffs were not fully insured. The words "subject to average" brought in the *pro rata* clause 1, *Bunyon on Fire Insurance* (sup.), 9 Geo. 4, c. 13, s. 3, was substantially the same as clause 1 (sup.), and known as the average clause. The clauses attached to the companies' policies were the same as clause 1 (sup.) and Lloyd's policies generally have the average clause attached, and even though no slip was attached to the policy under discussion the words "subject to average" have the same meaning. The words have a well-known trade meaning. Clause 2 (sup.) is inapplicable to the present case.

BRUCE, J. read the following judgment:—This is an action brought by the plaintiff company against underwriters at Lloyd's on a Lloyd's fire policy, dated the 16th Dec. 1901, by which the plaintiff company was insured from loss or damage by fire on timber and (or) wood goods whilst on any portion of Jarrah Wharf Tidal Basin, Victoria Dock, London, in the sum of 11,450*l.* for twelve months from the 10th Oct. 1901 to the 10th Oct. 1902. The policy was expressed to be "subject to average." No average clause was annexed to the policy. On the 18th Sept. 1902 a loss by fire of timber covered by the said policy occurred. The value of the timber so lost was 12,850*l.* There was a steam sawmill on the plaintiffs' premises. The plaintiff company, in addition to the policy sued on, had effected policies on timber at the wharf with insurance companies which were in force at the date of the said fire. The insurance companies required their policies to be limited by zones. Zone A comprised timber stacked within five yards of the sawmill. Zone B comprised timber stacked between five yards and thirty yards of the sawmill. Zone C comprised timber stacked over thirty yards of the sawmill. The total value of the timber in all three zones was 36,500*l.*, of which 1940*l.* was in zone A, 13,260*l.* in zone B, 21,300*l.* in zone C. The plaintiff company had insured with the North British and Mercantile Insurance Company 2000*l.* on zone A, 3000*l.* on zone B, 5000*l.* on zone C; with the Scottish Alliance Insurance Company 3000*l.* on zone C; with the Union Insurance Society, 5500*l.* on zone C; with the Liverpool and London

and Globe Insurance Company 12,000*l.* on zone C. The plaintiffs contend that all their timber was fully covered by their policies, and that they are entitled to a complete indemnity. The question turns upon the meaning of the words in Lloyd's policy "subject to average." According to the evidence given before me these words "subject to average" or the words "subject to the conditions of average" have a clearly defined meaning in a Lloyd's policy. It is expressed in a slip which is frequently attached to a Lloyd's policy, which runs in the following form: "Average clause—Whenever a sum insured is declared to be subject to average, if the property covered thereby shall at the breaking out of any fire be collectively of greater value than such sum insured, then the assured shall be considered as being his own insurer for the difference, and shall bear a rateable share of the loss accordingly." This clause is no new clause, for a clause almost precisely similar is referred to in 9 Geo. 4, c. 13, s. 3. In this clause I think the words "property covered thereby" mean the property covered by the policy which contains the declaration, and that the average clause has no relation to any other policy. Whether the average clause is attached to the policy or not, if the policy is expressed to be "subject to average," it is, according to the usage of Lloyd's, the same as if the clause were attached, and I think that where a person insures with Lloyd's, and obtains from Lloyd's a policy in the form ordinarily granted by Lloyd's, he must be taken to accept the terms expressed in the policy and to agree to the meaning which the words ordinarily bear. The decided cases with regard to the authority of brokers at Lloyd's are, I think, not inconsistent with this view. It may well be that a person dealing with Lloyd's and having no express notice of the customs of Lloyd's regulating the authority of brokers is not bound by such customs. But I think it is different with regard to the terms expressed on the face of the contract which is handed to and accepted by the assured. But it is not necessary for the purpose of this judgment that I should decide this point, because upon the evidence it seems to be clear that the plaintiffs had notice of the usage at Lloyd's, and knew what was meant by the words "subject to average," and must be taken to have entered into the contract with a full knowledge that the average clause attached, and with full knowledge of the meaning of that clause. On the 26th May 1899 the plaintiff company effected a policy with Lloyd's expressed to be "subject to the conditions of average," and to that policy the average clause was attached, and on the 6th Dec. 1900 the plaintiff company effected another policy at Lloyd's "subject to the conditions of average," and to which the average clause was attached. It is not, therefore, I think, open to the plaintiff company to contend that they had no notice of the meaning of the phrase "subject to average" in a Lloyd's fire policy. Some of the insurance companies have in certain classes of insurance adopted the rule that if any of the property declared to be subject to average and included in such average shall at the breaking out of a fire be covered by any other more specific insurance—i.e., by an insurance which at the time of such fire applies to part only of the property actually

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at risk and protected by this insurance, and to no other property whatsoever—then this policy shall not insure the same except only as regards any excess of value beyond the amount of such more specific insurance or insurances, which said excess is declared to be under the protection of this policy and subject to average as aforesaid. The plaintiff contends that by virtue of this last-mentioned rule he is entitled so to marshal the various policies as to enable him to recover on one policy or the other his whole loss. He contends that the Lloyd's policy and the North British policy for 3000*l.* should be applied rateably to the loss on zone B, which would leave 4000*l.* of the Lloyd's policy unexhausted. This 4000*l.* he would apply to zone C rateably with the company's policies for 25,450*l.* That would leave 3790*l.* unexhausted, and that 3790*l.* he would apply to zone A rateably with the North British policy for 2000*l.* But I am satisfied that no such system of marshalling can be introduced by the words "subject to average" in a Lloyd's policy. I think that the loss under the present policy must be calculated upon the principle laid down by the usual average clause which is applied to a Lloyd's policy, and that a loss on that policy must be calculated without regard to the other policies. The plaintiff company on this policy, being insured on only a portion of the goods at risk, must be considered as being their own insurers for the difference, and must bear a rateable share of the loss accordingly. The plaintiff company was insured by the policy sued on to the extent of 11,450*l.*; the property at risk was 36,500*l.*, and the loss was 12,850*l.*; so that 4031*l.* 0*s.* 6*d.* is the amount for which the underwriters are liable. The defendant has brought into court the sum of 70*l.* 8*s.* 3*d.*, being his proportion of the loss in satisfaction of the plaintiffs' claim according to the above calculation. I must therefore give judgment for the defendant, with costs.

Solicitors for plaintiffs, *Hollams, Sons, Coward, and Haicksley.*

Solicitors for defendant, *W. A. Crump and Son.*

Friday, Jan. 15.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

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County Court—Costs—Remitted Action—Payment into Court under Order XIV. of part of claim as condition of leave to defend—Trial in County Court—Judgment for defendant for balance with costs—Scale of costs applicable—County Courts Act 1888 (51 & 52 Vict. c. 43), ss. 65, 107, 113—County Court Rules, Order IX., r. 12; Order LIII., r. 18.

In an action of contract brought in the High Court for 71*l.* an order was made under Order XIV. that, on the defendants paying into court 23*l.* they should have liberty to defend the action, otherwise judgment for that amount and costs, with liberty to the defendants to defend as to the residue. The defendants paid the 23*l.* into court, and the action was remitted to a County Court

under sect. 65 of the County Courts Act 1888. After the action was so remitted, and more than five clear days before the day fixed for the hearing, the defendants gave the plaintiffs notice that they were willing to consent to judgment for the 23*l.* in court with costs. At the trial the County Court judge gave judgment for the defendants for the residue of the claim, with costs after payment into court, the plaintiffs to have the money in court and costs up to payment in, which were paid by the defendants. Upon taxation of the defendants' costs:

eld, (1) that the defendants were entitled to costs, and (2) that they were entitled to have their costs taxed under scale C—that is, the scale applicable where the sum recovered exceeds 50*l.*

Dicta in Wright v. Bull (82 L. T. Rep. 568; (1900) 2 Q. B. 124) dissented from.

APPEAL from Wolverhampton County Court.

On the 15th Jan. 1903 the Aston Tube Works Limited (the plaintiffs) brought an action in the Birmingham District Registry of the High Court against the defendants (J. S. Dumbell and J. B. Dumbell), claiming a sum of 71*l.* 5*s.* 10*d.* for the price of goods sold and delivered.

On a summons for judgment taken out under Order XIV., the district registrar, on the 31st Jan. 1903, made an order that "on payment into court by the defendants of the sum of 23*l.* 18*s.* 10*d.* within seven days from the date hereof the defendants be at liberty to defend the action; otherwise final judgment for the plaintiffs against the defendants for that amount and costs to be taxed, with liberty to defend as to the residue of the plaintiffs' claim," and that the action should be tried in the Wolverhampton County Court.

Within the seven days specified in the order the defendants paid the 23*l.* 18*s.* 10*d.* into court, and thereby under the order obtained leave to defend the action. The plaintiffs then, on the 27th Feb. 1903, remitted the action for trial to the Wolverhampton County Court for the whole amount claimed, and the hearing was fixed for the 27th March.

On the 5th March, the action being then in the County Court, the defendants sent a notice to the plaintiffs that they were willing to consent to judgment for the 23*l.* 18*s.* 10*d.*, which they had paid into court under the above order, and costs to be taxed.

On the 30th April the case was tried by the County Court judge, when he gave a verdict for the defendants with costs, the plaintiffs to have the sum in court, and he directed judgment to be entered for "the defendants; plaintiffs to have the money in court and costs upon that sum down to date of payment into court; defendants to have costs after payment into court."

The defendants paid the plaintiffs the amount of their costs down to the date of the payment into court on the High Court scale, and those costs were settled.

The defendants delivered their bill of costs in the action from the time of payment into court on scale C—that is, the scale which is applicable to cases in which the sum in dispute exceeds 50*l.*—and the registrar of the County Court taxed the defendants' costs under scale C.

The plaintiffs appealed to the judge, and it was contended on their behalf: (1) that the defendants were not entitled to any costs, inasmuch as

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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the proceedings were in one action in which the plaintiffs had succeeded in obtaining the 23*l.* paid into court, the event in that one action being in their favour, and that the court had made no special order as to costs, and had no power to make such an order; (2) that if there had been any special direction as to costs, then the defendants were only entitled to have them taxed on scale B, because, as the plaintiffs had succeeded as to the sum in court, the effect was to reduce the amount at issue under 50*l.*

The County Court judge, upon reviewing the taxation of the registrar on the 12th June, was of opinion that for the purposes of the application the plaintiffs could not now go behind the terms of his judgment and direction as to costs, and that, inasmuch as he gave special direction that the defendants for whom judgment was given were to have their costs as from the date of the payment of the money into court, the decision in *Wright v. Bull* (82 L. T. Rep. 568; (1900) 2 Q. B. 124) was distinguishable, although the dicta in that case would have been ground for refusal of any special direction if his attention had been called to that authority at the time when judgment was given.

The judge held therefore that the defendants were entitled to costs; but inasmuch as the plaintiffs had recovered in the action 23*l.* 18*s.* 10*d.*, with costs upon that sum down to the date of the payment of the money into court, he held that for purposes of the scale of taxation of the defendants' costs under his direction that sum of 23*l.* 18*s.* 10*d.*, in respect of which costs had already been awarded to the plaintiffs, must be excluded from the original amount, and he ordered the defendants costs to be taxed on scale B.

The defendants gave notice of appeal against the order of the judge directing that the costs in the action awarded to the defendants should be taxed under scale B instead of under scale C, and asked that such order might be reversed, on the ground that the order was wrong in law, and that it might be adjudged that the defendants were entitled to have their costs taxed under scale C.

The plaintiffs then gave notice of a cross-appeal that on the hearing of the defendants' appeal the plaintiffs would submit that the order of the County Court judge, made on the 12th June, was wrong in law, and that the defendants were not entitled to any costs in the action, and that the registrar of the County Court had no power to tax such costs, inasmuch as the plaintiffs had recovered 23*l.* 18*s.* 10*d.* in the action, and were consequently the successful parties in the action, and that the plaintiffs would ask that it might be adjudged that the defendants were not entitled to any costs, and that the registrar of the County Court had no power to tax upon scale B or C, or at all.

The County Courts Act 1888 (51 & 52 Vict. c. 43) provides:

Sect. 65. Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds . . . it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers, to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly;

and thereupon the plaintiff shall lodge the original writ and the order with the registrar of the court mentioned in the order, who shall appoint a day for the trial of the action, notice whereof shall be sent by post or otherwise by the registrar to both parties or their solicitors; and the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein; and the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the County Courts, and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court.

Sect. 107. It shall be lawful for the defendant in any action or matter within such time as shall be prescribed, to pay into court such sum of money as he shall think a full satisfaction for the demand of the plaintiff, together with the costs incurred by the plaintiff up to the time of such payment; and notice of such payment shall be communicated by the registrar to the plaintiff by post, or by causing the same to be delivered at his usual place of abode or business; and the said sum of money shall be paid to the plaintiff; but if the plaintiff shall elect to proceed, and shall recover no further sum in the action or matter than shall have been so paid into court, he shall pay to the defendant the costs incurred by him in the said action or matter after such payment; and such costs shall be settled by the court, and an order shall thereupon be made by the court for the payment of such costs by the plaintiff.

Sect. 113. All the costs of any action or matter in the court, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the court shall think just, and in default of any special direction shall abide the event of the action or matter, and execution may issue for the recovery of any such costs in like manner as for any debt adjudged in the said court.

Disturnal for the defendants.—The learned judge was right in holding that the defendants were entitled to costs, but was wrong in holding that those costs were to be taxed on the B scale and not on the C scale. The registrar was right in taxing the defendants' costs under the C scale. When an action is remitted to the County Court under sect. 65 of the County Courts Act 1888, the action and all proceedings therein are to be tried in the County Court as if the action had originally been commenced in the County Court. The action when remitted becomes a County Court action. Then sect. 107 of the Act gives power to a defendant to pay money into court, and the rules regulating the payment into court are rules 12 and 13 of Order IX. of the County Court Rules 1903. Where under that section and those rules a defendant pays money into court that payment into court does not convert the action into a new action for the difference between the whole sum claimed in the action and the sum paid into court. That payment into court merely has the effect of raising a new issue as to whether the plaintiff is entitled to recover such difference; but the action remains an action for the whole sum. In the present case the whole action when remitted became a County Court action, and it remained an action for 71*l.* 5*s.* 10*d.*, notwithstanding that 23*l.* 18*s.* 10*d.* had been paid into court. The costs to be recovered are dealt with in the latter part of sect. 65, and the costs in respect of proceedings subsequent to the order remitting the action are to be allowed according

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to the scale for the time being in force in the County Court, while the costs before the order remitting the action are to be on the High Court scale. By Order LIII., r. 1, of the County Court Rules 1903 the costs are to be taxed by the registrar of the County Court according to the scales of costs in part 4 of the appendix, and scale C is the scale applicable where the sum recovered exceeds 50*l.*; and by rule 18 of the same order where the defendants' costs are being taxed the word "recovered" in the scale is to be read "claimed." Therefore when the defendant succeeds in an action in which the plaintiff has claimed more than 50*l.* the defendants' costs are to be taxed on the C scale applicable where more than 50*l.* is claimed. In the present case the whole action was remitted, and the defendants have in that action succeeded, and they are entitled to have their costs taxed as upon a claim for 71*l.* in which the plaintiffs have failed—that is, upon scale C, notwithstanding the payment into court. He referred to *Bradshaw v. Thackray* (106 L. T. 334).

McCardie for the plaintiffs (the respondents).—The defendants were not entitled to any costs at all. The first point is that this action from first to last was one action and one action only, and in that one action the plaintiffs have recovered 23*l.* odd. The plaintiffs were therefore the successful parties in the action, and the registrar had no power to tax the defendants' costs upon any scale. What is remitted to the County Court is the whole action, and where that section (sect. 65) is applied the action cannot be considered as cut into two—one part in the High Court and the other in the County Court; and, it being the whole action which is sent down, the plaintiffs have recovered this sum in that action, per Smith, L.J. in

White v. Headland's Patent Electric Storage Battery Company, 80 L. T. Rep. 442; (1899) 1 Q. B. 507.

The next point is that where, as in this case, the plaintiff has recovered a certain part of the entire amount claimed, there is no jurisdiction to give any costs at all. The case of *Andrew v. Grove* (86 L. T. Rep. 720; (1902) 1 K. B. 625) is the converse of this case. There it was held that the County Court judge had no power to order a successful defendant to pay the costs of the plaintiff. So, where a plaintiff has succeeded, as it is submitted the plaintiffs in this case have succeeded, there is no power to order the successful plaintiff to pay the defendants' costs on any scale. The plaintiffs succeeded in the action in recovering the 23*l.*, although that sum was paid into court, and therefore, according to *Wright v. Bull* (82 L. T. Rep. 568; (1900) 2 Q. B. 124), the defendants are not entitled to any costs at all. The next point is that the defendants could only get costs by virtue of some order or special direction given under sect. 113 of the Act, but no such order or direction was given. The direction as to costs given by that section to the County Court judge is limited to costs "not herein otherwise provided for," and, as Ridley, J. points out in *Wright v. Bull* (*ubi sup.*), that narrows the power of the County Court judge to deal with the costs to such matters as are not dealt with by the general scheme of the Act. He further says: "The section seems to me to have been put in with a view to include such costs as were not dealt with by the general enactment as to costs; but in the

absence of any special direction it was provided that costs should abide the event," and he held that the "event" there was the recovery of the sum paid under the order. A special direction cannot be given under that section unless there is indicated the scale or schedule under which the costs are given, and the direction which was given by the judge was not a special direction within sect. 113, as no scale was specified under which the costs should be taxed. There is no scale applicable in such a case as this; the only provision applicable is Order LIII., r. 1, and that merely provides that the costs shall be taxed according to the scales in the appendix. Here there was really no payment into court within the meaning of the rules. The sum that was paid into court by the defendants was paid in by them as a condition of their being allowed to defend, and was not a payment into court within either the rule applicable to payments into court in the High Court or within the rule (Order IX., r. 12) applicable to such payments in the County Court.

Disturnal was not called on to reply.

LORD ALVERSTONE, C.J. — Two important points are raised in this case, one on the defendants' appeal and the other on the plaintiffs' cross-appeal. The first, which arises on the defendants' appeal, is whether the defendants, who in an action brought against them for 71*l.*, have succeeded as to that sum except as to the 23*l.* paid into court by them, and have got judgment with costs, are entitled to have their costs taxed on scale C—that is, the scale which is applicable to sums which are above 50*l.* That depends upon whether they have succeeded in a claim exceeding 50*l.*, or have only succeeded in a claim between 20*l.* and 50*l.*, in which latter case they would be entitled to costs on scale B only. The registrar taxed on scale C, but on a review of the taxation the judge held that scale B was the proper scale. The defendants now appeal from that order of the judge, and contend that scale C is the proper scale, as the registrar held. I agree entirely with the contention for the plaintiffs that the decisions lay it down that in such a case as the present the proceeding is one action only, and it was said that many consequences follow from that. The application of the principle laid down in *White v. Headland's Patent Electric Storage Battery Co.* (*ubi sup.*), goes to show that the action was an action for a sum above 50*l.*, and that the scale applicable is the scale for sums exceeding 50*l.* In that case the plaintiffs brought in the High Court an action to recover 73*l.*; by an order under Order XIV. the plaintiff was to have leave to sign judgment for 53*l.*, and the defendants were to have leave to defend as to the residue, namely 20*l.*, and it was ordered under sect. 65 of the County Courts Act 1888 that the action should be tried in the County Court. The plaintiff signed judgment for the 53*l.* under the order, and at the trial in the County Court he recovered judgment for the 20*l.*, the residue of his claim, with costs. Unquestionably a great deal might have been said in that case that the action in the County Court was only for the 20*l.*, and that only 20*l.* had been recovered; but the Court of Appeal held that the total amount recovered in the action was the 73*l.*, and that therefore the plaintiff was entitled to his costs upon that amount—that is,

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upon the scale applicable where the amount recovered exceeded 50*l*. Now assuming that in that case the result in the County Court had been the other way—namely, in favour of the defendants—which for the present purpose is the state of things in this case, could it then have been contended that the defendants would have been only entitled to costs under scale B? I think it could not have been so contended. In that case the defendants could not be said to have “recovered” anything in the action, within the actual language of the scale; but it seems to me that they have “recovered” in the action, because if we look at rule 18 of Order LIII. of the County Court Rules 1903 we find that it provides that “where the costs of a defendant are being taxed, the word ‘recovered,’ wherever it occurs in the scale, shall be deemed to be ‘claimed.’” When we add that to the decision in *White v. Headland’s Patent Electric Storage Battery Company* (*ubi sup.*) that the action in such cases is one action only, then I think it is clear that the scale applicable here is the scale which would be applicable to the amount originally claimed by the plaintiffs—namely, scale C. And if it were not so, it seems to me that great injustice would result, because if the plaintiffs had succeeded in the whole of their claim they would have been entitled to have their costs taxed under scale C, and it would be a great injustice if the defendants, who have succeeded as to the residue of their claim, should not also have their costs on the scale C. For both parties equally in such cases the action is one in which the scale of costs is determined by the amount which the plaintiff originally claims in the action. It seems to me, therefore, in this case, the point being whether or not the defendants should have their costs taxed on the scale B or the scale C, the scale applicable was the scale C, and that therefore upon that point the defendants’ appeal should succeed. Then there is another point raised on the cross-appeal by the plaintiffs as to whether the defendants are entitled to any costs at all. The defendants are met by the point that, because they have paid into court the sum of 23*l*. under an order made by the High Court under Order XIV., and the plaintiffs have succeeded as to that, the defendants are not entitled to get any costs at all, though as to the rest of their claim they have succeeded all along the line. It was said that the payment into court under Order XIV. was not a payment into court within the meaning of the County Courts Act and Rules, and that the judge had no power to treat it as a payment into court and give the defendants their costs. Where the money is in court and the defendant gives notice to the plaintiff—as the defendants in this case gave notice that they consented to a judgment for the amount paid in and costs—that the plaintiff may take the money out, then, when we remember that the plaintiff may under the rules take the money out of court, that is as good a payment into court under the County Courts Act and Rules as it would be in the High Court if the provisions of the High Court Rules as to payment into court were complied with. Then it is said for the plaintiffs that the action is one action, and that as they have succeeded in that one action to the extent of the money paid into court, the defendants were not entitled to any costs. That contention rests on the dictum of

Ridley, J. and, to a certain extent, of Darling, J. in *Wright v. Bull* (*ubi sup.*), in which case the plaintiffs had brought an action in the High Court for 20*l*. 2*s*., and the defendant had paid 8*l*. 14*s*. into court under an order made under Order XIV., and the case was remitted under sect. 65 to a County Court, where judgment was given for the defendant, and no order was made as to costs. The Divisional Court held that the plaintiffs having succeeded in the action in recovering the 8*l*. 14*s*., the defendant was not entitled to costs, though he had got judgment in the County Court. Ridley, J. said (1900) 2 Q. B., at p. 127: “Has the County Court judge the same power over the costs that a judge of the High Court would have? Can he say that the costs down to the recovery of the 8*l*. 14*s*. must be paid by the defendant, but the rest of the costs must be borne by the plaintiffs? I do not think he has such power, although I should be much inclined to say that he ought to exercise such a discretion if he possessed it. But the discretion of the judge is, by sect. 113 of the County Courts Act 1888, limited to costs ‘not herein otherwise provided for,’ and that, I think, narrows the power of the County Court judge to deal with the costs to such matters as are not dealt with by the general scheme of the Act. The section seems to me to have been put in with a view to include such costs as were not dealt with by the general enactment as to costs, but in the absence of any special direction it was provided that costs should abide the event.” I cannot agree with that. I cannot think that the general provision in sect. 113 that in the absence of any special direction, costs should abide the event, could have been intended to affect the power of the County Court judge to award costs. My own view is that the words “not herein otherwise provided for” do not mean that, and do not narrow the power of the County Court judge so as to prevent him from dealing with costs which are to follow the event if there is no special direction. I think the words “otherwise provided for” mean otherwise provided for by the County Court rules as to costs. The dicta of Ridley, J. in the case I have referred to were not necessary to the decision, as in that case no order as to costs was made. Then when we come to look at sects. 113 and 65 together, I should be sorry to decide that the discretion of the County Court judge was limited under sect. 113 in any such case as the present in the way suggested. Sect. 65 provides that after an order is made under that section remitting the action to a County Court, “the action and all proceedings therein shall be tried and taken in such court as if the action had originally been commenced therein,” and so forth. Counsel for the plaintiffs frankly admitted that if this action had been commenced in the County Court instead of in the High Court, the County Court judge would have had a discretion under sect. 113 to say what costs should be given. In my opinion the fact that this was an action which, when transferred to the County Court, was to be conducted in the same way and with the same consequences as if it had been originally commenced in the County Court, shows that sect. 113 applies, and that there was a discretion in the judge as to the costs; and in my judgment it is not a sufficient answer for the plaintiffs to say that the action is one action and that in that action they

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have recovered something, and that therefore the costs must follow that result. I therefore think the plaintiffs' appeal fails, and that the defendants' appeal should be allowed, and that the defendants' costs should be taxed on scale C. I wish to add that I decide this case on the supposition that the County Court judge did not exercise his discretion as to whether defendants' costs should be allowed under scale B or scale C, and that he thought he was bound to allow them under scale B.

WILLS, J.—I am of the same opinion. The order made by the County Court judge as to the defendants' costs was not an order made by him in exercise of a judicial discretion as to these two scales. That order was made on a wrong view taken by him that scale B, and not scale C, was the scale applicable to the circumstances of the case before him. The order he made was not properly an exercise of a discretion as to whether he should give costs under scale B or scale C, in which case we should not interfere with the exercise of his discretion. That was not so, but his order was founded, not upon an exercise of his discretion, but upon a wrong view of the principle applicable to the case. It was argued for the plaintiffs that in a scheme devised by the Legislature for the purpose of securing a cheap and speedy mode of trial, there were no means provided whereby a defendant who had succeeded in the whole matter in dispute in the County Court could get his costs, if a sum of money had been paid into court by him under Order XIV., as in this case. If that were the case then it would follow that the defendant would have to pay the plaintiff's costs on scale C if the plaintiff succeeded in the County Court; but that if the plaintiff recovered nothing in the County Court through the defendant paying into court under Order XIV. all that he owed the plaintiff, the defendant would not be entitled to any costs at all. That would be a strange result, and if it were the case I should, speaking for myself, never be a party to sending a case for trial in the County Court under such circumstances. I do not myself like the argument *ab inconvenienti*; but I think it may fairly be used when the argument contended for here leads to such an unjust result, a result, as it seems to me, which the Legislature never intended. With regard to the dicta of Ridley, J. and Darling, J. in *Wright v. Bull* (*ubi sup.*), I merely say that I do not agree with them. They were not necessary for the decision in that case, and we are not bound by them. If the same arguments had been put before the court in that case as have been put before us, likely they would not have used some of the expressions which they did use. I agree with what my Lord has said about those dicta and the other points argued.

KENNEDY, J.—I concur.

Solicitors for the plaintiffs, *A. H. Arnould and Son*, for *Buller and Cross*, Birmingham.

Solicitors for the defendants, *Christopher and Roney*, for *Hunt and Skidmore*, Wolverhampton.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Jan. 27, 28, and 29.

(Before BARNES, J. and TRINITY MASTERS.)

THE PEARLMOOR. (a)

Damage to cargo—Bill of lading—Exceptions—Marginal clause.

The plaintiffs were indorsees of bills of lading under which a cargo of maize, barley, linseed, oats, and wheat was shipped on the defendants' steamship. By the bills of lading it was provided that "the . . . owners . . . shall not be responsible for loss, damage, or injury arising from sweating . . . or consequences arising therefrom . . . or heat. That the . . . owners . . . shall not be responsible for any loss or injury to the said goods occurring from any of the causes above mentioned . . . whether any of the perils, causes, or things above mentioned . . . or occasioned by any act or omission, negligence, default . . . of stevedores . . . or other persons in the service of the shipowners . . ." On the margin of the bills of lading under which the maize was shipped was stamped: "In no case is the steamship to be held liable for heating or any other damage occurring to the within mentioned goods." Part of the maize became heated on the voyage, and the other cargo was damaged through improper stowage.

In an action by the plaintiffs to recover damages: Held, that the words "above mentioned" did not refer to the matters in the clause above or the marginal clause, and that the word "heat" referred to heat arising from some extraneous cause, and that the plaintiffs were entitled to judgment.

Held further, that if the owners desired to relieve themselves from liability for the negligence of their own servants there should have been express words.

Price v. Union Lighterage Company (89 L. T. Rep. 731; 9 Asp. Mar. Law Cas. 398; (1904) 1 K. B. 412) followed.

ACTION for damage to cargo by indorsees of bills of lading.

The plaintiffs were Robert Procter, Sons, and Co. Limited, and the defendants the owners of the steamship *Pearlmoor*.

The cargo consisted of maize, barley, linseed, oats, and wheat shipped on board the defendants' steamship *Pearlmoor*, at Buenos Ayres, in May and June 1902. The maize and barley and linseed were all shipped in bags, the oats partly in bags and partly in bulk, and the wheat was all in bulk.

On arrival of the vessel at Hull it was found that some of the wheat had been damaged by coal dust, some of the oats were mixed with the barley, and some of the linseed was mixed with the wheat, and it was also found that the bulk of the maize was in a heated condition, partly owing, it was contended by the plaintiffs, to its having been in contact with the sides of the ship.

The plaintiffs alleged that the damage was due to insufficient dunnage, to the bags having been cut by the stevedores so as to give more room for stowage, through the bulkhead between the

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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bunkers and one of the holds not being proof against coal dust, through insufficient ventilation, and generally owing to bad stowage. They also alleged that the vessel was unseaworthy, but this point was not proceeded with.

The plaintiffs claimed 551*l.* 14*s.* for the damage to the maize, and 21*l.* 0*s.* 4*d.* for the damage to the remainder of the cargo—571*l.* 0*s.* 4*d.* in all.

The defendants denied that the cargo was badly stowed, or that their vessel was unseaworthy, and alleged that the damage to the maize was due to inherent vice. They also alleged that, if the damage was caused by improper stowage, that was due to the negligence of the stevedores, and such negligence was covered by the exceptions in the bills of lading.

The material clauses in the bills of lading were as follows:

1. The Act of God, the King's enemies, &c.
2. That the master, owners, or agents of the vessel or its connections shall not be responsible for loss, damage, or injury arising from sweating . . . bursting of packages, or consequences arising therefrom . . . decay, hook marks, or injury from hooks . . . explosion, heat, fire at sea or on shore, at any time or in any place.
3. That the master, owners, or agents of the vessel or its connections shall not be responsible for any loss or injury to the said goods occurring from any of the causes above mentioned, or for any loss or injury arising from the perils or accidents of the seas . . . whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by or from any act or omission, negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the shipowners . . .

On the margin of the bills of lading under which the maize was shipped there was in addition stamped the following clause:

In no case is the steamship to be held liable for heating, or any other damage accruing to the within-mentioned goods, nor for insufficient strength of bagging.

The defendants in the further alternative, while denying liability, paid into court the sum of 30*l.*

Evidence was called by the plaintiffs and defendants in support of their respective cases, and

BARNES, J. in dealing with the facts of the case said:—It is necessary in this case to dispose first of the questions of fact, because there is a question of the construction of the bills of lading under which these goods are carried to be disposed of afterwards. The plaintiffs appear to be the consignees under certain bills of lading—a copy of one of which has been put in—for some maize, barley, linseed, oats, and wheat shipped on the *Pearlmoor* at Buenos Ayres, for Hull, in May 1902. It is said that the grain arrived at Hull damaged to a certain extent. The question of importance in the case is in connection with the maize, because the claim made relating to the maize amounts to 551*l.* 14*s.*, whereas the other matters are quite trifling. The plaintiffs' contention with regard to the maize may be put in this form: That for some reason or other a large number of the bags were cut in order to stow more cargo into the hold; that the crevices were filled up with loose maize; and that the loose maize got into the spaces at the ends of the cargo, against the fore and after bulkheads, and also

into the wings of the ship; and that, in that condition of things, the ventilation was not such as it should have been in the course of the voyage, and the damage was thus occasioned. With regard to the voyage, there seems to have been some bad weather, when the ventilators were closed, but the captain says he had often had such bad weather before, and that there was nothing out of the usual in the weather that was experienced. He had previously said that very bad weather was experienced on the 7th June and for several days afterwards, and the ventilators had to be closed for two or three days sometimes. There was undoubtedly closing of the ventilators for a certain time. The next matter is that the shipment was made under bills of lading which described the cargo as in good order and condition; but that does not mean anything more than that there was nothing specially noticeable about it which would require to be marked on the mate's receipts. [His Lordship then dealt with the evidence as to the number of bags that were cut.] The conclusion to which I have come upon the whole is that while no doubt there is always a certain quantity of loose grain, there was in this case an unusual quantity; and I think that must have been due to the cutting of the bags at shipment, for some reason or other—it does not matter what. It seems to me there was an undue proportion of loose grain, for the reasons I have given, and that that grain was in the places where the ventilation should be—namely, in the wings and the ends where the bulkheads should be separated from the cargo, and that there was therefore less free ventilation than there should have been. Now, I think it is not made out that the whole of this damage by heating is due to the cause which I have been considering, but I think some of it was. I think the ship's ventilation became defective to a certain extent owing to this excessive quantity of loose grain which was about for the reasons I have given; and I have asked the Elder Brethren what is their view. They think that as there was more loose grain than usual it might aggravate the heating. That is, I believe, all one can say about this case. I do not attribute the whole of this heating to this cause. The probability is that a portion of this heating was due to the state of the cargo itself, and to its being confined in the hold of the ship. It appears to me that the proper and only conclusion I can come to is to put down half of this heating to that cause. If the damage by heating amounts to 400*l.*, I think 200*l.* of that is due to this choking up of the ventilation. The next matter to discuss is what has been called the iron damage. It does not seem to me to be quite the right term. It means the damage to the bags which have been against the iron work of the ship, and, in consequence of the accumulation of water, have been thereby damaged. The bags were described as being so wet that they burst when moved, and the grain poured out and was damaged. Now, the quantity that is said to have met with damage in this respect is 920 bags, in all, equivalent to 344 quarters, and it is said that the damage amounted to 81*l.* Was that due to bad stowage, or was it not? I understand the contention of the defendants was that it was due to the working of the ship in bad weather if any bags got out of place—that everything was right at the start, and that any cargo which got against

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the side of the ship got there in the course of the voyage. Here again there is a question of fact to decide. The broad contention of the plaintiffs is that some of the cargo battens were not in their places when the ship arrived, so that some of the cargo got against the sides and frames and stringers. On the other hand, the case for the defendants is that the battens were all in their places when the ship started. I think myself that the evidence for the plaintiffs is better than that for the defendants on this point. My opinion is that the places where this grain had got against the ironwork of the ship were not adequately protected, in the way they should have been, when the ship started. I accept, broadly speaking, the view presented on this part of the case by the plaintiffs, and I find that the damage was due to improper stowage. So that matter will depend, as also the point I have already decided, upon what effect is to be given to the bills of lading. With regard to the other small items, wheat and coal dust got mixed, and it seems to me that could not have happened without there being some defect in the bulkhead. So also with regard to the mixing of wheat and linseed. It was a temporary bulkhead, and seems to have been in such a condition that the grain got through the interstices. Lastly, there was an item for the mixing of barley and oats in No. 5 hold. I cannot see how that happened unless the sail cloths were not properly fixed. Those are my findings on this matter, and the next question is what is the law.

Pickford, K.C. and Bateson for the plaintiffs.—Negligence is at the root of all the damage, and the exceptions in the second and third clauses, even if they cover damage, are of no avail. As Walton, J. says, in *Price v. Union Lighterage Company* (88 L. T. Rep. 428, at p. 430; 9 Asp. Mar. Law Cas. 398, at p. 400; (1903) 1 K. B. 750, at p. 754): "If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly, and not by general words." With regard to the marginal clause the words "in no case" do not explicitly cover negligence. In *Taubman v. Pacific Steam Navigation Company* (26 L. T. Rep. 704; 1 Asp. Mar. Law Cas. 336) there was a provision that the shipowner would not be answerable for loss of luggage "under any circumstances whatever." That, however, was a special contract between a shipowner and a passenger by sea, not part of a bill of lading contract. The case was commented on by the Court of Appeal in *Price v. Union Lighterage Company* (89 L. T. Rep. 731; (1904) 1 K. B. 412). It is submitted the second group of words "causes above mentioned" in clause 3 only refer to the first group in the same section. They cannot be said to refer to the exceptions in clause 2. This is clear because the defendants have put in the words "whether occasioned by negligence" in the one class of perils, and left it out in the other. The damage to the maize was caused by heating, which was caused by fermentation. It is not therefore within clause 2 as "sweating" or as "heat"; for the words before and after the word "heat" show that heat means outside action.

Laing, K.C. and Adair Roche, for the defendants, contra.—The damage by heating is within

clause 2, and comes under the heading of "sweating." Heating causes moisture, and the result of such moisture is what is termed "sweating." It also comes within the marginal clause. This is a rubber stamp clause specially used in the case of maize cargoes, and the words "any other damage" are expressly intended to cover any damage like the present. If there had only been room the marginal clause would have been stamped at the end of clause 3, and it must be read as if it were there. The words "In no case is the steamship to be held liable for heating," &c., by themselves cover negligence. See

Ashenden v. London, Brighton, and South Coast Railway, 42 L. T. Rep. 586; 5 Ex. Div. 190.

Mitchell v. Lancashire and Yorkshire Railway, 33 L. T. Rep. 161; L. Rep. 10 Q. B. 256.

The perils mentioned in clause 2 cover negligence, for the second group of words, "causes above mentioned," in clause 3 refer to clause 2.

Pickford, K.C. in reply.

BARNES, J.—Having disposed of the questions of fact, I now have to apply the law. That brings me to consider the terms of these somewhat extraordinary bills of lading. They are all in the same form, but the marginal clauses are stamped only on the bills of lading relating to the maize. They contain very long clauses of exceptions, and if it had not been for the courtesy of counsel in providing me with a type-written copy I do not know how I should have been able to get on without the assistance of a magnifying glass to read these exceptions, which are contained in several paragraphs of very small print. I cannot understand why at the present day shipowners do not take the opposite course to that which these bills of lading take—of excepting a mass of detailed perils, causes, and things—and state what they are willing to be responsible for. However, the exceptions seem to grow and grow, based upon the old form of bill of lading. The first point that is taken is a general point, and that is that what I may term the negligence clause—the third clause of exceptions—does not apply to those exceptions which have been relied upon by the defendants. The third clause begins thus: "That the master, owners, or agents of the vessel or its connections shall not be responsible for any loss or injury to the said goods, occurring from any of the causes above mentioned." I suppose "the causes above mentioned" must there mean the causes referred to in the first and second paragraphs of the exceptions and stipulations, because those are the only causes that so far have been above-mentioned. But then there comes a long string of words, which commences thus: "or for any loss or injury arising from the perils or accidents of the seas," &c. This ends with the words "whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by or from any act or omission, negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the shipowners, whether on board the said ship or any other ship belonging to or chartered by them, or otherwise howsoever, for whose acts they would otherwise be liable." Now, it is quite clear that the words "above mentioned," which I have just read, cannot

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have precisely the same meaning as the words "above mentioned" at the beginning of paragraph 3; because the first part only refers to the first and second sets of exceptions, and if it only refers to the first and second sets of exceptions, to use the words "above mentioned" where they occur again in precisely the same way would then only refer to the first and second sets of exceptions. No one has contended that it means that. The contention for the plaintiffs is that where you find the words "above mentioned" a second time they refer to what is just above—namely, in the third paragraph, beginning with the words "or for any loss or injury arising from the perils." The contention for the defendants is that they must include those perils, causes, or things, and also the causes or things mentioned in Nos. 1 and 2. I have considered this matter with as much care as I can, and the view that I take is that when the words "above mentioned" are used a second time, having regard to their collocation, they only refer to the specific causes and things which are set out in paragraph 3. It is extremely doubtful whether one is really right or wrong about that particular view, but that is a construction which I hold, and it seems to me that that is the proper one to adopt. If that is right it makes an end of this case; but assuming that is not the view to take, I have still to consider the effect of the words in paragraph 2, on which the defendants rely. What are those words? He relies first on the word "heat." I think that the contention of the plaintiffs is correct, that that word, having regard to its collocation, which is between the words "explosion" and "fire at sea or on shore" does not refer to the heating of the cargo from its own spontaneous combustion or generation of heat, through the action of moisture coming against it, or its own moisture causing it to develop heat, but that the word "heat" refers to some extraneous source, such as heat coming from the engine-room. So much for that point. The next word relied upon was the word "decay." The argument upon that was very faintly pressed, and I do not think myself that any of the loss with which I have had to concern myself in dealing with the facts can be attributed to the ordinary meaning which is attached to the word "decay." Then comes the word "sweating"—"loss, damage, or injury arising from sweating." Now, in this case I have already found that the damage was due to the causes which I specified in my judgment upon the facts, and it seems to me that those causes do not include the idea of sweating. I think the correct view of that word is that expressed by Mr. Pickford—viz., of moisture dropping on to the bags from condensation, which arises if there is moisture which evaporates and then condenses in the hold. The damage, in my opinion, was not caused by that class of injury. There is the further point taken on the marginal clause, which is as follows: "In no case is the steamship to be held liable for heating or any other damage accruing to the within mentioned goods nor for insufficient strength of bagging." Now, there are several cases referred to in connection with this point, the last of which is *Price v. Union Lighterage Company* (*ubi sup.*). I only propose to refer to one paragraph in the judgment there, which summarises what I wish to say upon this matter. That is as follows: Walton, J. in the course of

his judgment, said: "I understand the meaning of this to be that an exemption in general words, not expressly relating to negligence, even though the words are wide enough to include loss by the negligence or default of the carrier's servants, must be construed as limiting the liability of the carrier as insurer, and not as relieving him from the duty of exercising reasonable skill and care. If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly, and not by general words." Those are general words in this case, not expressly referring to negligence, and, it seems to me, do not include negligence on the part of the shipowner or those for whom he is responsible. But, of course, in this case the view which I take about that clause is fortified by the fact that this marginal clause only occurs in a bill of lading which does deal with negligence in certain specific cases; and negligence being thus dealt with in certain specific cases leads more than ever to the conclusion that—general words being used somewhere else—if in such a marginal clause as this the negligence of the shipowner or his servants is to be excluded, the language should expressly refer to that exclusion. There is a further point to be dealt with—that what has been discussed in the course of this case and called the iron damage is, as the defendants contended, sweating damage. If the first point that I dealt with, as to the construction of the words in clause 3 so far as they affect clause 2, is right, then any difficulty as to the construction of the word "sweating" is got rid of. But even if the view I take is not correct, it appears to me, having regard to the facts, that it is not shown by the defendants that the damage I have dealt with is, strictly speaking, damage done by sweating. There are only some other small matters to refer to—namely, the damage to the wheat and linseed and the barley and oats by mixing. It was not contended that those small items could be really brought within any of the terms of the exceptions in the bill of lading, and therefore the defence as to them fails. The result, in my opinion, is that the 30*l.* which has been paid into court in this case is not sufficient to satisfy the plaintiffs' claim, assuming, of course, that the damage which I have found, but which will have to be definitely ascertained by the registrar and merchants, exceeds that amount, which it almost certainly must do. My judgment must be for the plaintiffs, for an amount to be ascertained by the registrar and merchants in accordance with my judgment.

Solicitors for the plaintiffs, *Pritchard and Sons*, agents for *A. M. Jackson and Co.*, Hull.

Solicitors for the defendants, *Botterell and Roche*.

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THE HARE.

[ADM.]

Feb. 23, 24, and 25.

(Before BARNES, J. and TRINITY MASTERS.)

THE HARE. (a)

Collision—Manchester Ship Canal—Fog—Application of Sea Rules—Duty to stop and reverse on hearing whistle of approaching vessel—Art. 16—Regulations for Preventing Collisions at Sea, arts. 16 and 30—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 418 (1).

Semble, the Regulations for Preventing Collisions at Sea do not apply to the Manchester Ship Canal. Even assuming that they do apply, a vessel coming down the canal in a fog is not necessarily to blame under art. 16 of the regulations if she does not stop her engines on hearing the whistle of an approaching vessel forward of her beam; for the approaching vessel must be in the canal, and it may be assumed that she is being navigated on her right side, and her position is therefore, under the circumstances, sufficiently ascertained.

ACTION for damage by collision.

The plaintiffs were the owners of the steamship *South Coast*, and the defendants the owners of the steamship *Hare*.

The collision occurred about 1.28 p.m. on the 6th Dec. 1903 in the Manchester Ship Canal near the Weaver Sluices. The weather was foggy, and there was no wind, the tide was slack, and both vessels were sounding their whistles.

The *South Coast* was a steamship of 421 tons gross register, and at the time was proceeding down the canal on a voyage from Manchester to Plymouth with a general cargo on board and manned by a crew of twelve hands all told.

The *Hare* was a steamship of 804 tons gross register, and at the time was proceeding up the canal on a voyage from Dublin to Manchester with a general cargo and passengers, and manned by a crew of twenty-four hands all told.

The facts of the case will be found sufficiently set out in the judgment.

The case is reported on the question of the application of the Regulations for Preventing Collisions at Sea to waters such as the Manchester Ship Canal, and on the application of art. 16 of the regulations to such waters.

By the Regulations for Preventing Collisions at Sea it is provided:

These rules shall be followed by all vessels upon the high seas and in all waters connected therewith, navigable by sea-going vessels.

Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed having careful regard to the existing circumstances and conditions. A steamvessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Art. 30. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters.

By sect. 418 (1) of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Her Majesty may on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, make regulations for the preventing of collisions at sea, and may thereby regulate the lights to be carried and

exhibited, the fog signals to be carried and used, and the steering and sailing rules to be observed by ships, and those regulations (in this Act referred to as the collision regulations) shall have effect as if enacted in this Act.

At the trial of the action the master of the plaintiffs' vessel admitted that he had heard the whistle of the *Hare* before she came into view, but did not stop his engines.

It was contended by the defendants that on this account the plaintiffs' vessel must be found to blame as art. 16 of the Collision Regulations had not been complied with.

Aspinall, K.C. and Noad for the plaintiffs.—The Sea Rules do not apply to waters such as the Manchester Ship Canal. Sect. 418 (1) of the Merchant Shipping Act 1894 applies only to collisions at sea. There is no by-law for the Manchester Ship Canal which requires a vessel to stop on hearing the whistle of another vessel forward of the beam. The code deals with the duties of ships under all circumstances and is exhaustive, and it is submitted that any such regulation was expressly omitted. In *The Carlotta* (80 L. T. Rep. 664; 8 Asp. Mar. Law Cas. 544; (1899) P. 228) there were no express regulations, and there is no case which goes so far as to say that the regulations apply to such a locus as the Manchester Ship Canal. It is true that art. 30 provides that nothing in the Sea Rules shall interfere with the operation of a special rule made by a local authority. Assuming, however, that the Sea Rules applied, art. 16 has no application to the present case and the circumstances were special, and it would not have been a safe thing for the *South Coast* to have stopped. It is necessary that a vessel should keep her heading in the narrow waters of a canal, and there is no danger in her so doing, as a vessel must be coming in a fixed direction. It is not like the open sea, where one vessel may be crossing the course of the other. But, even assuming the rule does apply, in this case the position of the *Hare* had been duly ascertained.

Laing, K.C. and Bateson, for the defendants, *contra*.—The Sea Rules apply to the high seas and "all waters connected therewith navigable by sea-going vessels. If there is no local rule which ought reasonably and properly to prevent the application of the Sea Rules then the Sea Rules apply. For instance, in the case of a vessel in dock, she would be bound to carry the regulation lights when under way. The Manchester Ship Canal is a water connected with the high seas within the meaning of art. 30 of the regulations. The fact of a gate being shut at times during certain states of the tide does not prevent its being so, and it is submitted that although the Canal is shut off from the sea it is connected with it none the less. In this particular case the gate of the locks was open, so that in fact the canal at the time was actually connected with the high seas. In *The Carlotta* (*ubi sup.*) there was no rule as to navigation. There is as much a duty to stop in a canal on hearing a whistle forward of the beam as elsewhere. It is the duty of a vessel to stop and ascertain the true bearing of an approaching vessel in every case:

The Bernard Hall, 86 L. T. Rep. 658; 9 Asp. Mar. Law Cas. 300.

The Koning Willem I, 88 L. T. Rep. 807, 9 Asp. Mar. Law Cas. 425; (1903) P. 114.

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

ADM.]

THE HARE.

[ADM.]

The by-laws for the Manchester Ship Canal, even if they did provide for a case such as the present, could not be enforced as they had not received the consent of the Board of Trade as required by sect. 198 of the Manchester Ship Canal Act 1885.

Aspinall, K.C. in reply.

BARNES, J.—This is a case of a collision which took place between the steamships *South Coast* and *Hare*, a little before two o'clock in the afternoon of the 6th Dec. in last year, in the Manchester Ship Canal, near the Weaver Sluices. The weather at the time was foggy, and the tide had nearly ceased to operate at all—it was slack—such tide, I mean, as seems to be allowed to run in during the time that the lock gates are open at Eastham. The *South Coast* is a screw steamer of 421 tons gross register, and was proceeding down the Ship Canal on a voyage from Manchester to Plymouth with general cargo. The *Hare* is a screw steamer of 804 tons gross register, and was proceeding up the Ship Canal, on a voyage from Dublin to Manchester with general cargo and passengers. These vessels were sounding their whistles for fog, and they met in collision at the place I have mentioned, the collision taking place practically stem on, the stem of the *Hare* striking the star-board bow of the *South Coast* about two feet from the stem. The question is which of these vessels was to blame for this collision. I do not intend to go through the cases presented on each side, as there is a certain looseness in the evidence and certain inconsistencies have been pointed out in the preliminary act and pleadings of the plaintiffs and their evidence, and certain criticisms have been made on the defendants' evidence. The result, however, is that one of the broad points to determine in the case is whether the collision happened, to use an ordinary expression, in the water of the plaintiffs or in the water of the defendants, each side maintaining that it took place on their own side of the canal, and, therefore, that the other ship was in the wrong. Other points in the case are as to the navigation of these vessels with regard to stopping, helm action, and speed. With the assistance of the Elder Brethren I have come to a conclusion of fact in this case which enables me to decide it, but there are some points which have been disclosed in the course of the arguments that involve matters of some little difficulty; and if I felt it necessary to decide the case only upon some of these more difficult matters I should have thought it desirable, probably, to express what I have to say after more consideration. But the points that have been pressed, and which involve certain difficulties, are not, to my mind, essential features of the case, and I can without, I hope, tying my hand too tightly by the expression of any views about these more difficult matters, come to a conclusion about this case. Dealing first with one of the points presented on the part of the defendants against the plaintiffs, it is this: it is said that the plaintiffs' vessel did not stop her engines on hearing the whistle of the defendants' ship. The plaintiffs' master said: "I heard a whistle once before she came up before I saw her." Upon his evidence it would seem that he only stopped his engines when he saw what he described as a loom, and then thought it was a ship. The point made by the defendants is that

the plaintiffs' vessel must be to blame because her engines were not stopped on hearing the whistle of the defendants' ship, before even she was seen. It is said that that makes the plaintiffs' vessel responsible because of art. 16 of the Sea Regulations. The answer made to that point is that that regulation does not apply, and that none of the Sea Regulations do apply to the Manchester Ship Canal. I am not at all satisfied that it is necessary for me to express a positive opinion about that point, but my present impression is that the Sea Regulations do not apply to the Manchester Ship Canal. These regulations are made in pursuance of sect. 418 of the Merchant Shipping Act, under which Her Majesty—that Act was passed in the reign of the late Queen, namely in 1894—may on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, make regulations for the prevention of collisions at sea. Now, the plaintiffs say that the regulations only apply for the purpose of preventing collisions at sea, and that this was not a collision which took place at sea. The defendants, however, say that it did take place at sea within the meaning of the section, and that the words "at sea" have been interpreted by those who draw the regulations as including something which included the present case, because the preliminary is as follows: "These rules shall be followed by all vessels upon the high seas and in all waters connected therewith, navigable by sea-going vessels." I do not myself read that preliminary article as intended to extend the word "sea" beyond its proper meaning. The preliminary rule says "high seas and in all waters connected therewith," and my view has already been expressed in the case of *The Carlotta* (*ubi sup.*). Of course, if the sea rules do not apply, there is an end of that point, and my view is that they do not apply to the Ship Canal. I cannot myself conceive how they could strictly be said to apply to a piece of navigable channel artificially constructed, terminating at Eastham in locks which only at times admit the sea, and which has locks at different places all the way up, from place to place, and where it is necessary to do what the pilot of the *Rondane* said. He said they were in every lock together down to Latchford. I should have thought it was tolerably clear that the upper part cannot be said to be connected with the sea, at any rate, and I do not see very well how the term could be applied to the lower part, even if it is, for a portion of the time, allowed to have an inflow of sea water, when the gates are open. Certainly it would be, I think, extremely inconvenient if the Sea Regulations were so held to apply. It would have this very curious result, that vessels navigating in the canal near a part of the sea, to which they cannot get, and vessels navigating in the sea, might be hearing whistles forward of their beam, and for which they would have to act, though by no possibility could they get at each other. But Mr. Aspinall took a further point—namely, that even if the sea rules apply, then there is art. 30 of the regulations, which provides "that nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters." He said there is a scheme in this case of rules

ADM.]

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made by the local authority which regulates the navigation of the Manchester Ship Canal, and he referred me to the published regulations of the Manchester Ship Canal—to arts. 6, 7, 15, and 16, and to the schedule of signals which are contained in those regulations. Then he said that those rules, or some of them, show what vessels have to do when they are meeting each other, and what they have to do to avoid danger of collision. But there seems some difficulty in treating those regulations as really made within the meaning of art. 30—as really duly made by the local authority—because Mr. Laing pointed out that under sect. 198 of the Manchester Ship Canal Act 1885 the only power to make by-laws or regulations applicable to such a matter as I am considering is power to make regulations “for regulating the conduct of the owners, masters, and crews of vessels propelled by steam with respect to the rate of speed at which they may proceed within the canal, docks, or works, or any part or parts thereof, respectively, and for requiring such vessels to stop or slow their engines at such times and places as the company may require, and to keep the advertised times of sailing, and for regulating the taking on board, landing, or putting out of passengers”—which does not in terms cover all the matters that have to be considered with regard to signals, lights, and so forth on board ships; and, further, that in the latter part of the section there is a provision that such “by-laws, except so far as they relate solely to the company or their officers or servants, shall be subject to the provisions with respect to by-laws of the Harbour, Docks, and Piers Clauses Act 1847, except sect. 85 of that Act, but no such by-laws shall have any force or effect unless and until the same be confirmed by the Board of Trade.” Sect. 85 of the Act of 1847, which is there referred to, provides that no by-laws shall come into operation until allowed in the manner prescribed and approved by one of the judges. Now, for one of the judges is substituted the Board of Trade, but I understand that the particular regulations which have been relied upon by Mr. Aspinall have not been confirmed by the Board of Trade. That is the statement made to me, as far as I understand it. So that the point which Mr. Aspinall took would not seem to be satisfactorily established. But the result of that would be that although the regulations may not, perhaps, be strictly termed enforceable, as being duly made, as I understand it, at present, yet still they show what the practice of navigation is; and so far as the actual seamanship and navigation of those two vessels is concerned both parties have argued the case before me as if it was their own duty to keep to their own side and to act with reasonable caution and stop and reverse and pass port side to port side. There is one other point I might mention, which seems to me important. That is, that even if art. 16 applies, yet the rule applies only where the position of the vessel which makes the fog signal is not ascertained, and I think in this case that even if that rule is treated as applicable, the position in the particular circumstances of the case was such that when the whistle of the other vessel was heard that vessel was in a position which was ascertained. It is perfectly obvious that she must be in the canal—they need not trouble themselves about vessels in the river—and therefore her

ordinary position in the canal must be ascertained if both vessels keep to their right side. Her distance, too, must be reasonably ascertained, because the *Rondane* was proceeding ahead of the plaintiffs' vessel and between her and the *Hare*. So both I and the Elder Brethren think that if art. 16 applies the circumstances were such that it was reasonable to say that the position of the *Hare* was sufficiently ascertained to comply with the rule. I also think it is worth while pointing out that the rules must be worked with a certain amount of reason. Mr. Aspinall relied upon the second part of art. 16, “so far as the circumstances of the case admit.” It would be very awkward if every time a whistle was heard and there were a number of vessels going down and others were coming up, meeting each other, it was obligatory upon any vessel in a lock to stop. It would seriously hamper vessels astern; and although there is a rule in the schedule of signals providing a special signal to be made if a vessel is obliged to stop when another vessel is following her, the effect of stopping for every whistle heard would be to stop all the traffic, and there would be, it seems to me, a general standstill, which is not desirable. For these reasons, which, as I have said, I give without any lengthy consideration, I am of opinion that the plaintiffs' vessel cannot be held to blame simply because she did not stop her engines upon hearing the whistle of the *Hare*. [His Lordship then dealt with the facts, and found the *Hare* alone to blame for the collision.]

Solicitors for the plaintiffs, *Hill, Dickinson, and Co., Liverpool.*

Solicitors for the defendants, *Batesons and Co., Liverpool.*

House of Lords.

Tuesday, March 15.

(Before the LORD CHANCELLOR (Halsbury), LORDS MACNAGHTEN, DAVEY, JAMES OF HEREFORD, ROBERTSON, and LINDLEY.)

HUNTER v. ATTORNEY-GENERAL. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Revenue—Income tax—Deductions—Life insurance—Payment of annual premium—Income Tax Act 1853 (16 & 17 Vict. c. 34), s. 54.

The appellant insured his life with a registered insurance company. By agreement between himself and the company he only paid half the annual premium on the policy, the other half being advanced by the company, and the amount of such advances, with interest, being made a first charge upon the policy. He also made himself personally liable to repay these advances. The company gave him a receipt for the whole amount of the premium in each year.

Held, that, in making his return of profits and gains liable to income tax, he was only entitled to deduct, under sect. 54 of the Income Tax Act 1853, that half of the nominal premium which was actually paid by him to the company.

Judgment of the Court of Appeal affirmed, Lord James of Hereford dissenting.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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APPEAL from a judgment of the Court of Appeal (Williams, Stirling, and Mathew, L.JJ.), reported 88 L. T. Rep. 184; (1903) 1 K. B. 514, who had reversed a decision of Phillimore, J., reported 87 L. T. Rep. 180; (1902) 2 K. B. 255.

The question raised was whether upon the true construction of the Income Tax Acts the appellant was entitled to deduct from his assessment or to obtain relief in respect of 66*l.* 17*s.* 6*d.*, the full annual premium paid upon a policy of insurance upon his life, or only in respect of the sum of 33*l.* 17*s.* 6*d.*, the difference between the two sums being by arrangement between the appellant and the London Life Association Limited, with whom the insurance was effected, lent by the association to him upon the security of the policy and applied in part payment of the annual premium payable in respect of the assurance.

The policy was dated the 30th June 1896, and was for 1500*l.* It recited that the sum of 66*l.* 17*s.* 6*d.*, including an advance of 33*l.* under the first clause thereof (being the premium for such assurance until the 30th June 1897), had been paid to the association, and *inter alia* provided that a portion—viz., 33*l.*—of the renewal premium should, if the assured should so desire, be advanced by the association and be a first charge on the policy.

By clause 2 it was provided that after the premium should have been paid for seven years or commuted the renewal premium should be subject to any reduction which might be declared by the directors.

On the 30th June 1896 the appellant received from the association a receipt in the following terms:

Receipt No. 1625. The London Life Association Limited, 81, King William-street, London, E.C. Received this 30th day of June 1896 the sum of 66*l.* 17*s.* 6*d.* (including 33*l.* advanced by the association), being the first premium on an assurance of 1500*l.* on the life of Mr. Robert Lewin Hunter, for which a policy will be issued in due course. C. D. HIGHAM, Actuary and Secretary. 66*l.* 17*s.* 6*d.* premium (including advance as above). Countersigned, E. C. E. Sharpe.

By agreement dated the 19th July 1897 the appellant, in consideration of 33*l.* then advanced to him by way of loan, and of the same amount advanced to him by way of loan on the 30th June 1896, and of five further sums of the same amount to be advanced to him by way of loan by the association under the terms of the policy, charged the policy and all moneys and benefits thereby assured as security for repayment to the association of the principal sums advanced and to be advanced, together with interest as mentioned in the agreement; and he further agreed to pay to the association the principal sums and interest, and also, as long as the principal sums or any part thereof remained owing, to pay interest thereon at the rate therein mentioned.

On the 19th July 1897 he paid to the association the sum of 33*l.* 17*s.* 6*d.* in cash, and the association lent him the sum of 33*l.*, that amount making up the sum of 66*l.* 17*s.* 6*d.*, the full amount of the renewal premium.

A receipt was given in the words and figures following:

Receipt No. 1475. The London Life Association Limited, 81, King William-street, London, E.C. Policy

No. 30540. Due 30th June 1897. Received this 19th day of July 1897 the sum of 66*l.* 17*s.* 6*d.*, being the amount of one year's premium, due as above, for the assurance of 1500*l.* by this policy on the life of Mr. R. L. Hunter. 66*l.* 17*s.* 6*d.* amount paid. C. D. HIGHAM, Actuary and Secretary. For one of the directors of the association. Countersigned, E. C. E. Sharpe.

On the 8th July 1898 the appellant made a similar payment, and the association made a similar loan, which was applied in the same way. A receipt was given similar to that given on the 19th July 1897.

The association did not in any of the years 1896, 1897, and 1898 make any actual cash payment to the appellant, but in each of such years debited him with the sum of 33*l.* in the loan register, and in the renewal premium register he was credited with the full amount of the premium. The appellant in each of the years 1897, 1898, and 1899 paid interest upon the total amount of the loans made by the association then standing to his debit in the loan ledger. In each of the years 1896-7, 1897-8, and 1898-9 the firm of which he was a member were assessed to income tax under sched. D in respect of the profits of their business, the assessment being based on the assumption that the appellant was entitled to relief to the amount of 33*l.* 17*s.* 6*d.* only in respect of the premium for the policy, and in each year the special commissioners refused on appeal to grant relief in respect of the whole of the premium of 66*l.* 17*s.* 6*d.*

In the year 1900 the appellant presented a petition of right, claiming payment of the sum of 3*l.* 6*s.*, being the income tax paid in respect of the sum of 33*l.* in the three years above mentioned.

Phillimore, J. held that the appellant was entitled to deduct from the tax the whole 66*l.* 17*s.* 6*d.*; but his decision was reversed by the the Court of Appeal.

Danckwerts, K.C. and Acland, K.C. appeared for the appellant.

The Attorney-General (Sir R. Finlay, K.C.), the Solicitor-General (Sir E. Carson, K.C.), and Rowlatt for the respondent.

At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: It appears to me that this judgment ought to be affirmed. The whole point is that the exemption, or deduction, or whatever it is to be called, is to be allowed to the assured if the premium has been "paid by him," and the sole reason which I give for my judgment is that it has not been paid by him. I move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN.—My Lords: I quite agree.

LORD DAVEY.—My Lords: I am of the same opinion. No doubt the argument based on the charge on the policy appears to have some weight, because it appears as between the appellant and the insurance company that the premium has been paid. But that is not the question. The question is whether the appellant has paid the premium so as to obtain the benefit of the exemption. Looking at the whole transaction, it appears to me that it was a scheme of some ingenuity whereby the insurance company invited people to insure their lives in their office on the footing of

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half the annual premiums for seven years not having to be found in cash; and the very merit of the scheme, as pointed out in some of the documents, in the invitations, or prospectus, or whatever it is called, is that the insured will not have to pay in cash the whole of the premiums. In these circumstances I think that the entry in the ledger is a perfectly accurate entry, that 33*l.* 17*s.* 6*d.* is paid and 33*l.* remained "on credit." It may be that the insured was liable to be sued for that 33*l.*, but he was willing to run that risk, no doubt, for the sake of obtaining the very favourable terms which were offered to him by the insurance company, who were not likely to spoil their business by taking such a step.

LORD JAMES OF HEREFORD.—My Lords: I have entertained considerable doubt in this case, and I express the opinion which I now do express before your Lordships with very great hesitation as to whether I am right or not; but, on the whole, I have come to the conclusion that this payment does in fact exist and therefore that the appellant is entitled to succeed. I am aware of the statement that this transaction, as regards the 33*l.*, was described as "on credit." That, of course, is substantially in favour of the opinion which your Lordships have expressed. But I am disposed to look rather at the real substance of the transaction as it is found in the charge on the policy. It is admitted that the parties have acted in perfect good faith in this arrangement which has taken place; whether it is an ingenious one or not, it is certainly an honest transaction, and in it, as between the two parties, this sum is treated as an advance upon loan, and it is admitted that upon that document between them an action could have been brought, so that at any time, if the company chose to take that course, although it may be one which they would not have taken in fact, they could have sued upon it. It appears to me that there is nothing in the transaction which can be condemned, either in the nature of the transaction itself, or as being legally in fault. If one party chose to say to the other, "I will lend you money with one hand and receive it with the other," it seems to me to be a transaction of loan with a charge of interest upon that loan, and it was treated by the parties in good faith as a loan; and, that being so, it would be a "payment" in the same way, as has been mentioned at the Bar, as if the money had been borrowed from a third person, or as if there had been two different departments in the same office in which the transaction had taken place. For these reasons, with very great diffidence, I differ from my noble and learned friends who have expressed their opinions, for looking at the case as a whole, and it is full of difficulties, though it is a short one, it appears to me that the appellant is entitled to succeed.

LORD ROBERTSON.—My Lords: I agree with the motion which has been proposed, upon the very simple and sufficient ground stated by the Lord Chancellor. The whole argument of the appellant has been that as in a question between the assured and the insurance company he must be held to have paid the larger sum. But in point of fact in a question of the extent by which his income was diminished during the year by the

payment, there can be no doubt that it was only by 33*l.* and not by 66*l.*

LORD LINDLEY.—My Lords: I am of the same opinion. I think the judgment of Mathew, L.J. absolutely unanswerable. I say this bearing in mind that under the old common law plea of payment you could prove the plea by a settlement of account on a balance payment, but that is not such a payment as is contemplated by the Income Tax Acts at all.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Hunter and Haynes*.
Solicitor for the respondent, *Sir F. C. Gore*,
Solicitor of Inland Revenue.

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 3 and 4, 1903.

(Before WILLIAMS, ROMER, and STIRLING, L.JJ.)

BRIGG v. THORNTON. (a)

APPEAL FROM THE COUNTY PALATINE OF
LANCASTER.

Lessor and lessee—Covenant not to let adjoining property for purpose of a certain business—Breach of covenant—Remedies of lessee.

By an agreement in writing, dated the 30th Oct. 1901, T. agreed to grant to the plaintiff a lease of a shop in an arcade for twenty-one years, such lease to contain a covenant by the lessee "not to carry on upon the premises any other trade or business than that of a dealer in pictures (oil and water-colours), prints, engravings, photographs, etchings, and articles of vertu, artistic and heraldic stationer, frame-maker and dealer in photographic frames, artists' colours, and the accessories to the said trade or business": and also a covenant by the lessor "not to let any other portion of the said arcade for the trade or business hereinbefore mentioned to be carried on by the tenant."

By an agreement in writing, dated the 25th Sept. 1902, T. agreed to let to G. a stall in the arcade on a yearly tenancy, and it was agreed that the tenant should "not carry on any business other than that of a librarian, newsagent, bookseller, or stationer."

The plaintiff alleged that G. was selling articles which came within the covenant in the deed of the 30th Oct. 1901, and brought an action against T. and G. claiming an injunction restraining T. from letting or allowing to remain let and G. from using the premises comprised in his agreement for any of the purposes of the trade or business described in the tenant's covenant in the agreement of the 30th Oct. 1901.

Held, the evidence showed that there had been a substantial breach of the agreement with the plaintiff; that the covenant being against letting and not against using, and the plaintiff having in that action treated the letting to G. as an existing fact, he had no remedy against G.; but as against T. he was entitled to a declaration

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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that the letting to G. was a breach of the covenant not to let, and an inquiry as to the damages sustained by the breach, with liberty to apply for an injunction in case of any attempt at any further letting contrary to the covenant.

The principle of Kemp v. Bird (37 L. T. Rep. 53; 5 Ch. Div. 974) applied.

ON the 30th Oct. 1901 an agreement in writing but not under seal, was entered into between the defendants Robert Thornton and James Thornton, who were builders (therein called the "landlords," which expression was to include their heirs and assigns), of the one part and the plaintiff, Charles A. Brigg, a fine art dealer (therein called the "tenant," which expression was to include his executors, administrators, and permitted assigns), of the other part by which the landlords agreed, as soon as certain shops therein referred to were built, to grant, and the tenant agreed to take, a lease of the shop then about to be erected by the landlords in the arcade on the north side of Lord-street, Liverpool, as shown on the plan thereunto annexed and therein numbered 6 and 7, for a term of twenty-one years from the date when the shop should be fit and ready for occupation by the tenant for the purpose of his business, at a rent of 150l. a year. And it was agreed that the lease should contain a covenant by the tenant (*inter alia*) "not to carry on upon the premises any other trade or business than that of a dealer in pictures (oil and water colours), prints, engravings, photographs, etchings, and articles of vertu, artistic and heraldic stationer, frame maker and dealer in photographic frames, artists' colours, and the accessories to the said trade or business," and, further, that the lease should contain various covenants on the part of the landlord, including a covenant "not to let any other portion of the said arcade for the trade or business hereinbefore mentioned to be carried on by the tenant."

The shop having been completed, the plaintiff took possession in Oct. 1901, and was still in possession, but no lease had been actually granted pursuant to the agreement.

By an agreement in writing, not under seal, dated the 25th Sept. 1902, made between the defendants Robert and James Thornton (therein-after called "the landlords") of the one part and C. J. Grant, "bookseller and stationer" (therein-after called "the tenant") of the other part, the landlords agreed to let to the tenant, and he agreed to become tenant of, a stall occupying the whole of the front portion of the shop in the arcade known as Nos. 8 and 9, the tenancy to commence on the 1st Oct. 1902, for a year certain, and to continue until determined by either party on three months' notice in writing. And it was agreed that "the tenant shall not make any alteration in or addition to the said stall, nor carry on any business other than that of a librarian, news-agent, bookseller, or stationer, without the previous consent in writing of the landlords."

Grant entered into possession of the stall under this agreement and carried on business there under the name of Charles Grant and Son, and sold articles such as wedding cards and ball programmes, coming within the description of "artistic stationery," picture post cards, photographs, Christmas and New Year cards, "best camel hair brushes," Indian ink, lithographs coloured by hand, and other articles of that

natura. It was alleged that other persons to whom the defendant Thornton had let other portions of the shop Nos. 8 and 9 had sold photographic frames and articles of artistic stationery.

The plaintiff alleged that the acts of the defendants Thornton and of their tenant Grant were a breach of the agreement of Oct. 1901 and had caused him considerable damage, and he brought this action against Messrs. Thornton and Charles J. Grant and Son claiming an injunction restraining the defendants Thornton from letting, or allowing to remain let, and Charles J. Grant and Son from using or causing or allowing to be used, the premises numbered 8 and 9 in the arcade, or any part thereof, or any other portion of the arcade, for the purposes, or any of the purposes, of the trade or business described in the tenant's covenant in the agreement of the 30th Oct. 1901, and damages.

By their statement of defence the defendants Thornton alleged that the stall was not let to Grant for any business other than that of a librarian, newsagent, bookseller, or stationer; and that if Grant intended to carry on any other business they had no knowledge of such intention; that the other portions of Nos. 8 and 9 in the arcade were not let for the purpose of carrying on any of the trades or businesses of which the plaintiff complained as being carried on there, and they had no knowledge of any intention to carry on any of such businesses, and they denied that they were in fact carried on.

The defendants Charles J. Grant and Son by their defence denied that they were carrying on at their stall any of the businesses comprised in the covenant in the agreement of the 30th Oct. 1901, and contended that the sale of the articles sold by them as above mentioned constituted a part of the business of a librarian, newsagent, bookseller, or stationer, and was not either an essential or important part of the businesses mentioned in the covenant. In the alternative they contended that, if the sale of such articles was an essential and important part of the businesses mentioned in the covenant, they were not in fact carrying on such businesses.

The action was heard on *viva voce* evidence, a part of which referred to the question whether Grant or his firm had, at the date of the agreement of the 25th Sept. 1902, notice of the agreement of the 30th Oct. 1901, and of the restrictive covenant therein contained. Upon that point the Vice-Chancellor thought that the fact that a restriction was inserted in Grant's agreement was enough to support a finding that he or his firm knew that the premises in the arcade were subject to a restriction as to the kind of business which might be carried on there. The Vice-Chancellor came to the conclusion that all the defendants had acted in contravention of the covenant in the agreement of the 30th Oct. 1901, and he granted an injunction restraining the defendants Thornton, during the continuance of the plaintiff's tenancy under the agreement of the 30th Oct. 1901, or of any lease to be granted thereunder, from letting any portion of the arcade, other than the portion thereof agreed to be let to the plaintiff, for a trade or business comprising all or any of the trades or businesses mentioned in the tenant's covenant in that agreement. He also granted a similar injunction against the defendants

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Charles J. Grant and Son, but he suspended the operation of this injunction pending an appeal by them from that judgment. And he granted an inquiry as to what damages had, until that injunction should come into operation, been sustained by the plaintiff by reason of the breach, non-performance, or non-observance by the defendants, or any of them, of the above-mentioned covenant on the part of the landlords in the agreement of the 30th Oct. 1901, and an order for payment by all the defendants to the plaintiff of what should be certified to be due in respect of the said damages, the plaintiff's costs to be taxed and paid by the several defendants.

All the defendants appealed.

Neville, K.C. and F. M. Preston for the appellants.—The tenants, the defendants Grant, have not broken the covenant not to let the premises for this particular trade or business, and the plaintiff cannot sue them on a covenant entered into by their lessor. He must look to his lessor for damages. He might have insisted on a provision that none of the property should be used for this purpose, but did not do so:

Kemp v. Bird, 37 L. T. Rep. 53; 5 Ch. Div. 549, 974;

Fitz v. Hes, 68 L. T. Rep. 108; (1893) 1 Ch. 77;

Stuart v. Diplock, 62 L. T. Rep. 333; 43 Ch. Div. 343;

Ashby v. Wilson, 81 L. T. Rep. 480; (1900) 1 Ch. 66.

[*STIRLING, L.J.* referred to *De Matlos v. Gibson*, 4 De G. & J. 276.] If there had been a covenant by the lessor that the property should not be used for this business, the Grants might have been liable under the doctrine of *Tulk v. Moxhay* (2 Ph. 774); but it is not admitted that they had any notice of the covenant. The business for which the premises were let to the Grants is distinct from that of the plaintiff, though as to some articles they overlap. They also referred to

Lumley v. Gye, 2 E. & B. 216.

[*WILLIAMS, L.J.* referred to *Allen v. Flood*, 77 L. T. Rep. 717, 757; (1898) A. C. 1, 121.]

P. O. Lawrence, K.C. and R. B. Lawrence for the plaintiff.—The business carried on by the defendants Grant is that of fancy and heraldic stationers, and the landlords have committed a breach of the covenant. *Stuart v. Diplock* (*ubi sup.*) is distinguishable, and in *Ashby v. Wilson* (*ubi sup.*) the businesses overlapped. There is here a restrictive covenant which touches or concerns the land, and the only defence to an action on that covenant is that the defendant is a purchaser for value without notice having the legal estate; and the onus of establishing that defence is on the person who sets it up. That appears from the observations of *Jessel, M.R.* in *London and South-Western Railway v. Gomm* (46 L. T. Rep. 449, 452; 20 Ch. Div. 562, 583) with reference to *Tulk v. Moxhay* (*ubi sup.*):

Rogers v. Hosegood, 83 L. T. Rep. 186; (1900) 2 Ch. 388;

Osborne v. Bradley, 89 L. T. Rep. 11; (1903) 2 Ch. 446;

Attorney-General v. Biphosphated Guano Company, 40 L. T. Rep. 201; 11 Ch. Div. 327;

Nottingham Patent Brick and Tile Company v. Butler, 54 L. T. Rep. 444; 16 Q. B. Div. 778, 785.

[*WILLIAMS, L.J.* referred to *Leech v. Schweder*

(30 L. T. Rep. 586; L. Rep. 9 Ch. App. 463) and *Coles v. Sims* (5 De G. M. & G. 1, 8).] The question as to notice was not gone into before the Vice-Chancellor, and, if necessary, evidence on the point should be allowed to be given:

Ex parte Firth; Re Cowburn, 46 L. T. Rep. 120; 19 Ch. Div. 419.

It could be proved here that the estates were only equitable. [*STIRLING, L.J.* referred to *Cuthbertson v. Irving* (4 H. & N. 742; 6 H. & N. 135) and *Heath v. Crealock* (31 L. T. Rep. 650; L. Rep. 10 Ch. App. 22)]. A covenant not to let amounts to a covenant not to let or use. They also referred to

Mander v. Falcke, 64 L. T. Rep. 791; (1891) 2 Ch. 554;

Walsh v. Lonsdale, 46 L. T. Rep. 858; 21 Ch. Div. 9, 14;

Holloway Brothers v. Hill, 87 L. T. Rep. 201; (1902) 2 Ch. 612.

Neville, K.C. in reply.

WILLIAMS, L.J.—This action is in substance brought in consequence of an alleged breach of a clause in an agreement for a lease for twenty-one years at a rent of 150*l.* a year. The clause in the agreement which it is alleged is broken is a covenant on the part of the lessor "not to let any other portion of the said arcade for the trade or business hereinbefore mentioned to be carried on by the tenant." That clause, it will be observed, is a clause against letting; it is not a clause against using. In order to see whether there has been a breach of it, one must ascertain the meaning of the words "for the trade or business hereinbefore mentioned to be carried on by the tenant." The business hereinbefore mentioned is referred to in an antecedent clause providing that the tenant should covenant "not to carry on upon the premises any other trade or business than that of a dealer in pictures (oil and water-colours), prints, engravings, photographs, etchings, and articles of vertu, artistic and heraldic stationer, frame-maker and dealer in photographic frames, artists' colours, and the accessories to the said trade or business." I agree with the learned Vice-Chancellor here that, if one looks at the evidence and considers substantially what business it is which is mentioned in the earlier clause, the evidence shows that there has been a substantial breach of the covenant "not to let any other portion of the arcade for the trade or business hereinbefore mentioned." In order, however, to arrive at this conclusion, one is bound also to look at the letting from year to year to the defendant Grant; but it will be observed that that letting from year to year is a letting which is determinable by the lessor upon three months' notice. The words of that letting are: "The tenant shall not make any alteration in or addition to the said stall, nor carry on any business other than that of a librarian, news-agent, bookseller, or stationer, without the previous consent in writing of the landlords." If one looks at the description of the business in the plaintiff's agreement and asks oneself the question whether the letting to Grant of the premises for the purpose of carrying on the business of a stationer would be a breach of the agreement not to let the other part of the arcade for the purpose of carrying on the business mentioned in the plaintiff's agreement, it seems

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that if there is no qualification of the word "stationer," or limitation of what may be done under that business, it would be a substantial breach of the agreement. When one has once arrived at that conclusion it seems to me that one has got over the principal difficulty which exists in this case; but assuming that the letting by the Thorntons to Grant is a breach of the Thorntons' agreement with the plaintiff, it still is necessary to deal with what are the remedies of the plaintiff, and, moreover, against whom he has got those remedies. I think that if information had come to the plaintiff while this letting to Grant was threatened or in negotiation, the plaintiff could probably have gone to the court and applied for an injunction not only to restrain the Thorntons from letting to Grant, but to restrain Grant from taking these premises in breach of this covenant; and after the letting to Grant by the Thorntons had become an accomplished fact, in my judgment the plaintiff could have gone to the court and could have asked for a declaration that that letting was a bad letting, and that declaration would have bound both the Thorntons and Grant. But that is not what happened in this case. The plaintiff has not got any such declaration, nor has he got any such injunction as I have suggested. He has been content to leave the letting to Grant an existing fact, and not to impeach it. Such an injunction as he has obtained applies merely to the future dealings with the property, and not to that dealing which consisted of the letting to Grant. It seems to me that under those circumstances the remedy of the plaintiff against Grant is gone altogether. He cannot get, in my judgment, either damages or an injunction against Grant in respect merely of the user by Grant of these premises. What he can get is a remedy for the breach of the covenant as to letting; and, inasmuch as he does not now impeach the letting, it seems to me that his remedy is merely a remedy against the Thorntons, and is merely in damages. No doubt, if there was reason to suppose that there was likely hereafter to be a further letting in the same way in which the Thorntons have let to Grant, there might be an injunction with regard to the future dealing with the property, and indeed the Vice-Chancellor has granted such an injunction; but the primary remedy here in respect of this particular transaction is, in my judgment, that the plaintiff should have damages against the Thorntons for the breach of the covenant not to let; and it seems to me, the letting standing, that no damages in respect of that can be recovered by the plaintiff against Grant. So much for the damages. With a slight modification of wording the direction as to damages can stand. It cannot quite stand, because it will be seen that there is a reference in that direction to an injunction, and, in my judgment, there is no need for an injunction here at all. There is nothing in the facts of this case to lead one to suppose that there will be a repetition of a letting of this sort. In all probability the form which the letting took was a mere slip, and if the parties had been well advised in the transaction the letting might very well have been in such words as would have limited the stationer's business to be carried on by Grant in such a way that it would not, even if there had been an express letting, constitute a breach

of the covenant not to let any part of the arcade for the business mentioned in the agreement. Under those circumstances probably no injunction will be necessary. There only need be liberty to apply in case (which is very improbable) any attempt at any such further letting should be made; and we can make a declaration simply that the letting to Grant was a breach of the clause in the agreement by the Thorntons with the plaintiff not to let for the business before-mentioned in that agreement, and then grant an inquiry as to what damages have been sustained by the breach. I only wish to add that the damages will be really larger or smaller according as the Thorntons choose to mitigate them. For all that I can see, they are in a position as between themselves and Grant in which they can do so.

ROMER, L.J.—The parties here certainly raise, to my mind, a very puzzling question; but the conclusion I have come to is that, at any rate, the Thorntons must be held to have committed a breach of their agreement with the plaintiff. The trade or business referred to in the agreement with the plaintiff appears to be one of what I may call an aggregate kind—that is to say, it consists of several heads, which are detailed in the agreement, and amongst those heads I find "artistic and heraldic stationer" and "dealer in photographs." The conclusion that I have come to is that those references to the heads of the trade or business are all references to substantial portions of the trade or business regarded as a whole. One of those portions is that which is referred to in the words "artistic and heraldic stationer," and I cannot come to the conclusion that that was simply a mere accessory to another business—the business of a dealer in pictures—oil and water-colours. To my mind, it was an essential part of the business regarded as a whole, or, at any rate, a substantial portion. When the Thorntons entered into their agreement with Grant they expressly authorised him to carry on the business of a stationer generally. On the evidence it is reasonably clear that a stationer's business comprises more than the business which may be described under the head of "artistic and heraldic stationer"; but I gather that stationers would carry on a business which would include to a practical extent the business, if regarded as a separate business, of artistic and heraldic stationer; and, on the whole, I have come to the conclusion that the letting by the Thorntons to Grant was a letting to enable Grant to carry on a substantial portion of the trade or business referred to in the agreement with the plaintiff. That being so, it follows that there was a breach of the agreement by the landlords, and there is no doubt that some damages have resulted from that letting. The plaintiff therefore is entitled, I think, to a declaration that the letting to Grant was a breach of the contract with him, and to an inquiry as to damages. For the reasons given by my Lord it is clearly not a case where there was any necessity for an injunction with regard to future letting, but that, I think, shows the extent of the plaintiff's rights. I cannot see that he has established any right to make Grant liable in this action. The agreement by the Thorntons with the plaintiff was only not to let any of the other portions of the arcade for any trade or business

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referred to in that agreement. Nothing is said as to binding the property in the arcade generally with respect to user. On the face of it, the agreement is restricted to not letting. I suppose that, as was pointed out in *Kemp v. Bird* (*ubi sup.*), a somewhat similar case, such a covenant as that would not prevent the landlords themselves from carrying on in the arcade a business of any kind that they chose, or prevent them from selling the arcade and the purchaser from carrying on a similar business. It is clear from *Kemp v. Bird* that the court ought not, on the ground of presumed intention, to extend a covenant such as this beyond what on the face of it is the purpose of it. As was said by James, L.J. in that case: "Persons who are men of business, as they were here, are able to get protection and advice, and they must make their covenants express, so as to state what they really mean, and they cannot get a court of law or of equity to supply something which they have not stipulated for in order to get a benefit which is supposed to have been intended." That being so, finding here simply a covenant to restrain letting, what are the plaintiff's remedies if letting is purported to be made, or is made? If it is threatened, and it is an improper letting, he can apply for an injunction. It is possible, though we need not go into detail in considering it, that, even after a letting has been effected, if the tenant has notice express or implied (though probably he always would have implied notice), it may be that the plaintiff would be entitled to have the letting declared invalid as against him. That may be so, I need not consider it now; but beyond that his rights do not extend. I find nothing which enables him to say: "There is a letting; I do not apply to set aside that letting; I do not apply to prevent it. It is effective, and it is there, and I am not coming to set it aside; but, assuming that letting is a good letting and stands, I now ask the court to hold that the tenant cannot use the property under his tenancy except subject to a particular limitation." I can find nothing in the agreement with the plaintiff which enables the court to give effect to that, and in that respect I think we are bound by the principle of the decision in *Kemp v. Bird* (*ubi sup.*). The plaintiff here does not seek any relief in the way of preventing the letting or the repetition of the letting as against him. On the contrary, he comes here and asks for damages against the Thorntons on the footing that there has been a letting, and no doubt he will seek to establish substantial damages on the very ground that the letting has allowed Grant to carry on the business he is carrying on, and which he cannot be stopped doing—at least, that will be so decided by this appeal. It appears therefore that the plaintiff here has no remedy against Grant. He cannot attack him as being bound by any restrictive covenants affecting the user of the premises during his tenancy; and, of course, he not being a person who has contracted with the plaintiff, Grant cannot be sued for breach of covenant. Under those circumstances there can be no damages, it appears to me, as against Grant, and the action against him ought to have been dismissed with costs.

STIRLING, L.J.—I am of the same opinion. I agree with the Vice-Chancellor as to the construction which he has put upon the clause in the agreement which has been entered into between

the Thorntons and the plaintiff, and for the reasons which he has given and which my brothers have given. To those I cannot usefully add anything; but I should like to say one word upon the case as regards Messrs. Grant. As regards them the case is based upon the stipulation in the agreement with the plaintiff that the Thorntons would not let any other portion of the arcade for the purpose of the trade or business mentioned to be carried on by the plaintiff. We are really asked to read that as if it were a stipulation that the Thorntons would not let or use any other portion of the arcade for such a purpose. In my opinion that is not the fair construction of the covenant. I say so for the same reasons as were given by Fry, J. in *Kemp v. Bird* (*ubi sup.*) with regard to the covenant in that case—namely, that the covenant as it stands is perfectly intelligible and reasonable. In the second place, the construction contended for by the plaintiff creates a much wider obligation than is imported by the strict words of the covenant. The lessors might, upon my reading of the covenant, either themselves carry on the same business as the plaintiff upon another part of the arcade, or they might have sold part of the arcade for that purpose. That being so, and the covenant being, as it stands, intelligible and reasonable, it does not appear to me that there is any reason for reading it as extending to include not merely the letting, but the user, of the other portions of the arcade. I may point out that if, as I think, that is the true construction of the agreement in this case, the assigns of Messrs. Thornton are bound, and those include a lessee, still the same objection arises, because the only obligation upon such an assign is not to let a portion of the premises, and he is not prohibited from using them. It seems to me, therefore, that the relief which the Vice-Chancellor has granted is not exactly that to which the plaintiff is entitled. It may be that the plaintiff in this case has failed to protect himself to the extent which he desired, but that does not appear to me a sufficient reason for altering what is the plain construction, in my judgment, of the covenant.

Solicitors for the appellants: *Bremner, Sons, and Corlett*, Liverpool.

Solicitors for the respondents: *Sharpe, Parkers, Pritchards, Barham, and Lawford*, agents for *Charles Garnett*, Liverpool.

Saturday, Dec. 19, 1903.

(Before WILLIAMS and STIRLING, L.JJ.)

Re SAFETY EXPLOSIVES LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up—Proof of debt—Amendment—Solicitor—Lien—Omission to value security—"Inadvertence"—Companies Act 1890 (53 & 54 Vict. c. 63), sched. 1, clause 8.

The solicitor of a company in liquidation had a claim against it for costs, and claimed a lien for them on certain documents in his possession. He sent in a proof for the costs in the winding-up, stating he held no security for the debt, and voted at a meeting of the creditors in respect of the whole debt.

He afterwards acted for the liquidator in com-

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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pleting the sale of the company's property, and on completion received the purchase money and handed over the title deeds to the purchaser, without any express bargain with the liquidator that he should retain the benefit of the lien. He then claimed to retain the debt out of the purchase money, and applied for liberty to amend the proof by stating the security and the estimated value of it, or, in the alternative, to withdraw the proof and rely on the security for payment.

It appeared that the proof was made out by a clerk who was unaware of the existence of the lien, and that the solicitor, being told by the clerk that the proof was in order, signed and swore it, the statement in it that he held no security for the debt having escaped his attention.

Held, that under the circumstances leave ought not to be given to amend or withdraw the proof, as, even if "inadvertence" was proved, in the interval between the carrying in of the proof and the application for leave to amend the position of all parties, and of the liquidator in particular, had been altered.

Decision of Buckley, J. reversed.

The statement by Williams, I.J. in Ex parte Clarke (67 L. T. Rep. 232, 233) as to what constitutes "inadvertence" adhered to.

On the 5th Aug. 1902 an order was made for the compulsory winding-up of a company called the Safety Explosives Limited. At that date a large sum was due from the company to their solicitors, Messrs. Cox and Lafone. Cox and Lafone then had in their possession the title deeds of the freehold and leasehold properties of the company, some letters patent and certain documents conferring patent rights on the company, and a policy of insurance which had been assigned to the company, and on these documents they had a lien in respect of the costs due to them from the company.

A proof for the debt claimed by Cox and Lafone, showing the sum of 809*l.* 12*s.* 5*d.* was due to them, was sworn by G. Cox, one of the partners, and the proof stated the firm were unsecured creditors. Afterwards one of their clerks, as their proxy, voted at a meeting of creditors on the footing that they were unsecured creditors for the whole amount.

In Dec. 1902 the official liquidator sold by tender the whole of the company's property, consisting of freeholds, leaseholds, patent rights, machinery, plant, stock-in-trade, and the policy of insurance, for 3600*l.*, and Cox and Lafone acted as the liquidator's solicitors in the matter. The sale was completed on the 4th Feb. 1903, and Cox and Lafone handed over to the purchaser the title deeds and other documents on which they had a lien, and the purchase money was handed to them. They claimed to retain out of this sum the above-mentioned sum of 809*l.* 12*s.* 5*d.*, and 15*l.* 0*s.* 4*d.*, the costs due to them by the liquidator in the winding-up, and sent him a cheque for the balance. There was no express bargain between Cox and Lafone and the liquidator that they should retain the benefit of their lien though they handed over the deeds, nor did they inform him that they claimed the same right to payment as if they had retained possession of the deeds.

The liquidator contended that they had waived their lien, and had had no right to make the deduc-

tion from the purchase money; and on the 21st May 1903 Cox and Lafone took out a summons under clause 8 of the first schedule to the Companies Winding-up Act 1890 asking for leave, at their own expense, to amend their proof by inserting therein the particulars of their security and the value at which they estimated it; or, in the alternative, to withdraw their proof and rely on their security for payment of their debt due to them by the company. In support of this summons G. Cox made an affidavit in which he said that when a form of proof of the debt was sent to him by the liquidator he handed it to one of his clerks named Moore, with instructions to do what was necessary, but did not inform him that the firm had the title deeds and other documents of the company in their possession; that Moore afterwards placed before him the form of proof filled in and also a general form of proxy; that he inquired of Moore whether the proof and proxy were in order, and that, on being assured by him that they were, he swore the proof and signed the proxy and gave them to Moore. He continued:

In so doing I had the most perfect confidence that the documents had been correctly and carefully prepared in every detail. No question of security for the said debt was mentioned to me by Moore, and it entirely escaped my attention when I signed and swore the said proof that as prepared it purported to state that my firm held no security for the debt due to my firm by the company. Neither I nor my partner ever had the slightest intention of surrendering or abandoning the lien to which my firm was entitled on the company's deeds and documents in my firm's possession. We were not aware until some months afterwards that the said proof had been sworn in such terms as to make it appear that we did not hold the said security, and, as appears from the correspondence hereinafter referred to, my firm continued to act in all respects on the footing and assumption that it still held the said lien and security.

One of the letters in the correspondence there referred to was from the liquidator to Cox and Lafone, dated the 2nd Jan. 1903, in which he stated that the insurance company had given him notice that a bonus was due on the policy of insurance, and requested Cox and Lafone to let him have certain of the papers that he might post them on to the insurance company. In reply to this letter Cox and Lafone wrote on the 5th Jan.: "We have now looked up the documents mentioned in your letter of the 2nd inst. Having regard to the fact that we look to our lien on those and the other documents as security for our debt, we suggest that the better plan will be for us to register the two assignments with" the insurance company.

Moore made an affidavit stating that at the time when he prepared the proof he was quite unaware that his principals had the title deeds and other documents of the company in their possession and were entitled to a lien on them, and he assumed that the debt was unsecured; and he confirmed the account given by G. Cox of what took place between them. G. Cox made a further affidavit in which he said that at the commencement of the liquidation a loss to creditors was not anticipated, and the official receiver stated at the meetings, and it was expected, that the company's assets would be more than sufficient for payment of the creditors in full. However, when the assets were realised, it appeared that they were insufficient.

Buckley J. held inadvertence had been proved, and made the order asked by the summons.

Clause 8 of sched. 1 of the Companies (Winding-up) Act 1890 provides:

For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the court on application is satisfied that the omission to value the security has arisen from inadvertence.

The liquidator appealed.

Herbert Reed, K.C. and E. O. Simpson for the appellant.—The order of Buckley J. was wrong. The solicitors have parted with the documents, and have therefore lost their lien. The appellants have not proved "inadvertence" with regard to the proof. Negligence is not inadvertence. The order asked for, if made, would, under the circumstances, be illusory, and the court will therefore not make it:

Re Henry Lister and Co. Limited, 67 L. T. Rep. 180; (1892) 2 Ch. 417, 420.

The position of the parties has been altered, and therefore no order should be made:

Re Newton, (1896) 2 Q. B. 403, 406.

Gore-Browne, K.C. and Muir Mackenzie for the solicitors.—The meaning of "inadvertence" was explained by Williams, J. in *Ex parte Clarke* (67 L. T. Rep. 232; affirmed on appeal, p. 465). There he said (p. 233): "In my opinion the meaning of the rule is that the creditor who has voted and has omitted to value his security ought always to be allowed to withdraw his proof and to be relieved from being deemed to have surrendered his security unless he has elected really to abandon his security; that is, unless he has omitted to do that which he did omit, deliberately and on purpose. If it has been done accidentally, he ought, on such terms as the court may think fit to impose, to be relieved from the loss of his security." There was inadvertence here, and therefore there was no surrender of the security:

Re Piers, 78 L. T. Rep. 314; (1898) 1 Q. B. 627.

If the amendment of the proof is allowed, it will only allow the lien to be set up, and will not affect any question which the liquidator can raise with reference to it. It is not sufficient for the liquidator to show that he acted in a manner consistent with the proof; he must show that he altered his position in reliance on there being no lien. [WILLIAMS, L.J. referred to *Re Hawkes*, 78 L. T. Rep. 336; (1898) 2 Ch. 1, 16.]

WILLIAMS, L.J.—In my judgment this appeal ought to be allowed, and an order ought not to be made allowing these gentlemen to amend or withdraw their proof. I must not be understood to say that they could not withdraw their proof for the purpose of correcting an inaccurate statement in it. I do not suppose the liquidator would have any objection at all to their doing so with that object. But in my judgment they ought not now to be allowed to withdraw their proof for the purpose of relying on their lien. It is admitted that they wish to amend their proof for the very purpose of justifying their retention of the 809*l.* by virtue of

their lien; and it is also an admitted part of the case that there was not any express bargain made between the liquidator and the appellants that they should retain the benefit of their lien. Now, what have we to do in a case like this? We have first to apply clause 8 of the first schedule to the Companies (Winding-up) Act 1890. [His Lordship then read that clause, and continued:] I do not desire in the slightest degree to depart from what I said in *Ex parte Clarke*; *Re Burr* (*ubi sup.*) as to what constitutes "inadvertence." I mentioned there, amongst things which could not constitute "inadvertence," a case where the creditor, feeling the dangers and disadvantages of valuing his security, elects not to amend. That is not this case; but I have been left by the affidavit of Mr. Cox in a most uncertain frame of mind as to what were the circumstances under which he failed to mention his security in his proof. [His Lordship then referred to the affidavit stated above, and continued:] I can only say that it is quite consistent with the statement that he was unaware that the proof purported to state that his firm had no security for the debt, and that he remembered at that moment the fact that his firm had security. Now, if he remembered that his firm had security, he might well have been quite unaware of the statement in the proof that he had none, and yet have been of opinion that it was not worth while to trouble about the security as the estate was likely to yield 20*s.* in the pound; and that, if necessary, there would be time enough afterwards to amend the proof and state the security and its value. There is nothing in the affidavit which excludes that state of mind on the part of Mr. Cox. Now, if that was his state of mind, it would not be true to say that he omitted to state the security in the proof by "inadvertence" within the meaning of clause 8. Now, Buckley J. arrived at the conclusion that this proof omitted to state the security, and of course to value it, by inadvertence; but the attention of Buckley J. does not seem to have been called to the fact that the statement in the affidavit is open to the comment that I have made upon it. Besides, the later affidavit of Mr. Cox, although he does not mention the state of the assets as the reason for omitting to value his security, does show conclusively that this frame of mind continued down to the time of his swearing that proof; that is to say, he continued to take the view that 20*s.* in the pound would be obtained. I do not think that Mr. Cox, by that affidavit, satisfies the onus that was clearly on him of showing that the statement as to the security was omitted by inadvertence. I will now deal with the case upon the assumption that the proper view to take of Mr. Cox's affidavit is that it was omitted by inadvertence. But if it is, what is the state of things? A debt is due to solicitors from their client, the company, and they are relying upon a lien which has arisen during the time they were retained by the company, not by the liquidator. In the course of this liquidation it became necessary to realise the assets of the company, and Cox and Lafone were acting for the liquidator in the matter of this realisation of the assets. They put in a proof which negatived their having any lien for their debt, and they allowed their client to invite tenders for the sale of the assets, including portions of the property of which the firm hold

the title deeds. They allowed their client to do that without in the slightest degree warning him that, when he came to realise that part of the property of which the firm held the title deeds, there would be a difficulty in carrying out the entirety of the contract unless 20s. in the pound was paid to them in respect of their bill of costs. I can only say that such conduct by the solicitors was perfectly consistent with the proof that had been put in on behalf of the firm—a proof which was, of course, within the knowledge of the liquidator. After these tenders had been sent out a letter is written by the liquidator on the 2nd Jan. to Cox and Lafone, which runs thus: [His Lordship read that letter and the answer of the 5th Jan., and continued:] Now, in that letter of the 5th Jan. there is an allegation by Cox and Lafone of their lien, although the actual exercise of it is limited to that policy of insurance. As a matter of fact that policy was included in the property which was ultimately sold, although not apparently in terms. The letter did not in any way refer either to the proof or to the lien, so as to make it appear that the latter would in any way interfere with the carrying out of the contract. It is suggested that it is impossible that the liquidator in that state of things, after the receipt of that letter, could have acted upon the assumption that the proof as put in was in accordance with the facts and in accordance with the position taken up by Cox and Lafone. I do not agree. I can well conceive the liquidator receiving that letter without in the slightest degree realising that such a lien was claimed by these gentlemen as would interfere with the carrying out of the contract for the sale. It seems to me that these solicitors were actuated all the way through by a confident feeling that 20s. in the pound would be paid, and under those circumstances they did not call the attention of the liquidator to the fact that they were insisting upon this lien which would stand in the way of the completion of the sale. Now, the sale took place and the deeds were handed over by the solicitors to the purchasers. The obvious duty of the solicitors, if they meant to rely upon this lien, was, before they handed over the deeds, to call the attention of the liquidator to the lien, and ask him whether he had any objection to their retaining the benefit of their lien notwithstanding that the deeds were handed over to the purchaser. But nothing of that sort took place. In that state of things the sale went through, and the deeds were handed to the purchaser. The solicitors now come to us asking for leave to amend or withdraw their proof. I think that leave ought not to be given, because the solicitors' object in amending the proof is to set up a state of things which is inconsistent with their own proof that was on the file at the time of the carrying through of this sale, and is inconsistent also with their own action at the time of the sale. Counsel for the solicitors did not deny the proposition that the amendment of a proof ought not to be allowed if the position of the parties has been altered after that proof has been put upon the file, and while it remains there, if the liquidator has altered his position on the basis of that proof; but a distinction was drawn, and it was said it was not sufficient to show that the solicitors or the liquidator, as the case may be, has acted in a manner which is consistent with

the proof as it then stood, but it must be shown that he so acted because that proof was on the file. I do not agree with that. It seems to me if one man allows a state of things to continue, and another acts in a way which can be supported if that state of things exists, but could not be supported unless that state of things did exist, that you ought not to allow the person who acts in that way to be prejudiced by altering a state of things which existed at the time when he so acted. It seems to me it would be wrong to throw upon the liquidator the obligation of showing that he relied upon the proof. Whether the proof was or was not actually present to his mind, he was dealing with the property on the basis that these solicitors had no lien. I think it is plain the liquidator did deal with the property upon the basis that there was no lien at all upon it. I think the whole conduct of the solicitors, apart from the letter of the 5th Jan., was such as to induce him to suppose that there was no lien which the solicitors could enforce which could stand in the way of the completion of the sale and purchase; and I think that under those circumstances we ought not to allow the solicitors now to amend the proof. Therefore, in my opinion, this appeal should be allowed: first, on the ground that Mr. Cox has not satisfied the onus which was upon him of showing this proof was sworn by inadvertence. I have no doubt it was sworn by inadvertence, so far as Mr. Cox was aware that it stated there was no security; but I am not satisfied that Mr. Cox had not present to his mind that his firm had that security. Secondly, I am of opinion that amendment ought not to be allowed in a case where the liquidator has acted in a way which was consistent with the facts mentioned in the proof, but which would be inconsistent with the suggestion that a lien existed which is now sought to be made. I think, under the circumstances, leave to amend ought not to be given, and that the appeal should be allowed.

STIRLING, L.J.—I am of the same opinion. The first point to be considered is whether the court is satisfied that the omission to state and value the security claimed by the solicitors took place by inadvertence. Now, for the reasons which have been given by my learned brother, the evidence appears to me, as it does to him, to be very unsatisfactory; but I am not prepared to say that inadvertence has not been made out, though I agree with my Lord's criticisms of the affidavit. I prefer to rest my decision on the ground that the granting of leave to amend or to withdraw a proof is not a matter of right, but is subject to the control of the court, and ought not to be given in a case where, in the interval between the date when the proof is carried in and the application for leave to amend it, the position of all parties, and of the liquidator in particular, has been altered. Now, what took place here was this. The creditors in the present case are solicitors, and they had been solicitors to the company which is being wound-up, and had due to them costs to the amount of over 800l. in respect of their services, which were provable in the winding-up. They had in their office certain deeds and documents belonging to the company, and the liquidator appointed in the winding-up appointed them his solicitors, and amongst other things upon which they were called upon to advise

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the liquidator was the sale of the property of the company. The property consisted of a patent; freeholds and leaseholds on which were plant and machinery, fixed and movable; and, lastly, stock-in-trade. Now, that being the state of things, the solicitors had a lien on the documents belonging to the company for the debt due to them by the company. I cannot help thinking there has been some misapprehension by the parties as to the nature of the solicitors' right. It seems to have been imagined that the lien on the documents gave the solicitors a charge or security on the property to which the documents related; but I need not say that is an entire misapprehension. The solicitors' lien simply entitled them to retain those documents in their hands until they received payment of what was due to them as solicitors. Now, that being so, the solicitors advised the liquidator with reference to this sale, and it seems to me it was their duty to tell the liquidator plainly what rights they had in respect of these documents. They ought to have told him, "You have to sell this property, but you must remember we cannot complete this sale without payment of our costs, and we will not part with the deeds unless and until we are paid all that is due to us from the company." Then the liquidator would have been in a position to consider what he should do, and it would have been a most important thing for him to consider how he should sell the property. The patents, for example, which, as I understand, were in the possession of the solicitors, would undoubtedly affect the title to some of the assets of the company. The title of the leaseholds, again, would be affected by the lease. As regards the fixed plant, the machinery and stock-in-trade, that would be entirely unaffected. Now, that question has arisen, not only on the sale of estates, but in the winding-up of companies; and usually either an arrangement is made as between the solicitor and the trustee or liquidator by which the deeds are parted with, or, if the parties are unable to come to arrangements between themselves, the matter must be brought before the court. In some cases it might be that the sale could go on practically without the title deeds being produced at all, and the liquidator would simply obtain an order authorising him to put the property up for sale with conditions such as would dispense with the necessity of handing over to the purchaser the deeds to which the purchaser would otherwise be entitled. That is all. It sometimes happens a sale is allowed to go on on condition that a certain amount of the purchase money shall be set aside to meet the claims of the solicitor, but that is a matter of arrangement between the parties themselves, or an arrangement made under the direction of the court. It is admitted that no arrangement of any kind has been made in the present case. The whole of the company's property was put up for sale, both that to which the title deeds related and that to which they did not. The sale took place and was completed, and the solicitors handed over the deeds to the purchaser without any condition, and, having done that, they seek to retain the amount for which they had a lien out of the purchase money; and they ask the court to assist them in making good their claim, and allow them to withdraw or amend their proof. I think under the circumstances they should not be allowed to do so, and the appeal will be allowed.

WILLIAMS, L.J.—I omitted to say that I agree with Mr. Reed's argument that an order giving leave to amend or withdraw the proof would, under the circumstances, be illusory.

Solicitors: *Helder, Roberts, and Co.; Cox and Lafone.*

Feb. 5, 6, and 10.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

BAILY v. BRITISH EQUITABLE ASSURANCE COMPANY. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Alteration of regulations—Assurance company constituted by deed of settlement—Policy participating in profits—Registration under Companies Acts—Power of company to alter rights of policy-holder—Companies Act 1862 (25 & 26 Vict. c. 89), ss. 50, 209—Companies (Memorandum of Association) Act 1890 (53 & 54 Vict. c. 62), s. 1.

An insurance company was constituted in 1854 by a deed of settlement providing that the profits were to be divided in manner directed by the by-laws, and that any provisions of the deed and any by-law might be altered by a by-law.

In 1854 by-laws were made which provided that profits arising from the participating branch should be divided among the policy-holders in that department.

In 1886 the plaintiff effected a policy on his own life in the participating branch, relying on the statement in a prospectus of the company that the entire profits in the mutual department were divided among the policy-holders without any deduction for a reserve fund; and he paid a higher premium in consequence under a table given in the prospectus which was to assure a sum payable at death, "with profits in addition."

The policy contained a covenant by the company to pay the sum assured "and all such other sums (if any) as the company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being."

Profits were not otherwise expressly mentioned.

The company was afterwards registered under sect. 209 of the Companies Act 1862, and it was now proposed under the Companies (Memorandum of Association) Act 1890 to substitute a memorandum and articles of association for the deed of settlement, by which the directors would be empowered to appropriate 5 per cent. of all the profits (including those arising from the mutual department) to form a reserve fund.

Held, that there was a contract between the plaintiff and the company which the company could not alter either by a by-law, special resolution, or articles of association; that the word "practice" in the policy could not have so wide a meaning as to justify an alteration of the rights of, or the diversion of any part of the profits from, the participating policy-holders.

Decision of Kekewich J. affirmed.

The rights of a shareholder in respect of his shares.

(a) Reported by W. C. BIAS Esq., Barrister-at-Law.

except so far as they may be protected by the memorandum of association, are by statute made liable to alteration by special resolution, but the case of a contract between an outsider and the company is entirely different, and even a shareholder must be regarded as an outsider in so far as he contracts with the company otherwise than in respect of his shares.

Punt v. Symons and Co. Limited (89 L. T. Rep. 525, 528; (1903) 2 Ch. 506, 514) not followed on that point.

Allen v. Gold Reefs of West Africa (82 L. T. Rep. 210; (1900) 1 Ch. 656) distinguished.

THIS action was brought by a participating policy-holder in the defendant company, on behalf of himself and all other the participating policy-holders, claiming a declaration that the company was not entitled to pay, apply, or dispose of any profits arising from the mutual and participating branch of its business, either in the formation of a reserve fund, or to shareholders, or otherwise than by distributing the same amongst the holders of participating policies, or in accordance with the company's by-laws of 1854; and an injunction to restrain the company from paying or applying any such profits contrary to such declaration.

The defendant company was constituted under the Joint Stock Companies Registration Act 1844 (7 & 8 Vict. c. 119) by a deed of settlement dated the 15th July 1854 for the purpose of carrying on the business of a life and fire assurance company and of an annuity endowment reversionary interest and loan association, and was afterwards duly registered under the provisions of sect. 209 of the Companies Act 1862 as an unlimited company.

By clause 9 the profits were to be ascertained and divided in a manner to be directed by a by-law or by-laws. By clause 24 power was given to the company by extraordinary general meeting to make by-laws. Clause 56 provided that any provisions of the deed of settlement and any bye-law might be altered, repealed, or suspended by a by-law or by-laws, but not otherwise.

The company made by-laws from time to time, and those passed in 1854 contained the following provisions:

(2) That in the beginning of January and July in each year a calculation shall be made of interest upon the amount paid up in respect of each share in the company at the rate of 7½ per cent. per annum up to the next preceding 31st day of December and the 30th day of June respectively, and such interest shall at some time in the months of January and July, to be fixed by the directors for that purpose, be payable to the holders of the shares out of the profits of the company only at the company's chief offices for the time being, but every shareholder shall be entitled to receive interest only from the time of the actual payment of the amount so paid up, notwithstanding the payment by any shareholder of interest for the time any call was in arrear. (3) That in the month of January in the year 1858 and in every subsequent third year a general valuation and calculation shall be made of the whole assets and liabilities of the company, and, after carrying forward such portions (if any) of the expenses of establishing the company as the directors shall consider equitable, the net profits of the company's business shall be ascertained by the actuary under the direction of the board of directors. (4) That in the month of January in the respective years last aforesaid a calculation shall be made by the actuary of the profits that

have arisen in the departments of business in which the assured are to be entitled to participate in profits, and in such calculation a fair proportion of the interest hereinbefore directed to be paid and of the other expenses of the company shall be charged upon such last-mentioned departments, and the profits so ascertained to have arisen from the said last-mentioned departments of business shall be set apart and divided amongst the policy-holders in such departments by the actuary under the superintendence of the directors, and the remainder of the profits of the company shall be divided amongst the shareholders according to the amount of shares held by each, and be paid to them along with the next half-yearly dividend.

By the by-laws of 1893, a quinquennial valuation and ascertainment of profits and a like quinquennial division of profits between policy-holders were substituted for the triennial valuation ascertainment and division of profits prescribed by the by-laws of 1854. From 1862 until after the date of the plaintiff's policies the company issued prospectuses inviting the public to become policy-holders in the company upon the terms therein stated. These prospectuses contained (*inter alia*) the following statements:

The British Equitable Assurance Company affords the public advantages unattainable elsewhere.

Mutual Life Insurance Department.—In ordinary mutual societies the public sustain the following disadvantages, which are here avoided: (1) Each assurer in such societies is personally liable for the entire engagements of the society; (2) the policy-holder in such societies loses a large portion of his profits to form a reserve fund, which is in fact so much property taken from his family and put into the pockets of foreign parties; (3) The frequent alterations of the constitution of such societies involve considerable risk to the policy-holders. In the British Equitable Assurance Company these defects are avoided. (1) Complete security is given to every policy-holder absolutely without responsibility; (2) the current expenses of working the company are assessed rateably on the premiums received in the mutual life assurance department and the general premiums and the entire profits made by the company in the mutual department, after deducting the expenses, are divided among the policy-holders without any deduction for a reserve fund. The policy-holders are thus placed in as good a position the moment they enter the company as if they had been ten years in most other societies. The profits are divided every three years.

In Jan. 1886 the plaintiff, having seen a prospectus of the company and relying on these statements, applied for and obtained two participating policies on his own life for 400*l.* and 350*l.* respectively, dated 30th Jan. 1886, and he had since paid all the premiums necessary for keeping the policies on foot. By these two policies the company covenanted with the plaintiff, after the expiration of one calendar month after satisfactory proof of his death, to pay to his executors or administrators the respective sums of 400*l.* and 350*l.*, "and all such other sums (if any) as the said company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being." These policies were in the common form then used by the company in like cases.

The statements above mentioned were printed on the back of the form of proposal which the plaintiff signed and formed the basis of his application. The proposal was to insure under table A, which gave the "annual" premiums to assure a

sum of money at death, with profits in addition; and at the foot was, "The entire profits divided triennially."

On the 4th July 1903 the company was registered as a limited company under the Companies Acts 1862 to 1900, with a memorandum and articles of association in the place of the deed of settlement. The memorandum and articles had been approved by special resolutions of the company, and a petition for the approval of the court under the Companies (Memorandum of Association) Act 1890 (53 & 54 Vict. c. 62) was pending.

The plaintiff alleged that the effect of the proposed articles would be to alter the existing system of profit sharing by the plaintiff and other participating policy-holders, and to deprive them to some extent of the rights theretofore enjoyed by them; that the purport of the proposed articles was that 5 per cent. of the profits of the company's business, including the profits arising from the departments of business in which the assured were entitled to participate in profits, would be set aside to form a reserve fund, until such fund amounted to 37,500*l.*; that a fixed annual dividend of 2*s.* 6*d.* per share should be paid to the shareholders out of the profits of the company, and there should be carried to the credit of the shareholders' profit account a bonus equal to 5 per cent. of the divisible profits of the life assurance branch of the company's business; and that subject thereto, unless and until otherwise determined by the company in general meeting, the divisible profits of the whole of the company's business should be carried to the credit of the life assurance branch, and to such fund thereof as the directors should determine; that this scheme, if carried into effect, would deprive the participating policy-holders of 10 per cent. until the proposed reserve fund so to be formed amounted to 37,500*l.*, and after that of 5 per cent. of the profits which under the former scheme would have been paid to them, and would enable the directors to divert the whole or any part of the profits to some other fund; and that the proposed scheme was contrary to the terms upon which the plaintiff and other participating shareholders effected their assurances with the company, and to the statements contained in the prospectus, and was a breach of the contract contained in and forming the basis of the policies.

By the statement of defence the company alleged that the plaintiff had knowledge or notice of the constitution and of the rules and regulations of the company, which included power from time to time to make alterations and amendments thereof by means of by-laws; and that the proposed alteration in the method of distributing the profits was a fair, honest, and businesslike modification thereof, carried out in a manner permitted by the constitution of the company, and that the policy-holders would be very largely benefited by it.

Kekewich, J. expressed an opinion that the company were acting in good faith, but he held that the representation in the prospectus must be regarded as part of the contract with the policy-holders, and in his Lordship's opinion there was a contract with the participating policy-holders that there should be no reserve fund, but that the whole of the profits arising from the mutual department, less certain deductions for

working expenses, should be divisible among the policy-holders, and he made a declaration that the company ought to continue to distribute the entire profits accordingly.

The company appealed.

It was agreed between the parties that the question upon which the decision of the court was desired was whether, having regard to the contractual relations between the company and the participating policy-holders, the company was at liberty to alter the provisions of by-law 4 of the by-laws of 1854 in such a manner as to alter the rights of those policy-holders to profits under the by-law.

Warrington, K.C. and Whinney for the appellant company.—The contract is to be found in the policy, and that contract is to pay the amount assured and such other sums as the directors may have ordered to be added "according to their practice for the time being." The words "for the time being" show that it was contemplated that this practice might differ from time to time, and therefore the proposed alteration will not be a breach of contract. Under the deed of settlement there was power to alter the by-laws from time to time. The contract contained in the policy is not affected by the statements in the prospectus. There is nothing which binds the company not to create a reserve fund. The policy, which is the contract between the parties, is not silent on the subject; therefore the prospectus cannot be treated as a collateral agreement. *Erskine v. Adeane* (29 L. T. Rep. 234; L. Rep. 8 Ch. App. 756) was a different case. There a lease was executed on the faith of a separate agreement. The company can only contract in a particular way—that is, under seal—and the policy is the only document under seal. If the appellant is right, the policies could be varied by informal transactions entered into before they were granted. The deed of settlement authorises the directors to grant policies—not to make special agreements with various policy-holders:

Pipe v. City and Suburban Permanent Building Society, 68 L. T. Rep. 846; (1893) 2 Ch. 311;

Allen v. Gold Reefs of West Africa, 82 L. T. Rep. 210; (1900) 1 Ch. 656;

Punt v. Symons and Co. Limited, 89 L. T. Rep. 525; (1903) 2 Ch. 506.

It does not follow that the formation of a reserve fund will decrease the profits; it may well be that they will be increased by the increase of the number of policies.

P. O. Lawrence, K.C. and Gatey for the plaintiff.—The company may have a power to make some alterations in the provisions of the deed of settlement, but they have no power to create a reserve fund by taking some of the profits from the participating policy-holders. They now propose to do what in the prospectus they pointed out is the vice of other companies. The respondent made his proposal for a policy under table A of the company's tables, and has paid a higher premium to secure those benefits. Neither of the cases cited apply here, as in this case the policy was applied for on the faith of the prospectus. If no profit was earned, the directors, of course, would not order any sum to be added, nor probably would they if, according to actuarial calculations, there would be no profit. The word "practice" cannot be con-

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strued so widely as to permit the company to do what is proposed. If there are any profits in this branch the participating policy-holders are entitled to have them. The court will not allow the company to break the contract they have made. In the cases referred to, the companies had been incorporated under the Companies Acts, and there was power to alter the articles of association under sect. 50 of the Act of 1862. But in this case there is a deed of settlement, and there is no statutory right to alter the rights of the participating shareholders in the way proposed :

Kearns v. Leaf, 1 H. & M. 681.

Warrington in reply.—This company was registered under sect. 209 of the Companies Act 1862, and under sect. 196 the deed of settlement is to be deemed to contain the conditions and regulations of the company in the same manner and with the same incidents as if they were contained in a memorandum and articles of association; and sect. 50 gives any company within the Act power to alter the articles by a special resolution. The company therefore has power by special resolution to alter any provisions in the deed of settlement and any by-law, and the plaintiff is seeking to prevent the company from exercising its statutory power :

Re European Assurance Society; Ramsay's case, 35 L. T. Rep. 654; 3 Ch. Div. 388;

Re English and Irish Church and University Assurance Society, 8 L. T. Rep. 724; 1 H. & M. 85, 104.

Cur. adv. vult.

Feb. 10.—COZENS-HARDY, L.J. read the judgment of the court as follows :—This is an appeal from the judgment of Kekewich, J., who has in effect held that the profits attributable to the participating policy branch of the company's business, after certain undisputed deductions, ought to continue to be paid to the holders of participating policies, and ought not to be applied to the creation of a reserve fund or for any other purpose. The defendant company was originally constituted under a deed of settlement in 1854. By clause 9 the profits were to be ascertained and divided in manner directed by a by-law or by-laws. And by clause 56 any provisions of the deed of settlement and any by-law might be altered, repealed, or suspended by a by-law. By-laws were duly passed by the company in 1854. [His Lordship read the by-laws 2, 3, and 4 of 1854, above stated, and continued :] These by-laws, so far as material for the present purpose, were in force in 1886, when the plaintiff effected two policies in the mutual or participating branch of the defendant company. It is admitted that the plaintiff relied upon the statements contained in a prospectus issued by the company, in which the special advantages of the mutual or participating policies are set forth in emphatic language—*e.g.*, Whereas in ordinary mutual societies the policy-holder loses a large portion of his profits to form a reserve fund, the entire profits in the defendants' mutual department are divided among the policy-holders, without any deduction for a reserve fund. The proposal, which was not before Kekewich, J., but which has been admitted in evidence before us, shows that it was for a sum "payable at death under table A." This language is intelligible by reference to the prospectus, which prints table A with the follow-

ing words at its head : "Annual premiums to assure a sum of money at death with profits in addition," and the following words at its foot : "The entire profits divided triennially." The premium payable in respect of a participating policy is, of course, higher than in respect of a non-participating policy. One of the questions in the proposal, applicable only to policies in the mutual department, was as follows : "XI.—Are any profits which may be declared to be appropriated by way of addition to the policy, or reduction from the future premiums, or making the policy payable during lifetime?" To which the plaintiff answered : "By way of addition." This proposal was accepted by the company. The actual policy as issued contained a covenant by the company to pay the full sum assured, "and all such other sums (if any) as the said company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being." The indorsed conditions mention the deed of settlement and the by-laws and the documents addressed to the company, which would include the proposal; but the words I have read are the only words in the policy itself expressly mentioning profits. It has been agreed that the only question upon which our judgment is desired is this—whether, having regard to the contractual relations between the company and the participating policy-holders, the company are at liberty to alter the provisions of by-law 4 of 1854 in such a manner as to alter the rights of those policy-holders to profits. This being so, it is not necessary to consider whether, apart from such agreement or admission, there would be any real difficulty in so far connecting the plaintiff's policy with the by-laws and with the prospectus as to identify it with the participating policy described in the prospectus. It must be assumed, therefore, that by-law No. 4 was originally applicable to this policy. Now, under this by-law it is for the directors, with the assistance of the actuary, to ascertain what (if any) are the profits of the participating branch, but the amount so ascertained "shall be set apart and divided amongst the policy-holders" in that department. The directors have no power under the by-law to apply any portion of those ascertained profits to the formation of a reserve fund or to the relief of the shareholders. It is, however, contended that as the company was registered under sect. 209 of the Companies Act 1862, it thereby acquired power by special resolution to alter all or any of the provisions of the deed of settlement, not being in the nature of a memorandum of association, and all or any of the by-laws, and that the plaintiff is seeking to restrain the company from altering by-law No. 4 in exercise of this statutory power. And it is said that, apart from the statute, the deed of settlement itself contained a power to alter the by-law, of which power the plaintiff had notice. I cannot assent to this argument. As between the members of a company and the company, no doubt this proposition is to some extent true. The rights of a shareholder in respect of his shares, except so far as they may be protected by the memorandum of association, are by statute made liable to be altered by special resolution : (see *Allen v. Gold Reefs of West Africa*, *ubi sup.*). But the case of a contract between an outsider

and the company is entirely different, and even a shareholder must be regarded as an outsider in so far as he contracts with the company otherwise than in respect of his shares. It would be dangerous to hold that in a contract of loan or a contract of service or a contract of insurance validly entered into by a company there is any greater power of variation of the rights and liabilities of the parties than would exist if, instead of the company, the contracting party had been an individual. A company cannot, by altering its articles, justify a breach of contract. But it is further contended that by the terms of the policy the company are only bound to pay such profits as the directors, "according to their practice for the time being," may order to be added, and that the directors may regulate their practice by reference to a special resolution creating a reserve fund. This argument really involves the proposition that it is competent to the directors to change a participating policy into a non-participating policy. The word "practice" cannot have such a wide meaning. It cannot justify an alteration of rights or the diversion of any part of the profits from the participating policy-holders. In the present case there was a contract for value between the plaintiff and the company relating to the future profits of a particular branch of the company's business, and the company ought not to be allowed, by special resolution or otherwise, to break that contract. The appeal must be dismissed.

Solicitors for all parties: *Henry Gover and Son.*

Friday, Feb. 19.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re CHAPMAN; PERKINS v. CHAPMAN. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Forfeiture clause—"Shall thenceforth cease and determine"—Alienation or bankruptcy—Marriage within certain degree of kindred, or without consent of trustees—Marriage between date of will and death of testator.

A testator declared that certain benefits given by the will to his sons and daughters should "thenceforth cease and determine" on alienation or bankruptcy, or if they married within a certain degree of kindred, and as to his daughters without the written consent of his trustees.

Between the date of the will and the death of the testator a daughter married within that degree.

Held (Cozens-Hardy, L.J. dissenting), that there was sufficient in the context of the will to show that the testator intended the provision as to forfeiture to apply only to marriages which took place after his death.

Decision of Kekewich, J. reversed.

Per Williams and Stirling, L.JJ.: The decision in Metcalfe v. Metcalfe (65 L. T. Rep. 426; (1891) 3 Ch. 1), in which it was held that a forfeiture clause took effect in the case of bankruptcy or alienation between the date of the will and the testator's death, applies only to the particular acts of forfeiture there considered.

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

EDWARD CHAPMAN by his will, dated the 24th March 1881, after making certain specific and pecuniary bequests, devised and bequeathed all his real and residuary personal estate to trustees upon trust to sell and convert the same, and to invest the net residue of the proceeds thereof, and to stand possessed of the said investments upon trust to apply the income thereof as therein directed until the date fixed by him for distribution. And he directed that at the date of distribution the investments and accumulations of income of his trust estate should be divided into as many equal shares as the number of his sons and daughters present and future (other than one daughter, whom he mentioned), who either died before the date of distribution leaving a child or children living at the date of distribution, or were living at the date of distribution, one such share to be allotted in respect of each such son and daughter, the share to be allotted in respect of each son and daughter dying before the date of distribution leaving a child or children living at that date to be in trust for such child or children as therein mentioned, and the share to be allotted in respect of each son living at the date of distribution to be in trust for such son absolutely, and the share to be allotted in respect of each daughter living at that date to be upon trust as to the income for the daughter for life without power of anticipation, and after her death to be upon trust for her children and remoter issue, and her brothers and sisters and their issue (other than the daughter before excluded), as she should appoint, and in default of appointment upon trust for her children or child as therein mentioned, with a gift over on the failure of the vesting of any share. And he declared—

That if any son or daughter of mine shall do or suffer any act whether by way of alienation, charge, or otherwise and including any act under any statutes of bankruptcy or for the relief of insolvent debtors for the time being by reason or means whereof any part or share of him or her in any income or capital of my said estate to or of which he or she shall not have already become entitled in possession or be for the time being actually entitled to the receipt shall or but for this present clause would become wholly or in part vested in or payable to any other person or persons, or if he or she shall contract any marriage forbidden by me as hereinafter expressed, then and in any such case his or her share, right, title, and interest of, in, and to my said trust estate and the income thereof shall thenceforth cease and determine, and my said trust estate shall thenceforth go and be held in such manner as the same would have been held if he or she had died before me without leaving any child or children living at my death. And I declare that the marriages forbidden by me are in the case of son or daughter marriage with a person of any degree of kindred unless more remote than third cousin and also in the case of a daughter marriage contracted without the previous written consent of the trustees or trustee for the time being of this my will, or if more than two of a majority of them.

On the 9th Nov. 1886 the appellant, one of the testator's daughters, married her first cousin.

The testator died on the 23rd Dec. 1902 without altering his will.

A summons was taken out by the daughter against the trustees of the will to have it declared whether or not she had by her marriage forfeited her share and interest in the testator's trust estate.

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The summons was heard by Kekewich J., who held that the case was within *Metcalf v. Metcalf* (65 L. T. Rep. 426; (1891) 3 Ch. 1), and the plaintiff, having married within the prohibited degree, had forfeited her share and interest in the testator's estate, and also that of her children.

The plaintiff appealed.

Upjohn, K.C. and *E. Clayton* for the appellant.—The whole will shows that the testator only intended this forfeiture to take place in the event of a marriage within the prohibited degree taking place after his death. In *Metcalf v. Metcalf* (65 L. T. Rep. 426; (1891) 3 Ch. 1) it was held that a forfeiture took place in the event of bankruptcy between the date of the will and the death of the testator, unless it had been annulled at the date of his death. The court there gave what Bowen L.J. called a non-natural meaning to this clause in order to give effect to what they considered the intention of the testator. But that rule ought not to be extended to a case like this. The clause should be interpreted differently here, where it refers to marriage, which is such a different thing to bankruptcy. The same words have been interpreted differently with regard to different subject-matters:

Forth v. Chapman, 1 P. Wms. 663, 667.

Here the husband might have died or the marriage might have been dissolved between the date of the will and the testator's death. The appellant could not be aware of this provision until after the death of the testator, and if the testator had intended that the clause should apply to this marriage he could have said so expressly in his will.

Levett, K.C. and *Iselin* for the respondents.—A will speaks from the death of the testator as to property only, and not as to other things:

Wills Act 1837 (1 Vict. c. 26), s. 24;

Bullock v. Bennett, 7 DeG. M. & G. 283, 285.

The will shows the testator intended that if any daughter at any time married within the prohibited degree, a forfeiture should take place. A testator using the word "shall" means from the date of the will, not after his death. If a child had become bankrupt after the date of the will, and the bankruptcy had not been annulled at the date of the testator's death, that child's interest under the will would have been forfeited:

Trappes v. Meredith, 26 L. T. Rep. 5; L. Rep. 7 Ch. App. 248;

Ancona v. Waddell, 40 L. T. Rep. 31; 10 Ch. Div. 157;

Metcalf v. Metcalf (*ubi sup.*).

The provision as to forfeiture both on bankruptcy and on a prohibited marriage is contained in one clause, and should be construed in the same manner as regards both of them.

W. A. Russell for the widow.

Upjohn, K.C. in reply.

WILLIAMS, L.J.—The question which we have to determine in this case is really from what date this will speaks *quā* the forfeiture clause. It was decided in *Bullock v. Bennett* (*ubi sup.*) that sect. 24 of the Wills Act 1837 has no application except so far as a will is speaking as to property; and everyone would agree, therefore, that in this case no argument can be founded upon that section, and we are left in the same position as we

should have been in before the Wills Act. Now, I go a step further than the decision in *Bullock v. Bennett*. There was an old rule before the Wills Act as to the time from which a will should speak with regard to personalty—namely, that it should speak from the death—I say again, as was decided in *Bullock v. Bennett* with regard to sect. 24 of the Wills Act 1837, that rule only applied to the property. Therefore we have to look at the will and see from what date it speaks. I rather feel that the true proposition is that where you have got the date of a will, either on the will or, possibly ascertained by evidence, when a testator uses words of futurity, *prima facie* those words should be read as speaking from the date of his making his will and not from the date of his death. It may be a strong presumption; but if there is a presumption one way or the other, I think that that is the more likely presumption. But I do not think that matters. We are entitled, and bound, to take this will and look at it and construe its clauses and see from what date the testator intended the words of futurity in this particular clause of this particular will to speak, and it seems to me that we have ample here to show that this testator intended that these acts of forfeiture to which he refers should be acts of forfeiture occurring after his death. I need not go through all the clauses again. We have heard very cogent arguments about them; but, speaking shortly, the two instances of user of words (there are a great many more than two) in this particular clause indicating that the testator intended that the acts of forfeiture should be acts of forfeiture after his death which struck me most as I heard them read were the words, "then and in any such case his or her share, right, title, and interest of, in, and to my said trust estate and the income thereof shall thenceforth cease and determine"; and the other words are the words relating to the consent of the trustees. Here we have one forfeiture clause, and I think that there is amply sufficient here to show that the testator meant that the acts of forfeiture should be acts taking place after his death. Now, if that is so, there is an end of the case, because, when one arrives at that construction, the necessary result has been determined. But I want to say a word or two about the cases. We have had our attention called to *Re Metcalf*; *Metcalf v. Metcalf*. That is a case decided in the Court of Appeal by Lindley, Bowen, and Fry, L.J.J. Lindley, L.J. begins his judgment by saying: "The first question on the appeal is whether the language of this forfeiture clause has any application to a bankruptcy which took place before the death of the testator. If we only look at the words of the clause, there would seem to be a difficulty in construing it so as to include a bankruptcy commencing before the testator's death—that is, before the will came into operation." In my judgment, what Lindley, L.J. means there is, that if you take in that case the words of the will, the words are such as to lead you to the conclusion that the testator intended the acts of forfeiture to be acts occurring after his death, and you find in the will in that case various things pointing to this intention of the testator, some of them resembling very much things which we find in this will. Take, for example, the provision that "my said trustees or trustee" (that means the trustees or trustee

of that will) "shall upon such act or default, or upon such operation of law as aforesaid, pay or apply." Having come to that conclusion, then the court proceeded to ask themselves whether the decision in *Trappes v. Meredith* (*ubi sup.*) applied—a decision which I understand to be one relating exclusively to the particular act of forfeiture constituted by alienation or by an act of bankruptcy; and they held that, notwithstanding the date from which the will was intended to speak, they were bound by the decision of the Court of Appeal in *Trappes v. Meredith*, overruling James, V.C., to hold that, at whatever time that particular act of forfeiture took place, whether antecedently to the date from which the forfeiture clause was to speak or subsequently to it, it was an act of forfeiture which would have deprived the legatee of the benefit of the estate. I do not think that that decision ought to be applied to anything else but that particular act of forfeiture. I think myself that if that particular court had had to deal with this case, they would, as far as I can judge from their judgments, have arrived at the same conclusion that I have arrived at. The result, in my opinion, is—first, that this will refers to marriages which occur after the death of the testator, as being the marriages upon which the forfeiture is to take place; and, secondly, I think that there is nothing in *Re Metcalfe*; *Metcalfe v. Metcalfe* (*ubi sup.*) which applies to such a case as this. I think the decision in that case applies only to the particular act of forfeiture with which the court had to deal there. I think, therefore, that this appeal should be allowed.

STIRLING, L.J.—I am of the same opinion, but I confess that I have felt very great difficulty in dealing with the case. In this case the testator, having conferred benefits on his children, sons and daughters, has introduced a forfeiture clause, upon which the whole question turns, and the acts which are to occasion forfeiture are of two classes. Now, if there were no authority bearing on the question, I should have said that the language of the gift over with reference to the share, right, title, and interest "thenceforth," which means from the occurrence of any such event as mentioned in the prior part of the clause, "shall thenceforth cease and determine and my said trust estate shall thenceforth go and be held in such manner as the same would have been held," would be strong to show that the testator was referring to the occurrence of such event after his death; but it appears to me that, as regards acts of alienation, including bankruptcy, it is not open to me to come to that conclusion. In *Re Metcalfe*; *Metcalfe v. Metcalfe* (*ubi sup.*), there was equally strong language which seemed to point to and deal with acts of forfeiture occurring after the testator's death; yet it was the view of the Court of Appeal—it may be a view taken reluctantly—that the forfeiture clause applied to acts done in the lifetime of the testator. Therefore it appears to me that, with reference to that portion of the forfeiture clause, I am not at liberty to say that the events there contemplated were merely events occurring after the death of the testator. What is the ground of the decision in that case and in the cases which preceded it? It appears to me that the ground of decision is that a somewhat unnatural construction must be put on the language of the will "in order to give effect," as

Lindley, L.J. put it, "in such cases to the obvious intention of the testator, which is to secure the personal enjoyment by the legatee of the property left by the will." I have now to turn to the other class of cases in which the testator prescribes that a forfeiture shall take place, that is "in case any son or daughter" shall contract any marriage "forbidden by me as hereinafter expressed" in the will. What are the events—the marriages which are forbidden? The testator says, "And I declare that the marriages forbidden by me are in the case of son or daughter marriage with a person of any degree of kindred unless more remote than third cousin, and also in the case of a daughter marriage contracted without the previous written consent of the trustees or trustee for the time being of this my will, or if more than two a majority of them." It is said that we ought to follow the decisions with reference to the bankruptcy cases; and that it is as obvious on the face of the will that the intention of the testator was that a child contracting a forbidden marriage should be deprived of the benefits which were otherwise intended for that child, as that it was his intention that the child should enjoy personally the property given by the will. I think not. The testator provides not merely for the contracting of marriage within a certain degree, but also, in the case of a daughter, a marriage contracted without the previous written consent of the trustees. It is said that it would be an extraordinary result in this case that a son or daughter who, in the lifetime of the testator, contracted a marriage within the prescribed degree of kindred should not forfeit the benefit under his will; while a child who, after the death of the testator, did so would forfeit. That is a forcible observation, but it seems to me another observation which may be made, which has no less force, is this, that a daughter who, in the lifetime of the testator, contracted a marriage without his consent would, upon the terms of this will, not forfeit any benefit, while a daughter who contracted such a marriage after his death, without the written sanction of the trustees, would forfeit. Looking at this peculiarity in the clause, I see no sufficient reason why, in construing the will, so far as it relates to forfeiture in the event of marriage, we should not follow the language of the will as expressed; and therefore I think that the daughter who did marry in the lifetime of the testator within the forbidden degree is entitled to share.

COZENS-HARDY, L.J.—Although I have the misfortune to differ from my Lord, and from Stirling, L.J., as to the way this appeal should be decided, I entirely agree as to the principles which ought to be applied. *Prima facie* a will speaks from the date of its execution, except as to the property comprised in it; but there may be sufficient context in a particular case to show that this rule is not applicable. It is a matter of construction whether a particular clause is intended to speak and operate from the death, and not from the date of the execution of the will. My doubt is simply whether there is on this particular will sufficient context to justify such a conclusion. The clause has been read before, and I will not read it again; I will only say this that it is one forfeiture clause, and it strikes me

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that it would be a strange result if it were held that as to part it is retrospective, and as to part it is not. We are asked to read the clause as though it were "If any son or daughter becomes bankrupt after the date of this my will, or marries a first cousin after the date of my death, then there shall be a forfeiture." I cannot accept that view. Being bound, as we are, to hold that a bankruptcy or alienation after the date of the will would bring the forfeiture clause into operation, it seems to me that we ought to arrive at the same result in the case of a marriage after the date of the will and before the testator's death. If, therefore, it rested with me, I should be disposed to say that the view of Kekewich J. was correct.

Solicitors: Ward, Perks, and McKay; John F. Child.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Oct. 31, Nov. 2, 3, and Dec. 21, 1903.

(Before BYRNE, J.)

WERNER MOTORS LIMITED v. A. W. GAMAGE LIMITED. (a)

Design—Registration—Infringement—Patent and registered design for same invention—Second registered design similar to previous design—Marking goods—Registration of design not known to infringer—Injunction—Damages—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), ss. 47, 51, 58, 59, 60, 61.

The plaintiffs registered a design for improvements in motor cycles between the time when they applied for and the time when they obtained letters patent for a similar invention. Subsequently they registered a new design, which in fact was similar to the originally registered design, and sold machines marked with the second registration number only. The fact of the registration was unknown to the defendants prior to the issue of the writ in an action against them for infringement, but they sold some machines after the writ was issued, and on an application for an interim injunction they offered to keep an account.

Held, that a patent and a registered design for the same invention might co-exist, the rights conferred did not clash, and the registration was valid; that the first registration was not forfeited; and that want of knowledge was not a reason why an injunction should not be granted, but that it protected the defendants from payment of damages in respect of sales effected by them before writ.

THE plaintiff company were the registered proprietors of a design, No. 383,283, for motor bicycles, being goods comprised in class 1.

In Aug. 1902 they brought this action for an injunction to restrain the defendants from applying for the purpose of sale to motor cycles the plaintiffs' registered design, or any fraudulent or obvious imitation thereof.

It appeared that on the 18th Nov. 1901 the plaintiffs' original design had been registered in this country in the name of Michel Werner and Eugene Werner.

On the 8th Nov. 1901 one A. F. Spooner, as agent for Michel and Eugene Werner, applied for and eventually obtained letters patent for improvements in frames for motor cycles alleged to be identical with their design.

In Nov. 1902, after this action was brought, the plaintiffs registered a new design, which was very similar to their original design. It was alleged that since that date they had sold motor bicycles marked with the new registration number only.

The defendants by their defence denied infringement; alleged want of novelty in plaintiffs' design; said they had not applied the plaintiffs' design to any cycles "knowing that the same had been so applied without the consent of the registered proprietor"; and contended that, by registering the design as well as taking out the patent, the plaintiffs had committed a fraud on the Crown, and that the registration was invalid.

The action was tried with witnesses. The result of the evidence is sufficiently stated in the judgment.

A. J. Walter and Kerly for the plaintiffs.

T. Terrell, K.C. and J. C. Graham for the defendants.—This action is for infringement of a registered design. The defendants did not know that the design had been registered. Knowledge need not be proved in the case of a patent, but under the Patents, Designs, and Trade Marks Act 1883, ss. 58, 59, such evidence is indispensable where the action is for infringement of a design. The court will not grant an injunction where there was no knowledge of the registration of the design before the writ was issued. Anything that has happened since the issue of the writ is immaterial.

Jan v. Grossman, 12 Rep. Pat. Cas. 537.

The registration itself was bad. The Statute of Monopolies reserves to the Crown only the right to grant a monopoly to the first and true inventor. Here the plaintiffs had a patent for the same invention as their registered design before they registered the latter. They were proprietors of both under the Patents, Designs, and Trade Marks Act 1883, ss. 47, 60, 61. The fact that both grants were made to the same person makes no difference, for he might assign them to two different people, and two people cannot have monopolies of the same thing. After the plaintiffs registered their new design they ought to have put both numbers on the cycles they sold. They also referred to:

Le May v. Welch, 51 L. T. Rep. 867; 28 Ch. Div. 24;

Hecla Foundry Company v. Walker, Hunter, and Co., 61 L. T. Rep. 738; 14 App. Cas. 550.

A. J. Walter in reply.—The defendants knew of our registration when they were served with the writ, even if they did not know before. At the hearing of the motion they agreed to keep an account, which implies an intention to go on selling these machines. There is no question of prior grant; design is a question of copyright, and the Statute of Monopolies has nothing to do with it. The Act does not say that you cannot have a patent and a registered design for the same article.

Cur. adv. vult.

(a) Reported by E. L. HOPKINS, Esq., Barrister at Law.

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Dec. 21.—BYRNE, J. read the following judgment.—The plaintiffs are the registered proprietors of a design for motor bicycles, being goods comprised in class 1. They sue for an injunction to restrain the defendants from selling motor cycles to which such design, or any obvious imitation thereof, has been applied, and for damages. The defendants deny infringement, and raise other defences, grounded on want of novelty; denial of knowledge of application of the design without the consent of the registered proprietors; and fraud on the Crown, a previous application for a patent for improvements in frames for bicycles, which frames are identical with the design, having been made ten days before the registration of the design, and letters patent subsequently granted dating back to the date of application. I am satisfied that the design registered was new and original. It represents the frame of a motor bicycle, having the strengthening tube placed a good deal lower than usual, joining two tubes, called on the lettered reproduction of the registered design used at the trial (a) and (b), by means of junction pieces, the front join being a good way down tube (a). There is also a continuation of of tubes (a) and (b) downwards so as to leave an open space between, filled and joined only by the motor, by means of two bolts; the front tube (a) being bifurcated and passing outside the motor case, the back one with stays, not bifurcated, the bearings of the pedal crank axle being shown situate at the commencement of the lower back stay, at a place before it bifurcates. A comparison of this drawing with the drawing of Chapelle's frame relied on shows that the latter differs essentially. It represents the strengthening tube in the usual position, and it represents a crank axle in front of, not behind, the engine. In the representation of a motor cycle in the picture of Baine's machine in the *Autocar*—a very badly blurred impression, not, I think, much relied on—there is no cross stay shown as in the plaintiffs' design. It was, in fact, admitted that the design of this machine is quite different from the registered design, but it was said that it showed a similar fastening of motor to rods. I cannot say that I am persuaded that even this is the case. On the other hand, I am clearly of opinion that the design of the machines sold by the defendants as shown in their drawing is, with the exception of small and immaterial details, identical with the registered design. In fact the two drawings are different drawings of the same machine. Next, as to the point raised that the defendants had no knowledge that the design was registered, I come to the conclusion, though not without a natural doubt, inspired by a knowledge of the keenness with which advertisements are examined by those whose duty it is to see and and look at the literature connected with the trade, that I must accept the evidence given on behalf of the defendants, with the result that the fact of registration was unknown to those persons connected with the defendant company, whose duty it was to watch and know about what was doing in the trade in motor cycles prior to the issue of the writ in the action. It is not the fault of the plaintiffs that the defendants did not know, but, treating the case upon the footing that notice of registration has not been brought home to the defendant company,

what is the result? Only that the plaintiffs are not entitled to damages in respect of sales effected before writ. The relevant sections of the Act are sects. 58 and 59. The defendants have not themselves applied the design, and their acts, so far as penalty or damages are concerned, appear to be protected up to the date of the service of the writ. This, however, will not protect them against an injunction unless they can bring themselves within the exception from the general rule mentioned in *Proctor v. Bayley* (61 L. T. Rep. 752; 42 Ch. Div. 390). That was a case having reference to infringement of a patent, and Cotton, L.J. says: "Where a patent is infringed, the patentee has a *prima facie* case for an injunction, for it is to be presumed that an infringer intends to go on infringing, and that the patentee has a right to an injunction to prevent his doing so. Again, if there has not been any infringement, but an intention to infringe has been shown, an injunction will be granted." He then goes on to deal with the facts of the particular case and comes to the conclusion that the plaintiff was not justified in believing that the defendants intended to continue the infringement, and consequently an injunction was refused. The facts of that case were very special. There was a single and isolated act of user nearly five years before action, and the use of the machines had then been abandoned, because the defendants had found them unserviceable. The defendants, in their pleadings admitted the validity of the patent, and expressly pleaded that they never threatened or intended, and did not threaten or intend, to use any apparatus infringing the plaintiff's patent. The facts in the present case differ entirely. The defendants put in an affidavit on the interlocutory application for an injunction, strongly opposing an injunction on the ground of delay in bringing the action and offering to keep an account. So far from saying they did not mean to repeat the acts, they in effect claimed the right to repeat them if they kept an account, so that justice might be done at the trial should they prove to be wrong in selling more. They have defended attacking the validity of the design, and they have since action offered to sell though stipulating that they could give no indemnity. Four machines have also been sold since the writ, and I have no doubt at all but that the defendants were threatening and intending, at and after the date of the service of the writ, to sell machines to which the registered design had been applied. If on service of the writ they had written and said that they had been in ignorance of the registration and that they did not mean to sell any more machines, or if on the motion they had offered an undertaking not to sell more, the matter would have stood on an entirely different footing. The plaintiffs had every right to suppose when they issued the writ that the defendants must know of the registered design, and want of knowledge was not raised on the motion as a defence. In Aug. 1902, as I have said, the writ was issued, and in Nov. 1902 the plaintiffs registered a new design which in fact was similar to the originally registered design, except as to a matter of 2in. in some detail, as it was put by one of the witnesses. I am not sure that I yet appreciate the argument put forward. A man sues in respect of infringement of his design, and he, subsequently to action,

registers another, and if I understand the point it is suggested that subsequent sale by him of things according to the new design without having both registration numbers upon them has occasioned a forfeiture of his right to relief. I cannot follow the reasoning I could understand the second registration being invalid because it was in truth a second registration of the original design, but this is not the argument. Sect. 51 has reference to delivery on sale, and I have no sort of evidence that before delivery on sale any article was not caused to be duly marked. The remaining point in the case is whether or not there has been a fraud upon the Crown, because, having registered a design under statute, the Crown has been induced to grant a patent for a machine the grant dating back to a period before the registration of design. There appear to me to be several answers to this. In the first place the grant from the Crown was not made until after the statutory title was created, although when made it dated back to an earlier date prior to publication; in the second place it is not a question between grant and subsequent grant from the Crown; and in the third place there is nothing inconsistent between a grant for a patent and a coincident right and existence of a statutory right to design. The object of and privilege conferred by letters patent are wholly different from the object of and privileges conferred by statute to a design by registration. They may be co-existent and the rights conferred do not clash. The patent rights may be infringed notwithstanding design, and design may be infringed though patent rights may not be touched. A design may be copied exactly without a patent for the subject being infringed, and a patent may be easily infringed without touching rights to a design. The two rights are separate and distinct in title as well as in substance, and though, no doubt, any attempt to bolster up an invalid patent, or to get the advantage of an equivalent to patent rights by the utilisation of the right to register a design, would be jealously watched, the rights may and do fairly co-exist. I think, therefore, that the plaintiffs are entitled to an injunction in the terms of their claim, with costs.

Solicitors: John B. and F. Purchase; Ward, Perks, and McKay.

Tuesday, March 8.

(Before FARWELL, J.)

ST. JAMES' AND PALL MALL ELECTRIC LIGHT COMPANY LIMITED v. THE KING. (a)

Statutory powers—"Damage sustained by reason or in consequence of the exercise of such powers"

—*Compensation—Negligence—Burden of proof*

—*Telegraph Act 1863 (26 & 27 Vict. c. 112), ss. 6, 7—Telegraph Act 1868 (31 & 32 Vict. c. 110), s. 2.*

Where a public body was empowered by statute to carry out certain works and it was provided in the same statute that compensation should be paid to any person sustaining damages by reason or in consequence of the exercise of such powers, it was held that if the public body relied on the negligence of its agents or contractors as relieving it from all liability under the statute, it must discharge the onus of proving such negligence.

(a) Reported by H. C. GARRIA, Esq., Barrister-at-Law.

PETITION OF RIGHT.

The Postmaster-General is empowered under the Telegraph Acts 1863 and 1868 to place and maintain telegraph wires under any street or public road, and for that purpose he may open or break up any necessary streets.

In Jan. 1902 the Postmaster-General arranged to have certain cables laid down in King-street, St. James', in connection with the Post Office telephone system.

On the 3rd Jan. 1902 the workmen of the contractors, Messrs. Reid Brothers, were engaged in breaking up the footway and making a trench when one of the workmen drove a pick into a 2in. iron water pipe laid under the footpath. The trench immediately filled with water, and the culvert belonging to the suppliant company, which had also been exposed in digging the trench, was flooded. This culvert contained a bare copper conductor, and a serious short circuit resulted. The dynamo magnets at the two stations of the company were discharged, and the supply stopped from 2.45 p.m. to 3.15 p.m. Besides this, the particular section of the main had to be replaced.

The suppliant company by a letter dated the 21st Jan. 1902 claimed compensation for this.

The letter was addressed by the company's general manager and secretary to the Superintending Engineer, Post Office Telegraphs, and was, so far as is now material, couched in the following terms:

On the 3rd inst. at one o'clock in the afternoon your contractors, Messrs. Reid Bros., broke a 2in. cast iron water pipe in the footway of King-street, near the St. James' Theatre, by their carelessness. . . . There can be no excuse for the breakage of such a pipe in the footway . . . and I am advised that my company has a right to full compensation at the hands of your department.

After some intervening correspondence an answer was written on the 31st Jan. 1902 in the following terms:

In further reference to your letter of the 21st Jan. I have to inform you that your complaint has been inquired into, and I find that the damage complained of was done by the department's contractors. . . .

Only one other letter need be referred to. This was a letter dated the 5th May 1902 written by the general manager and secretary of the suppliant company in which the following passage occurs:

. . . I would point out that this occurrence took place at the commencement of January, and must request a prompt settlement of this claim for damages caused by reckless carelessness on the part of Messrs. Reid. Their operations in the London streets have been of a nature to fully justify the strongest protest on the part of ourselves and other parties possessing valuable property underneath the streets.

As the suppliant company was unable to obtain satisfaction of its claim for compensation, a formal notice requiring the amount of its claim to be assessed by a jury in accordance with sect. 68 of the Lands Clauses Consolidation Act 1845, and as provided by sect. 7 of the Telegraph Act 1863, was served upon the Postmaster-General. Accordingly the Postmaster-General issued a warrant to the High Bailiff of Westminster, dated the 24th July 1902, requiring him to summon a common jury to assess the amount of

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the damage sustained by the company. Such warrant was issued under protest by the Postmaster-General, who entirely denied that he was liable.

An inquisition was subsequently held on the 13th Aug. 1902, and the damages assessed at 145l. 19s. 6d.

As the Postmaster-General still denied that he was liable, and refused to pay such sum, this petition of right seeking to recover this sum from the Crown was delivered on the 16th March 1903.

The petition was duly indorsed "Let right be done," and the matter now came before the court for hearing.

By the Telegraph Act 1863:

Sect. 6. Subject to the restrictions and provisions hereinafter contained the company may execute works as follows: (1) They may place and maintain a telegraph under any street or public road, and may alter or remove the same; (3) they may, for the purposes aforesaid, open or break up any street or public road, and alter the position thereunder of any pipe (not being a main) for the supply of water or gas . . .

Sect. 7. In the exercise of the powers given by the last foregoing section the company shall do as little damage as may be, and shall make full compensation to all bodies and persons interested for all damage sustained by them by reason or in consequence of the exercise of such powers, the amount and application of such compensation to be determined in manner provided by the Lands Clauses Consolidation Act 1845 . . .

By the Telegraph Act 1868:

Sect. 2. The Telegraph Act 1863 shall be incorporated with this Act, except so far as the same, or any part thereof, may be expressly varied, altered, or be inconsistent with this Act; and the term "the company" in the Telegraph Act 1863 shall, in addition to the meaning assigned to it in that Act, mean the Postmaster-General.

Cripps, K.C. and R. J. Parker (Llewelyn Davies with them) for the suppliant company.—On the facts we are clearly entitled to succeed. The only defence pleaded by the respondent is "that the matters complained of in the petition of right do not constitute damage within the meaning of sect. 7 of the Telegraph Act 1863." Now, this section, after saying that as little damage as possible is to be done in the exercise of the powers in sect. 6, provides that "full compensation to all bodies and persons interested for all damage sustained by them by reason or in consequence of the exercise of such powers" shall be made. The only possible defence, therefore, appears to be that the damage was not inflicted in the exercise of the powers, but through negligence. Negligence, however, has not been specially pleaded, and it is doubtful whether the defence could be rightly raised without such a plea. Apart from any such objection, we submit that, where work is being done in exercise of statutory powers it is immaterial whether there be negligence or not. For negligence to be a good defence, there must have been such negligence that what was done was outside or in excess of the statutory powers:

President and Councillors and Ratepayers of Colac v. Summerfield, 68 L. T. Rep. 769; (1893) A. C. 187, 191;

Hornby v. Liverpool United Gaslight Company, (1883) 47 J. P. 231;

Uttley v. Todmorden Local Board, 31 L. T. Rep. 445.

Clavell Salter, K.C. and J. H. Harris for the Crown.—The onus of proof that the damage was effected in exercise of statutory powers granted to the Postmaster-General lies with the plaintiff. This is clearly shown by

Brierley Hill Local Board v. Pearsall, 51 L. T. Rep. 577; 9 App. Cas. 595.

In that case Lord Fitzgerald says, at p. 603; "In establishing his case plaintiff had to sustain four propositions." The second of these propositions is: "That such damages had been occasioned by reason of the exercise by the local authority of the powers of the Act." The suppliant company suggests that we have to prove that there was such negligence that the acts complained of must have been acts in excess of the statutory powers, the above-mentioned case shows this is not so; on the contrary, it is for the suppliant company to show that the acts of which it complains were done in exercise of such powers. In our view, therefore, it is questionable whether the suppliant company has shown any claim in law against the Postmaster-General. Even if we were wrong as to this, the reference to negligence contained in the suppliant company's letters amount to admission by it that the damage was inflicted through the negligence of the Post Office contractors; if this be so, the claim for compensation must be bad in law. Compensation is given by a statute, to provide a remedy where, apart from the statute, none would exist. Where there has been negligence, an action for tort can be brought at common law, and therefore no right to compensation exists. This is clear from the cases. The company has mistaken its remedy, and this action must fail. They then referred to the following cases in support of their argument, which is not here set forth in detail, as the point was not dealt with in the judgment:

Broadbent v. Imperial Gas Light Company, 26 L. J. 276, Ch.;

Re Penny and South-Eastern Railway Company, 26 L. J. 225, Q. B.;

New River Company v. Johnson, 29 L. J. 93, M. C.

Lawrence v. Great Northern Railway Company, 20 L. J. 293, Q. B.;

Clothier v. Webster, 6 L. T. Rep. 461; 31 L. J. 316, C. P.;

Clowes v. Staffordshire Potteries Waterworks Company, 27 L. T. Rep. 298, 521; L. Rep. 8 Ch. App. 125;

Biscoe v. Great Eastern Railway Company, L. Rep. 16 Eq. 636;

Hall v. Mayor of Batley, 37 L. T. Rep. 710.

R. J. Parker in reply.—These allegations of negligence in the correspondence are not admissions; they are mere allegations in aggravation of damages which the suppliant company now disavows. Are we to be tied down to these statements when the respondent will not on his side allege negligence? Then it is said that it is for us to prove that the damage was effected in the exercise of the statutory powers. This, in effect, is asking us to prove that there was no negligence. The burden of proving a negative cannot be laid on the suppliant company, it is for the respondent to prove negligence if he relies on it. Here it has never been pleaded.

FARWELL, J.—This is a petition of right in which the St. James and Pall Mall Electric Light Company are the suppliants, and they allege that

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the Postmaster-General in the course of laying down certain telegraph wires has caused damage for which they claim compensation. The question turns on the construction of the 6th and 7th clauses of the Telegraph Act of 1863, which, by the amending Act of 1868, extend to the Postmaster-General. The material section in sect. 7. [His Lordship then read the section referred to.] In pursuance of the powers contained in the 6th section the Postmaster-General proceeded to break up King-street, St. James'. Now, the first matter to which I always address myself when I try a case is to ascertain the facts, and make a finding for my own guidance. I must confess that the parties have put me in a very considerable difficulty in the present case. I do not consider it is any part of the function of the court to deliver pronouncements on law at large, but to adjudicate on facts proved or admitted. Now, the only facts are those I can obtain from the pleadings, correspondence, and proceedings before the high bailiff and jury. These I have to deal with as best I can in order to ascertain the facts. I rather protest that it is not part of the duty of the court to pick out the facts in this sort of way; they ought to be proved or found. On the facts, however, as I find them, I get this. I have the letter of the 31st Jan. from the Post Office authorities in which there is the following statement: "I have to inform you that your complaint has been inquired into, and I find that the damage complained of was done by the department's contractors." This is an admission made on behalf of the Postmaster-General which is accepted by the suppliants. The correspondence is also referred to by the Postmaster-General's counsel as containing allegations that the damage was caused by the negligence of the contractors' workmen, but these allegations are not admitted and accepted by him; and therefore I cannot regard those statements that are disavowed now by the suppliants, and are not adopted by the Postmaster-General, as facts for any sort of purpose before the court. The only fact that I have got on such materials as the parties have thought fit to place before me, is this statement contained in this letter of the 31st Jan., that the damage complained of was done by the department's contractors. Now, it was done by their contractors in the course of opening up King-street. Mr. Clavell Salter, to whom I am extremely indebted for most interesting argument, referred me to the case of *Brierley Hill Local Board v. Pearsall* (51 L. T. Rep. 577; 9 App. Cas. 595), in which Lord Fitzgerald, dealing with a case of this sort, says, at p. 603 (he is referring to the Public Health Act which, for the purposes of this action, is practically the same as the section in the Telegraph Act): "Looking at the case as wholly governed by sect. 308 of the Public Health Act, it seems to me to be clear that it was open to the respondent (the plaintiff) to pursue the course of having the fact of damage and the amount of compensation settled in the first instance by arbitration." That has been done in the present case. The jury have found the damage and assessed the amount of compensation. Then Lord Fitzgerald proceeds: "In establishing his case under that section, the plaintiff had to sustain four propositions—viz., first, that he had sustained damage; secondly, that such damage had been occasioned by reason of the exercise by

the local authority of the powers of the Act; thirdly, that such damage arose in relation to some matter as to which he was not himself in default; and fourthly, the amount of compensation to which he was properly entitled. Any dispute as to the propositions 1 and 4 is to be settled by arbitration. The fact of damage comes first in the section, and is the foundation of all the rest." Propositions 1 and 4 have been dealt with by the jury in the present case. The second—namely, that such damage has been occasioned by reason of the exercise of the powers of the Act—appears to me to be involved in the petition of right, the letter that I have read and the proceedings also before the arbitrator. Now, the point that has been argued before me is that the damage was really occasioned by the negligent exercise of the powers of the Act. It is not said that there was anything *ultra vires*; neither side suggest this, but the suggestion of the Postmaster-General is that the contractors' workmen in carrying out the powers of the Act acted negligently, and I have heard a very interesting argument and many cases cited to establish the proposition that for a negligent exercise of statutory powers a common law right of action subsists, and that when a common law right of action subsists the provision for compensation does not apply. In the view that I take, it is unnecessary for me to express any opinion as to how far that proposition can be driven. I think the question before me turns on the onus of proof. In cases of this class it is obvious that the onus of proof practically goes to the root of the matter. When the local authority or the Postmaster-General, as the case may be, breaks up a street, the persons who are likely to be injured cannot or certainly do not keep a watchman on the watch to see whether anything is going to happen so that they may have evidence available as to how or by reason of whose negligence injury has been caused. The fact of damage is the only thing which is within their knowledge, and of this the onus of proof lies on them. The negative, no negligence, is not for them to prove. The burden of proving a negative is never on the plaintiff. If the fact of negligence is set up and relied upon by the defendant, or the respondent as the case may be, the onus is on him to prove that negligence affirmatively. This is, to my mind, most material because it is obvious that the respondent might very well escape liability altogether, if he could say to the person claiming compensation, "You have got to prove the fact that there was no negligence," and to the same person bringing a common law action, "You have got to prove the fact that there was negligence." The result, it seems to me, would be most unsatisfactory; but as I take the view, that when it is intended to set up negligence to that which is otherwise a *prima facie* case for compensation, the onus of proving that negligence or at least of alleging it (so that it may be used as an admission in subsequent proceedings) lies on the respondent, no practical difficulty arises in the present case. I am not concerned with the numerous cases which have been cited, for negligence has never been put in issue by the respondent in such a way that I need consider it. The result, therefore, is that the suppliants succeed, and the respondent must pay the amount of compensation found by the high bailiff and jury,

together with the costs of this action including the costs of the high bailiff's inquisition.

Solicitor for the suppliant company, *Sydney Morse*.

Solicitors for the Crown, *H. S. Harris and Co.*

March 16, 17, and 18.

(Before FARWELL, J.)

EAST LONDON RAILWAY COMPANY v. CONSERVATORS OF THE RIVER THAMES. (a)

Evidence—Expert's reports—Facts not within living memory—Admissibility.

Where an engineer's reports are within the common knowledge of engineers and accepted by them as accurate, they constitute evidence which the court will accept as to facts not within living memory.

THE plaintiffs were the leasees and owners of the Thames Tunnel, which was built under a private Act of 1824, the short title of which is the Thames Tunnel Act 1824.

By the East London Railway Act 1865 this tunnel, which had originally been built for passenger traffic, was adapted for use as a railway to form a connecting link between various railways on the Surrey and Middlesex sides of the river respectively.

This tunnel is built entirely of brick, and has a covering of soil of which the minimum depth is rather over 13ft.

In 1880 the defendants, the Conservators of the River Thames, had proposed to dredge the river bed adjacent to and over the tunnel to a considerable depth; but that scheme was abandoned upon the representations of the East London Railway Company, as that company alleged that the removal of soil from above the tunnel would seriously endanger it.

Prior to Dec. 1903, however, numerous traders represented to the conservators the desirability of a deep channel up to London Bridge, which would enable merchant ships of large tonnage to enter that part of the river at all states of the tide.

In consequence the conservators entered into a contract in Dec. 1902 for the dredging of the upper pool so as to make a channel of the width of 210ft. and of the depth of 35ft. below Trinity high-water mark. The contractors were, however, only to dredge to within 50 yards of the tunnel.

Dredging was commenced on the 23rd Dec. 1902, and by June 1903 it had been effected from 50 yards above the tunnel up to London Bridge.

The dredging below the tunnel from Millwall Dock was then proceeded with, and at the date of the hearing of this action had been carried out to within 170 yards of the tunnel.

In May 1903 the defendants forwarded certain plans to the East London Railway Joint Committee, and at the same time gave notice to them as required by the Thames Conservancy Act 1894 s. 88, that they proposed to dredge the bed of the river over the tunnel as shown in the plans, that is, so as to make a channel of 210ft. broad, of a depth of 36ft. below Trinity high-water mark.

In spite of objections made by the committee the defendants notified the plaintiffs' solicitors on the 8th Dec. 1903 of their intention to proceed

with the dredging operations proposed after the expiration of a week from the 9th Dec. 1903.

The writ in this action was therefore issued on the 11th Dec. 1903.

The plaintiffs now claimed "an injunction to restrain the defendants, their officers, contractors, agents, or workmen from deepening or dredging or working in the bed of the river Thames at any place within 150 yards above or below the Thames Tunnel . . . or in any manner so as to injure, endanger, or affect the said tunnel, or the roof, sides, or protections thereof, or the railway running through the same or covered thereby."

The defendants put in issue the allegations of the plaintiffs that damage would be caused by the removal of a few feet of soil, as proposed by them.

It appeared from the expert evidence called by the plaintiffs that there would be grave risk in removing any part of the soil from over the tunnel, if the soil was in fact of a loose and semi-fluid nature.

The evidence as to the nature of the soil rested almost entirely on the reports of the original constructor of the tunnel, Sir Isambard Brunel. It was impossible to verify the facts there stated, for the prickings of the soil which had been made in connection with the present action only went to show the nature of the actual surface of the bed of the river over the tunnel, and it was not possible to make further investigations without endangering the tunnel. The reports of Sir I. Brunel, which, it appeared, were commonly accepted by engineers as a correct record, stated that in making the tunnel, the material met with was for the most part, of a loose and semi-fluid nature. It further stated that there had been several irruptions of black water in the tunnel works, and the holes so caused in the river bed had had to be filled in with bags of clay. The question as to whether the reports were admissible was raised by the defendants, and this is the only point in the case which it is necessary to report.

Upjohn, K.C. and Waggett for the plaintiffs.

Butcher, K.C. and G. R. Northcote for the defendants.

Upjohn, K.C. in reply.

FARWELL, J.—This is a *quia timet* action, and I have had evidence given by experts to prove the existence of danger. Now in *quia timet* actions it is impossible to expect a witness to commit himself to a statement that it is absolutely certain that danger will ensue; nor is that necessary. All that is required is that there be a strong case of probability that the apprehended mischief will arise. I have had called before me two very eminent experts to prove the likelihood of danger by the proposed dredging who are absolutely unbiassed and impartial in the matter; but whose opinion is based on statements made by the original constructor of the tunnel. It is not immaterial, therefore, to consider one or two matters of history with respect to Sir Isambard Brunel's construction of the tunnel and his memoranda and records of what took place. It has been submitted that these records are not proper evidence; but I am of opinion that I am entitled to regard them in the same way that I regard any other fact of history which did not take place within living memory, if it is estab-

(a) Reported by H. C. GASKIA, Esq., Barrister-at-Law.

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lished by authentic records. Inasmuch as all the engineers whom I have seen agree that these records are accessible to engineers and are accepted by them as absolutely accurate, it appears to me that the court would be very shortsighted to decline to take advantage of whatever benefit may be obtained from the knowledge of the historical facts so authenticated. [His Lordship then proceeded to deal with other parts of the case not dealt with in this report.]

Solicitors for the plaintiffs, *Wilson, Bristows, and Carpmael*.

Solicitor for the defendant, *James Hughes*.

KING'S BENCH DIVISION.

Jan. 11 and 12.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

ESCOTT v. MAYOR, &C., OF NEWPORT. (a)

Trespass—Statutory right to erect post "in, over, or under any street"—Erection of electric post—Taking of land—Lands Clauses Act 1845 (8 & 9 Vict. c. 18)—Newport Corporation Act 1900 (63 & 64 Vict. c. xlii.).

By sect. 51 of the Newport Corporation Act 1900, with which the Lands Clauses Act 1845 was incorporated, the corporation might, for the purpose of working their tramways, construct and erect "on, in, over, or under any street or road" poles and posts.

For the purpose of working their tramways the corporation erected an iron pillar, about 10in. in diameter, upon the plaintiff's land, which by dedication, subject to a user by the plaintiff, formed part of the street, such pillar being sunk about 6ft. in the ground.

Held, that this was not a "taking of land" within the Lands Clauses Act, but was an exercise of the statutory powers of the defendants under their private Act.

APPEAL from His Honour Judge Owen, sitting at the Newport County Court.

The action was brought to recover damages for an alleged trespass by the defendants upon the plaintiff's property by the erection on it of an iron pillar for the purpose of carrying an overhead electric cable, and for a mandatory injunction to remove the pillar.

The facts of the case were not in dispute, and were as follows:—

By a lease dated the 6th Nov. 1885 a plot of ground upon part of which this pillar had been erected was leased to the plaintiff's predecessor in title for the term of ninety-nine years from the 25th March 1883, and by an indenture dated the 18th April 1899 the premises were assigned to and are now vested in the plaintiff.

The lease was of a plot of ground adjoining and abutting upon the Chepstow-road, upon which the lessee covenanted to build and did build a house and shop now known as No. 103, Chepstow-road.

There is a plan upon the lease of the plot of ground demised with a number referring to an estate map, and upon that estate map the frontage building line of the house to be built is shown,

between which line and the boundary of the plot abutting on the Chepstow-road there is a space of 10ft. in width which was originally intended as a forecourt to the house.

The plot of ground demised was at the date of the lease divided from the Chepstow-road by a hedge, which was included in the lease. When the lessee, one Page, built the house he pulled down this hedge, and with the leave of the ground landlord, instead of using the piece of ground in front of the house as a forecourt, he paved the whole of it from the house up to the roadway in the Chepstow-road, and he put down a line of kerbing immediately adjoining the road. This paving and kerbing were wholly upon the plot of ground leased to him. Other houses on each side of Page's house were from time to time built forming a continuous row of houses with their frontages built up to the line shown on the estate map, and such houses all had pavement in front forming a continuous line of pavement.

Page carried on in the shop which he so built the business of a furniture dealer, and he was in the habit of putting furniture for sale upon the pavement in front of his shop.

The plaintiff since he bought the premises has carried on there a similar business, and he has also put furniture for sale upon the pavement in front of his shop.

Such user of the pavement by Page and the plaintiff has been without interruption and without any objection to it, either by the defendants or any other authority.

Subject to this user of the pavement a right by the public to use this pavement as a footpath has been acquired.

In 1890 the defendants remodelled the Chepstow-road and straightened the footpaths on each side of it, and put in new kerbing and channelling in the same place as the kerbing put in by Page was. The defendants have also from time to time at the public expense repaired the pavement in front of the plaintiff's shop. The Chepstow-road is now a street of almost continuous lines of houses on each side with paved footpaths in front of them leading from the Newport Bridge over the river Usk towards Chepstow. The plaintiff's house is situated about a mile to the eastward from the bridge.

In exercise of the power given them by the Newport Corporation Acts of 1893 and 1897 the defendants constructed a tramway in the Chepstow-road, passing in front of the plaintiff's premises. It was used for tramcars for the conveyance of passengers, and the tramcars were drawn by horses.

In 1900 the defendants being desirous of applying electrical power as the motive power of their tramcars, they were empowered by the Newport Corporation Act 1900 to use mechanical power on their tramways.

The system adopted by the defendants was a system by which electrical power is supplied to the tramcars from a continuous wire cable running along the tramways and suspended above them at a height of about 25ft. This cable is supported by wires across the roadway at fixed distances, and these wires are fastened to hollow iron pillars on each side of the roadway.

One of these pillars had without the plaintiff's consent been fixed in the pavement immediately in front of his shop, and it had been fixed in a

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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place which is wholly within the boundaries of the plot of ground demised by the lease under which the plaintiff held. This iron pillar was 31ft. in height and about 10in. in diameter at the base, and about 6ft. of its height was sunk in the ground.

The placing this pillar in the place where it was fixed was the trespass of which the plaintiff complained in the action.

The learned County Court judge having stated the facts, delivered judgment as follows:

The defendants' defences to the action are—(1) That the pillar complained of was erected by them under and pursuant to the authority given to them by the Newport Corporation Act 1900, s. 51; and (2) that the pillar having been erected on the 8th Aug. 1902 the claim is barred by the Public Authorities Protection Act 1893, s. 1. In the Corporation Act 1900, the Lands Clauses Acts are incorporated, and it is provided that the several words and expressions to which by the Public Health Acts meanings are assigned, shall in that Act have the same respective meanings, and it is provided by sect. 51, sub-sect. 1, that for the purpose of working any of the corporation tramways by mechanical power the corporation may, subject to the provisions of that Act, "construct, lay down, erect, maintain, renew, and repair, on, in, over, and under any street or road in which any corporation tramways are for the time being laid," certain works and appliances, including "poles, posts," and the defendants are further empowered to "make such alterations in any existing tramways of the corporation, and execute all such works on and in connection therewith as may be necessary or expedient for adapting the same to be worked by mechanical power." By sect. 4 of the Public Health Act 1875 the word "street" is to include "any highway (not being a turnpike road) and any public bridge (not being a county bridge) and any road, main footway, square, court, alley, or passage, whether a thoroughfare or not." It is admitted that the roadway of the Chepstow-road, and the footpaths on each side of it, are together a street within this definition. The defendants contended that by sect. 149 of the Public Health Act 1875 the Chepstow-road, including the pavement in front of plaintiff's house and the place where the pillar has been fixed, became vested in them, and that they are therefore empowered by sect. 51 of their Act of 1900 to erect the pillar in question in the place where they have erected it without obtaining the consent thereto of the plaintiff, and without making him any compensation therefor. I think that this which is the defendant's first defence to the action is disposed of by authority. It has been decided by a series of cases beginning with *Coverdale v. Charlton* (40 L. T. Rep. 88; 4 Q. B. Div. 104), decided by the Court of Appeal in 1878, to *Baird v. Corporation of Tunbridge Wells*, decided by the Court of Appeal (71 L. T. Rep. 211; (1894) 2 Q. B. 867), and affirmed by the House of Lords (1896), A. C. 434, that by sect. 149 of the Public Health Act 1875 the local authority become the owners of so much of the soil of a street as is necessary for the ordinary user of the street as a street, and not of anything more. In the *Tunbridge Wells* case the streets were vested in the corporation in the same way and under the same section of the Public Health Act 1875 as in the present case and as they were empowered by a special Act to erect lavatories in any street it was held that the sub-soil in the street did not belong to them, and that they had not any right to excavate the soil and erect lavatories below the surface of a street. The present Lord Chancellor, speaking of the section in question, said that it vested in the corporation "The street *quod* street and indeed so much of the actual soil of the street as might be necessary for the purpose of maintaining it and using it as a street," and the late Lord Herschell said: "It seems to me that the vesting of the street vests in the urban authority such property

and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use." In the present case, I think, the placing of an iron pillar is not necessary for the purposes so mentioned. But then it is said that the defendants are empowered to do this by sect. 51 of their Act of 1900. Upon this point the observations of Smith, L.J. in the *Tunbridge Wells* case, in the Court of Appeal, are, I think, conclusive. His Lordship says: "Now, where a statute enacts that a corporation may erect a building in a street over which they have only a right of way as one of the public, What does that mean? Does it mean that they may only utilise what the landowner had already dedicated to the public, or does it mean that they may take from the landowner what he has not dedicated to the public and which remains his own? It seems to me that the true answer is, that it only entitles the corporation to use what the owner has dedicated to the public, and it does not entitle the corporation to take the landowner's land for nothing. And I should point out that if the corporation desire to erect buildings upon another man's land they can do so by paying for it, for the Lands Clauses Consolidation Acts are incorporated in the Act of 1900, and the Act can be brought into play." I think, therefore, that the defendants' first defence fails. The only other defence is, that as this pillar was erected on the 8th Aug. 1902, and the action was not begun until the 30th March 1903, the plaintiff is precluded from bringing the action by the Public Authorities Protection Act 1893. Sect. 1 of that Act provides that an action brought for any act done in the execution of any Act of Parliament "shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of or in case of a continuance of injury or damage within six months next after the ceasing thereof." The erection of the pillar is, I think, a continuing injury or damage to the plaintiff, and this defence, I think, also fails. The plaintiff has therefore succeeded. I think, however, that I ought not to grant a mandatory injunction for the removal of the pillar, and what I propose to do is, at the plaintiff's option, either to assess the damage which he has suffered by the defendant's wrongful act or to do what was done by the Court of Appeal in the *Tunbridge Wells* case—that is, to make a declaration that the defendants are not entitled to the soil in which they have erected the pillar and that its erection was a trespass upon the plaintiff's property. The defendants must pay the costs of the action upon scale C. If the defendants wish to keep this pillar upon the plaintiff's land they can do so by paying for a right to do so as provided by the Lands Clauses Acts.

By the Newport Corporation Act 1900 (63 & 64 Vict. c. xlii.), s. 51:

(1) For the purpose of working any of the corporation tramways by mechanical power or of providing access to or forming connection with any generating or other stations, or any engines, machines, apparatus, the corporation may, subject to the provisions of this Act, construct, lay down, erect, maintain, renew, and repair on, in, over, or under any street or road in which any corporation tramways are for the time being laid, cables, conductors, electric mains, wires, poles, posts, brackets, plates, tubes, channels, grooves, engines, apparatus, machinery, works, and appliances, and may make and maintain opening and ways on, in, over, or under any such street or road, and may attach to any house or building and maintain brackets, electric conductors, wires, and apparatus, and the corporation may also make such alterations in any existing tramways of the corporation, and execute all such works on and in connection therewith as may be necessary or expedient for adapting the same to be worked by mechanical power, and may for those purposes or any of them, subject to the restrictions and provisions contained in part 2 of the Tramways Act 1870, open and

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break up any street or road in which the tramways so to be worked by mechanical power or any of them may be situate, and any sewers, drains, water, or gas pipes, tubes, wires, telephonic and telegraphic apparatus therein or thereunder. (3) No such works shall be attached to any house or building without in each case the consent of the occupier of such house or building, and if there is no occupier then of the lessee entitled to possession, or if there is none then of the owner, and the consent of the occupier or lessee shall not be effective after the termination of his occupation or the expiration of the term of his lease, as the case may be. (3) On the termination of the occupation of any occupier or lessee the owner entitled to possession, if he did not consent to the attaching of such work to the house or building, may give notice to the corporation that he requires the same to be removed, and the corporation shall remove the same accordingly within one month after receiving such notice. (4) Nothing in this section shall extend to or authorise any interference with any works of any undertakers within the meaning of the Electric Lighting Acts 1882 and 1888 to which the provisions of sect. 15 of the former Act apply.

The Lands Clauses Acts were incorporated in this statute.

The defendants appealed.

Macmorran, K.C. and Corner for the appellants.

A. T. Lawrence, K.C. and John Sankey for the respondents.

LORD ALVERSTONE, C.J.—In this case the learned County Court judge has held that the act of the defendants in placing this pillar was a trespass upon the plaintiff's property. Originally the property of the plaintiff went up to the kerb, but he has dedicated part of that property, so that the public have acquired a right of passage over it, though to a certain extent a right of interrupting such passage has been maintained by putting out furniture upon the pavement. It is quite clear, however, that as to the surface, at any rate, this was part of the street. In that state of things the defendants, acting under the Newport Corporation Act 1900, s. 51, placed this iron pillar in the pavement immediately in front of his shop, in a place which was wholly within the boundaries of the land demised to the plaintiff. Their right to place the pillar there was not disputed, but it was said that, as the pillar went down into the soil to a greater depth than what was vested in the defendants, thereby getting and acquiring support from the soil, that was an entry upon and taking of the plaintiff's land which constituted a trespass. The point that arises is whether the erecting of the pillar under the powers conferred by sect. 51 of the Newport Corporation Act 1900 is a taking of land within the Lands Clauses Act 1845, so that the formalities required by that statute must be complied with. It seems to me that sect. 51 contemplates something which is a common law occupation, but it is not meant to be a taking of land under the Lands Clauses Act. I come to the conclusion that this is not a taking of land, but was the exercise of an express statutory power to erect on, in, over, or under a street an electric pole or post. If, however, that injuriously affects the land then there is a remedy under sect. 68 of the Lands Clauses Act. I must hold that the land has not been taken, but merely that something has been done under statutory powers.

WILLS, J. concurred.

KENNEDY, J.—I am of the same opinion, and I wish to adopt the judgment given by my Lord, which seems to me a simple way of putting the case. Under sect. 51 for the purpose of working the tramways the defendants may erect poles or posts on, in, over, or under any street or road. As I understand the findings of fact in this case what was done here was for the purpose of working the tramways, and for that purpose the pillar was erected. That was a thing strictly within the terms of the section, and was justified by statutory authority. It is said that the defendants could do this, but that there is reserved to the plaintiff the right to object to any interference with the soil except with his permission, but I am not prepared to accept that as stated. I think that, while no property passes to the defendants, there is a right in them to enter any area under their statutory powers if such area is "on, in, over, or under any street or road in which any corporation tramways are for the time being laid." The basis of the judgment of Chitty, J. in *Fareham Local Board and Fareham Electric Light Company v. Smith* (7 Times L. Rep. 443) was stated by him as follows: "The local authority was entitled to take so much of the zone above as was required for the due execution of its powers and the due performance of its duties. To express the matter shortly, it was the area of user which showed what was vested, and the street comprised the zone. The local board had a proprietary right in the zone above the surface, or at any rate, had a possession of so much above and so much below as fell within the objects of the Act." There is nothing there contrary to any of the cases referred to by the learned County Court judge. In *Taylor v. Oldham Corporation* (35 L. T. Rep. 696; 4 Ch. Div. 395) it was held that the usual clause in local Acts vesting sewers in the sewer authority conferred an absolute property in that part of the subsoil occupied by the sewer and not merely an easement, and Jessel, M.R., at p. 411, said: "It was found under the old law and it was sometimes held that the sewer authorities . . . had only an easement, and it was found to be very inconvenient, and consequently in the modern Acts the property in the sewers has been vested in the sewer authorities. That is to say, that, instead of allowing the subsoil to remain in the owner of the soil subject to an easement or right of sewerage or drainage, the absolute property in the sewer (which means not merely the brick barrel or whatever it may be forming the sewer, but the whole interior of the sewer—that is the whole of the space occupied by it) is now vested in the sewer authorities." That was not done here, but what was done was not the taking of the soil at all, but merely the exercise of a statutory right in the nature of an easement in a given area. That does not exclude a good claim if the plaintiff's rights have been injuriously affected.

Appeal allowed.

Solicitors: *Ley, Lake, and Ley*, for Morgan and Co., Newport; *Cole and Jackson*, for A. A. Newman, Newport.

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PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Feb. 2 and 9.

(Before Sir F. JEUNE, President, and BARNES, J.)

THE NORMANDY. (a)

Damage to pier by ship—Action by owner of pier—County Court jurisdiction—Writ of prohibition—County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), s. 3, sub-s. 3.

By sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868 it is provided that County Courts having Admiralty jurisdiction shall have jurisdiction as to any claim for "damage by collision."

The plaintiff was the owner of a pier, and brought an action in the County Court against the defendants for damage done by their vessel to his pier. The defendants moved for a writ of prohibition.

Held, that there was no jurisdiction under sect. 3, sub-sect. 3, for the County Court judge to determine the action, and that a writ of prohibition must therefore go.

MOTION on behalf of the owners of the steamship *Normandy* for a writ of prohibition to the judge of the County Court of Barnstaple to restrain proceedings.

The plaintiff, Reginald Joseph Weld, who, being a person of unsound mind, sued by his committees, was the owner of a pier at Ilfracombe, and the action was brought to recover 200*l.* for damage alleged to have been done by the defendants' steamship to the pier. The action was brought under sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868, which gives to any County Court having Admiralty jurisdiction power to hear and determine causes as to any claim for "damage by collision."

The defendants contended that the words "damage by collision" referred only to collisions between ships, and that, although the amending Act of 1869 extended the Admiralty jurisdiction of County Courts to damage to ships, whether by collision or otherwise, yet it did not give the court power to deal with claims for damage to a fixed object such as a pier.

Sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) is as follows:

Any County Court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes): (3) As to any claim for damage to cargo or damage by collision—Any cause in which the amount claimed does not exceed three hundred pounds.

Sect. 4 of the County Courts Admiralty Jurisdiction Act 1869 (32 & 33 Vict. c. 51) is as follows:

The third section of the County Courts Admiralty Jurisdiction Act 1868, shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds.

The defendants now moved the court for a writ of prohibition to prohibit the learned County Court judge from hearing and determining the action.

Dawson Miller, for the defendants, in support of the motion.—Sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868, under which the action is brought, gives a County Court jurisdiction to hear and determine causes as to any claim for "damage by collision." Collision must be a collision between ships. That is the ordinarily understood meaning of the word in the Admiralty Court:

Robson v. Owner of the Kate, 59 L. T. Rep. 557;

6 Asp. Mar. Law Cas. 330; 21 Q. B. Div. 13;

Everard v. Kendall, 22 L. T. Rep. 408; 3 Mar. Law Cas. O. S. 391; L. Rep. 5 C. P. 428.

It is true that sect. 4 of the County Courts Admiralty Jurisdiction Act 1869 extended the jurisdiction to damage to ships, "whether by collision or otherwise," but that would not include damage by a ship to a structure such as a pier.

Herbert Chitty and *H. Stuart Moore*, for the plaintiffs, *contra*.—The language used in *Robson v. Owner of the Kate* (*ubi sup.*) is only a dictum. The damage done there was to a pile-driving machine on a wharf on the bank, and the ground of the decision was that damage which had been done on land outside the ebb and flow of the tide could not have fallen within the jurisdiction of the Court of Admiralty, and therefore did not come within sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868. The intention of the Legislature was to give the County Courts the same jurisdiction as the High Court had:

The Zeta, 68 L. T. Rep. 40; 7 Asp. Mar. Law Cas. 369; (1893) A. C. 468.

The High Court clearly has jurisdiction to try the action under sect. 7 of the Admiralty Court Act 1861. That was decided in

The Uhla, 19 L. T. Rep. 89; 3 Mar. Law Cas. O. S. 148; L. Rep. 2 A. & E. 29n.

See also

The Excelsior, 19 L. T. Rep. 87; 3 Mar. Law Cas. O. S. 151; L. Rep. 2 A. & E. 288.

The word "collision" has been used with regard to other objects than a ship—*e.g.*, in the case of damage done by a ship to a barge (*The Malvina*, 6 L. T. Rep. 369; 1 Mar. Law Cas. O. S. 341; Lush. 493); by a ship to a ship (see *The Uhla*, *ubi sup.*); by a ship to a wharf (*The Excelsior*, *ubi sup.*); collision by a ship with a keel (*The Sarah*, Lush. 549); and in *Union Marine Insurance Company v. Borwick* (73 L. T. Rep. 156; 8 Asp. Mar. Law Cas. 71; (1895) 2 Q. B. 279) it was held that a vessel which was driven on to a sloping bank formed of loose boulders to protect a breakwater was lost by collision and not by stranding, and therefore the loss came within the words of an insurance policy, "loss or damage through collision with . . . piers or stages or similar structures." See also

The Munroe, 70 L. T. Rep. 246; 7 Asp. Mar. Law Cas. 407; (1893) E. 248.

They also referred to

The Merle, 31 L. T. Rep. 447; 2 Asp. Mar. Law Cas. 402;

River Wear Commissioners v. Adamson, 37 L. T. Rep. 543; 3 Asp. Mar. Law Cas. 521; 2 App. Cas. 743;

Reg. v. Judge of City of London Court, 66 L. T. Rep. 185; 7 Asp. Mar. Law Cas. 140; (1892) 1 Q. B. 273;

The Indus, 56 L. T. Rep. 376; 6 Asp. Mar. Law Cas. 105; 12 P. Div. 46;

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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The Robert Pow, 9 L. T. Rep. 237; 1 Mar. Law Cas. O. S. 392; Br. & L. 99;
The Merchant Shipping Act 1894, ss. 418, 419.

Dawson Miller in reply.

Feb. 9.—The judgment of the court was delivered by

BARNES, J.—This is a motion for a writ of prohibition to the judge of the County Court of Barnstaple to restrain proceedings in a suit by the committees of the estate of the plaintiff, the owner of a pier at Ilfracombe, in the county of Devon, against the defendants, the owners of the steamship *Normandy* of Liverpool. According to an affidavit filed in the case, the summons was issued by the plaintiff in rem, claiming 200l. against the steamship in respect of damage alleged to have been caused by the vessel to the pier, no part of which is afloat. The action was brought under sub-sect. 3 of sect. 3 of the County Courts Admiralty Jurisdiction Act 1868, which is as follows: [His Lordship then read the section.] It was contended by counsel for the applicants, the defendants in the suit, that the suit was not a cause as to a "claim for damage by collision," within the meaning of the sub-section, and that the question raised was covered by authority. On the other hand, counsel for the respondent argued that the words in the sub-section, "damage by collision," include a claim such as that made by the plaintiff, and that the authorities cited on behalf of the defendants were distinguishable from the present case, and inconsistent with the judgments in the House of Lords in the case of *The Zeta* (*ubi sup.*). The simple question is whether the words "damage by collision" include damage done to a pier by a ship striking against it. The principal cases relied on by the applicants were *Everard v. Kendall* (*ubi sup.*) and *Robson v. Owner of the Kate* (*ubi sup.*). In the former case it was held that the Admiralty jurisdiction of the County Court in cases of collision was not more extensive than that of the High Court of Admiralty, and, as the Court of Admiralty had no jurisdiction in the case of a collision on the Thames between two barges propelled by oars only, the County Court had no such Admiralty jurisdiction. In the course of his judgment Montague Smith, J. said (22 L. T. Rep., at p. 409; 3 Mar. Law Cas. O. S., at p. 392; L. Rep. 5 O. P., at p. 432): "What is the meaning of 'damage by collision'? We have nothing to guide us as to what damage by collision is within the Act, except the general scope and object of the Act. In common understanding, and as understood in the Court of Admiralty, damage by collision is damage sustained by a ship from another ship coming in contact with it." The late Master of the Rolls, then Brett, J., said the Act of 1868 "gives the County Court power to try in a particular way questions of salvage, claims for towage, necessities supplied to ships, and wages, and claims for damage to cargo or damage by collision. Damage by what collisions? Looking at sects. 7 and 22 of the Act of 1868, it seems to me that it means a collision between two vessels—such vessels as were formerly dealt with in the Admiralty Court." These dicta are favourable to the defendants' contention in this case; but the case is not conclusive in their favour, because the basis of the decision appears to have been that it was not the intention of the

Legislature to give the County Courts Admiralty jurisdiction over Admiralty causes other than those over which the Admiralty Court had jurisdiction, and that the Court of Admiralty had no jurisdiction in respect of such a collision as that in question in the case. It did not decide what jurisdiction the County Courts have within their limit of amount in cases of damage done by a ship in which the Admiralty Court has jurisdiction. In *Robson v. Owner of the Kate* (*ubi sup.*) it was held that damage occasioned to an object on the bank of a river by contact with the sailing gear of a vessel afloat in the river was not "damage by collision" within sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868, so that a County Court had no Admiralty jurisdiction in respect of such damage. Wills, J. in the course of his judgment said (59 L. T. Rep., at p. 558; 6 Asp. Mar. Law Cas., at p. 330; 21 Q. B. Div., at p. 14): "It is not necessary to define the word 'collision.' The words 'damage by collision,' used, as here, in an Act the object of which is to confer an Admiralty jurisdiction, cannot be construed as including damage which has taken place on land, outside the ebb and flow of the tide, and which would certainly not have fallen within the original jurisdiction of the Court of Admiralty in respect of collision"; and Grantham, J. said: "In *Everard v. Kendall* (*ubi sup.*), which was a proceeding by way of prohibition under this Act, Montague Smith, J. is reported to have said"—he then quotes the passage I have already referred to, and adds: "This explanation seems to me well founded, and I think the preceding words 'damage to cargo,' which obviously refer to damage to cargo while on board a ship, tend to show that the intention of the Legislature was to confine the newly conferred jurisdiction to cases of collision between ships." The reason given by the latter judge for his decision is applicable to the present case; but the basis of the judgment of Wills, J. is that the damage was on land, outside the ebb and flow of the tide, whereas, if there be any distinction in the case before us, the damage is to a structure which stands in the sea. The case mainly relied on by counsel for the plaintiff was *The Zeta* (*ubi sup.*), in which it was held that the jurisdiction given by sect. 3 of the County Courts Admiralty Jurisdiction Act 1868, and extended by sect. 4 of the County Courts Admiralty Jurisdiction Amendment Act 1869, included a claim for damage to a ship by collision with an object which was not a ship—e.g., a pier-head. That case turned on sect. 4 of the amending Act of 1869. The argument for the appellants, the Mersey Docks and Harbour Board, which succeeded in the House of Lords, was that sect. 4 of the Act of 1869 had clear words which gave the County Courts jurisdiction in "all claims for damage to ships, whether by collision or otherwise," and that the Admiralty Court had jurisdiction over such cases. The respondents do not appear to have disputed that the case fell within the language used in sect. 4, but argued that it was not intended to confer jurisdiction beyond that possessed by the Court of Admiralty, and that the action was not within that jurisdiction. The judgments were to the effect that the Admiralty Court had jurisdiction over claims of the character of that in question in the case, and that the claim fell within the words of sect. 4.

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Reference was also made by counsel for the plaintiff to expressions in some judgments in which the word "collision" has been used in a general way in relation to the impact of a ship against another object, and to some other cases which have only an indirect bearing on the present case; but in my opinion little assistance is to be derived from these references. I may here observe that the true meaning of collision is not a mere striking against, but a striking together; and to me it seems more correct to speak of a vessel stranding, or running, or striking upon or against rocks or the shore, than colliding therewith; and the same, to my mind, is true when the contact is by a vessel with some structure erected on the rocks or shore, and I notice that the use of the word "collision" in sects. 418 and 419 of the Merchant Shipping Act 1894 appears to refer only to collisions between ships. If this matter were clear of all that has been said in other cases, the question would appear to me to be a simple matter of construction, and having regard to the object of the Act of 1868, and its general scope, and the ordinarily understood meaning of the words "damage by collision" in the Admiralty Court, where the term "causes of damage" is the general expression for damage cases, I should come to the conclusion that the word "collision" referred to collision between ships. This opinion is in accordance with the case of *Everard v. Kendall* (*ubi sup.*) and *Robson v. Owner of the Kate* (*ubi sup.*), and there is nothing of substance to conflict with this view unless the argument based on the case of *The Zeta* (*ubi sup.*) does so. That argument comes to this, that the Admiralty Court had jurisdiction in 1868 in causes of damage received by or done by a ship which included a case of the present kind, and that the Act of 1868 gave similar jurisdiction to the County Courts within a limited amount; but in my opinion that argument seeks to establish too much. It has been decided in several cases that the County Court Acts of 1868 and 1869, while conferring Admiralty jurisdiction upon County Courts up to certain limited amounts, conferred no greater jurisdiction, except with regard to charter-parties, than was possessed by the Admiralty Court: (see *The Dowse*, 22 L. T. Rep. 627; 3 Mar. Law Cas. O. S. 424; L. Rep. 3 A. & E. 135; *Allen v. Garbutt*, 4 Asp. Mar. Law Cas. 520n.; 6 Q. B. Div. 165; and *Reg. v. Judge of the City of London Court*, *ubi sup.*). The arguments and judgments in these and other cases show that the question has in such cases not really been whether the particular claim came within the ordinary meaning of the words of the County Court Acts, but whether the claim was one in respect of which the Admiralty Court had jurisdiction, and, if not, it was considered that it could not have been intended to confer Admiralty jurisdiction in such a case in the County Courts, as these Acts were to confer Admiralty jurisdiction, though sect. 2 of the Act of 1869 in certain matters gave a somewhat wider jurisdiction: (see *The Alina*, *ubi sup.*). I am not aware whether the words "damage to cargo," in sub.sect. 3 of the Act of 1868, have yet been considered: (see *The Victoria*, 56 L. T. Rep. 499; 6 Asp. Mar. Law Cas. 120; 12 P. Div. 105). So also in *The Zeta* (*ubi sup.*) the real question was not whether the claim fell within the ordinary meaning of the words of sect. 4 of the Act

of 1869, or as to the meaning of the word "collision," but whether the words of sect. 4 should have a restricted interpretation on the ground, as was contended, that the case was not within the jurisdiction of the Admiralty Court. It was held, however, in the House of Lords, overruling the Court of Appeal, that the case was within the jurisdiction of the Admiralty Court, and thus any difficulty in the construction of the Act of 1869 was removed. In the present case the difficulty does not arise upon any question as to the jurisdiction of the High Court. It is clear from the terms of the Admiralty Court Act 1861, and the decisions thereon, that the High Court has Admiralty jurisdiction in respect of this claim as being damage done by a ship (see *The Uhla*, *ubi sup.*; and *The Excelsior*, *ubi sup.*); but the question is whether the wording of the Act of 1868 is sufficient to give similar jurisdiction to the County Court within the limited amount in such a case. Now, it is quite clear that the Acts of 1868 and 1869 do not give Admiralty jurisdiction within the limited amounts in all cases in which the Admiralty Court has jurisdiction. For instance, no jurisdiction is given in causes of possession, co-ownership cases, mortgage or bottomry, and it cannot therefore be inferred that the County Courts were intended to have Admiralty jurisdiction in all Admiralty causes up to limited amounts. On the contrary, care is taken to specify exactly what causes may be brought in the County Court. Whatever the old Admiralty jurisdiction was at the time when the Act of 1868 was passed, the Acts of 1840 and 1861 had enacted that the High Court of Admiralty should have jurisdiction over all claims for "damage received by any ship or sea-going vessel," and "over any claim for damage done to any ship," and nothing would have been easier than to have used similar words in the County Courts Admiralty Jurisdiction Act of 1868, whereas the words adopted in that Act are "damage by collision." We have only, therefore, to consider what is included in these words. All cases of damage done by a ship cannot, in my opinion, be so included. It has been held, for instance, that injury to a diver who was caught by the paddle-wheel of a steamer (*The Sylph*, 17 L. T. Rep. 519; 3 Mar. Law Cas. O. S. 37; L. Rep. 2 A. & E. 24), approved in *The Beta* (20 L. T. Rep. 988; L. Rep. 2 P. C. 447), which, however, was dissented from in the case of *Smith v. Brown* (24 L. T. Rep. 808; L. Rep. 6 Q. B. 729); damage done to a cable in freeing it from a vessel's anchor by which it had been fouled (*The Clara Killam*, 23 L. T. Rep. 27; 3 Mar. Law Cas. O. S. 463; L. Rep. 3 A. & E. 161); and damage to a vessel through grounding to avoid another vessel owing to negligence in the navigation of the other vessel (*The Industrie*, 24 L. T. Rep. 446; 1 Asp. Mar. Law Cas. 17; L. Rep. 3 A. & E. 303) could be sued for in the Admiralty Court; but clearly these cases could not properly be called cases of damage by collision. Other illustrations may be put analogous to the last case, though probably they are rather cases of damage received by a ship than of damage done by a ship. Possibly the plaintiffs' argument need not be put so high as to include in damage by collision all cases of damage done by a ship, but only cases of damage done by one ship to another, or by a ship to some other object

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by striking against it; but even then the word "collision" in the ordinary meaning, and as ordinarily used and understood in the Admiralty Court, would not be properly applicable to the latter case. Cases of striking something which is not engaged in navigation are very rare, and it is not unreasonable to assume that, in using the word "collision," the framers of the Act intended to deal with the class of case which forms the ordinary subject of a collision suit. It was urged that it would be strange if, as held in *The Zeta* (*ubi sup.*), the owner of a pier or dock could be sued in the County Court for damage caused to a ship by the negligence of the servants of such owner, and yet that such owner could not in the County Court sue for damage to the structure by negligence on the part of the ship's people; but the answer appears to be that the amending Act of 1869 covers the one case but not the other. The collocation of the words "damage by collision" and "damage to cargo" in the sub-section, to my mind, also intends to show that the sub-section was only dealing with ships, though what is included in "damage to cargo" is not a subject for present consideration. For these reasons I am of opinion that the writ of prohibition must go, and that the applicants are entitled to their costs of this motion against the respondents.

Solicitors for the applicants, *Botterell and Roche*, agents for *John J. Richards*, Swansea.

Solicitors for the respondents, *Eland, Nettleship, and Brett*, agents for *Ffinch and Chanter*, Barnstaple.

July 13, 1903, and Feb. 16, 1904.

(Before BUCKNILL, J.)

THE MINNETONKA. (a)

Collision—Both to blame—Damages—Payment by cargo owners to shipowners—Right of cargo owner to recover money so paid from wrong-doing vessel—Registrar and merchants.

A collision occurred between the steamship U. and the steamship M., for which both vessels were

found to blame. The U. had on board at the time a cargo of coals shipped by and the property of the Admiralty, and, in order to avoid probable expense, an agreement was come to by which the owners of the U. waived their right to carry the cargo to its destination, and the coals were discharged and sold. The owners of the U. recovered against the owners of the M. a moiety of their damages. A claim was made by the Admiralty, as owners of the cargo on board the U., against the owners of the M. for their proportion of the sum paid to the owners of the U.

Held, affirming the report of the registrar, that they were not entitled to recover anything, as such a payment could not be said to be the natural result of the collision, and that, if the owners of the M. were liable, the sum recovered would be payable to the owners of the U., who had already been paid a moiety of all the losses they had incurred by reason of the collision.

MOTION in objection to the report of the assistant registrar.

A collision occurred on the 9th June 1902, in the English Channel, between the steamships *Uskmoor* and *Minnetonka*. The *Uskmoor* at the time was on a voyage from the Tyne to the Cape with a cargo of coals shipped by and the property of the Admiralty. After the collision the *Uskmoor* put into the Thames for repairs, and after some correspondence, which is sufficiently dealt with by the learned judge in his judgment, the following letter was written on behalf of the Director of Navy Contracts to the managing owner of the *Uskmoor*:

Admiralty, S.W., 18th June 1902.—Gentlemen,—With reference to your letter of the 13th June, I have to acquaint you that, to minimise loss in the interests of all concerned, the Admiralty is prepared to agree to the following arrangement, to which it is understood that you and the underwriters have given your concurrence—viz.: The voyage to be terminated and the coal sold. The owners to be paid the sum of 1000*l.*, to be apportioned as a substituted expense, in lieu of those which would otherwise have been incurred, on the basis shown by the following approximate figures:

General Average.				Cargo.		Freight.	
£664	10	0	.....	Hire of barges	£166	2	6
106	17	6	.....	Shifting, &c.	53	8	9
424	10	10	.....	Reshipping	—	—	424 10 10
£1195	18	4	.....		£219	11	3
£996	15	0	.....	Apportioned in substitution for the above	£332	5	0
					£644	2	1
					£182	19	11
					£276	18	4
					£536	16	9

For 1000*l.* the figures will, of course, be slightly different. The *Uskmoor* to load another cargo on completion of repairs, on same conditions as charter of the 15th May, and at rate of freight current at date of signing the new charter, provided the owners give proper notice to Messrs. Mathwin and Sons, of Newcastle, of the date when steamer will be ready to load after repair. I shall be glad to have your confirmation of this arrangement by return of post, and to have a letter from you agreeing on these conditions to allow the cargo to be handed over to whomsoever it is sold to. The name of the buyers for insertion in such letter will be communicated to you as soon as sale is definitely arranged.—I am, Gentlemen, your obedient servant, PERCY MINTER, for Director of Navy Contracts.—Messrs. W. Runciman and Co.

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

This was agreed to by the owners of the *Uskmoor*, and the cargo was duly discharged and sold.

An action was brought by the owners of the *Minnetonka* against the owners of the *Uskmoor* and heard before the President (Sir F. H. Jeune) and Trinity Masters, and both vessels were found to blame for the collision. The case will be found reported in 87 L. T. Rep. 55; 9 Asp. Mar. Law Cas. 316; (1902) P. 250.

An action was then brought by the Admiralty, as owners of cargo on board the *Uskmoor*, against the owners of the *Minnetonka*, but was settled upon the terms of both vessels being to blame. At the reference before the assistant registrar and merchants to assess the damages, it was found that there was nothing due from

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the defendants except the sum of 5*l.* 5*s.* in respect of surveys.

The assistant registrar in his report dealt with the claim as follows:

The first item of the claim is for the difference between the cost of the coal and the price realised. It was contended by the defendants that nothing was due from them, on the ground that the cargo owners had not acted with reasonable diligence in not accepting a better price than that ultimately obtained. We are of opinion that the defendants' contention is right, and that this head of the cargo owners' claim must be disallowed. A sum for the cost of surveys is, however, payable to them—namely, 5*l.* 5*s.*—of which a moiety is recoverable against the defendants. The second head of the claim was for 1000*l.* agreed to be paid by the Admiralty to the shipowners for abandoning the voyage. It is not clear from the evidence that the whole of this sum was to be paid. In our view of the case, however, this doubt is not material, for we are of opinion that under all the circumstances the reasonable and business-like course for all parties was for the cargo to be sold in the Thames, and the payment of any sum to the shipowners by the cargo owners was not a consequence of the collision for which the wrongdoers are liable. The shipowners have recovered from the wrongdoers the cost of repairs and damages for the detention of their ship, and at the end of the period of detention they were in a position to, and did, take up a fresh charter. The duty of the shipowner being to carry the cargo to its destination, it was to his advantage to make an arrangement with the cargo owners whereby he would be free from this duty, and be able to take a new cargo when the repairs were finished. Any payment therefore made by the cargo owners to the shipowners is not a natural and reasonable result of the collision, and therefore is not recoverable against the wrongdoer.—(Signed) E. S. ROSCOE, Assistant Registrar.—12th June 1903.

The Admiralty appealed on the ground that everything had been done by the Admiralty to minimise the loss for the benefit of all parties, and that they were therefore entitled to recover the sum claimed.

Bucknill, J. referred the case back to the assistant registrar for further information as to whether or not the amount claimed by the Admiralty had or had not been paid to the owners of the *Uskmoor*.

The following is the material part of the further report of the assistant registrar:

By the report dated the 12th June 1903, I found that the cargo owners could not recover this sum from the owners of the *Minnetonka*, and the cargo owners appealed against the report. The hearing of the appeal on the 13th July was adjourned by Bucknill J. in order that I might report whether any part of the sum of 276*l.* 18*s.* 4*d.*, a moiety of which is now claimed by the cargo owners, had been allowed to the owners of the *Uskmoor* by the report on the claim against the *Minnetonka* dated the 22nd Dec. 1902. The claim in respect of this sum of 276*l.* is based on several letters which were put in at the previous reference; the particulars of the claim are set out in the letter of the Director of Navy Contracts dated the 18th June. It is to be noted that in the letters of the 13th and 17th June the proposed payment is spoken of as being in respect of freight, a word which would be proper, since, if the ship was repairable, her owners were entitled to carry on the cargo and earn this freight, and in the letter of the 20th June it is stated that the sum payable by the cargo owners would follow the completion of "the general average adjustment." The claim is, however, now put forward as being in respect of the hire of barges for the purpose of warehousing the cargo, and

expenses which would have been incurred had the voyage not been abandoned, but which was not in fact incurred and were therefore saved. I have to report that, as in the reference on the claim by the *Uskmoor* only the actual expenses incurred for discharging the cargo and for the hire of barges were allowed (item No. 7), no part of the present claim has been dealt with in the ship's reference. In the ship's reference, however, all sums in respect of loss of freight, and for expenses at the port of loading, were allowed to the shipowners (see item No. 35). At the further hearing further arguments were addressed to us by counsel for the claimants and the defendants, and I was asked to make several findings on points submitted to us. The points submitted by counsel for the cargo owners and our findings thereon are as follows: (1) That the voyage was not commercially at an end; we find that the voyage was not commercially at an end. (2) That on the 18th June repairs were expected to take six weeks; we find that the repairs were expected to take six weeks. (3) That 1000*l.* was agreed to be paid on terms contained in letters of the 18th June, explained by those of the 19th and 20th; we find that 1000*l.* was agreed to be paid on the terms contained in these letters. (4) That the Admiralty has been called on to pay their share. There is no direct evidence as to this, but the solicitor for the owners of the *Uskmoor*, who was present at the further reference, stated that the cargo owners would be called on to pay the sum claimed. (5) That the agreement was beneficial to all concerned, and a reasonable and proper one to reduce loss which would have been occasioned had the parties insisted on their strict rights to have voyage concluded. I find, as stated in the previous report, that it was reasonable and for the benefit of all concerned that the voyage should be abandoned, so that expenses in the Thames might be lessened, and that there should be no risk of the deterioration of the cargo. I further find the agreement by the Admiralty to pay 1000*l.*, or a part thereof, was not a reasonable agreement, because the object of the abandonment of the voyage was to save further expenses, and it was unreasonable for the cargo owners to pay any sum to the shipowners, since it was the duty of the shipowners to take all measures necessary to enable them to carry the cargo to its destination (see Carver on Carriage by Sea, 3rd edit., sect. 302); and, as the voyage was not commercially at an end, the cargo owners could have insisted on their cargo being carried to its destination without any payment to the shipowners except that of the agreed freight. I further find that the agreement, so far as it related to the payment of 1000*l.*, or any part thereof, was one arising out of the relation between ship and cargo, and that the collision was not the cause of it, and that the sum claimed is inadmissible as a head of damage in an action against the wrongdoing ship: (*The Marpessa*, 66 L. T. Rep. 356; 7 Asp. Mar. Law Cas. 155; (1891) P. 403). (6) That none of the items shown in the previous reference were allowed in respect of the expenses included in the 276*l.* The finding on this head has already been stated. The points submitted by counsel for the defendants were: (1) That by the arrangement made in June 1902 on the basis of a reshipment of cargo, which was alleged to be necessary and reasonable, the owners of the *Uskmoor* recovered from the owners of the *Minnetonka* a complete indemnity for all damages actually incurred arising out of the collision. I find that this was so. (2) That that indemnity, being obtained on the basis of voyage being abandoned, included all loss of expenses and all loss of profits from the date of eleven days before collision when the *Uskmoor* commenced her voyage by bunkering in the Tyne. That under these circumstances the owners of the *Uskmoor* could not claim from the owners of the *Minnetonka* any further sum in respect of the abandonment of the voyage, and that therefore the Admiralty cannot claim any such sum. I find the facts stated in the

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affirmative. I also find that the owners of the *Uskmoor* have obtained damages on the basis of the voyage being abandoned, and that the owners of the *Uskmoor*, if they recover the sum claimed in this reference by the cargo owners from them, should deduct this amount from the sum awarded to them in this claim against the *Minnetonka*: (see *The Marpessa*, *ubi sup.*). I was further asked to vary the previous order as to costs, but, having regard to my finding, I cannot vary the order as to the costs of the previous reference. The costs of this further reference I leave to be dealt with by the court.—(Signed) E. S. ROSCOM, Assistant Registrar.—20th Nov. 1903.

Acland, K.C. for the plaintiffs.—The agreement was to pay a sum of money which should be a substituted expense, and as such ship, cargo, and freight would have to contribute if it was a case of general average. The expense was a diminution of a certain loss. The assistant registrar has found that the parties did the right thing under the circumstances, and that the course taken of discharging and selling the cargo was a reasonable and businesslike one:

The Marpessa (*ubi sup.*);
Carver on Carriage by Sea, 3rd edit., sect. 302;
Notara v. Henderson, 26 L. T. Rep. 442; 1 Asp.
Mar. Law Cas. 278; L. Rep. 7 Q. B. 225.

The agreement was made to minimise the loss. The expenses of warehousing cargo would not have been general average losses at all, as they would have been incurred after the ship had arrived in a place of safety. It may be that the owners of the *Uskmoor* recovered more than they ought to have done from the owners of the *Minnetonka*, but that is no answer to our claim.

Aspinall, K.C. (*Pritchard* with him), for the defendants, *contra*.—In *The Marpessa* (*ubi sup.*) the question was whether the owners of the ship could recover money actually paid, and the President (Sir F. H. Jenne) found that the loss had not legally been caused by the collision. In the present case there is the same class of claim, but the parties have come to an arrangement, and apportioned certain hypothetical expenses. The claim has first of all been made on the ground that it is in the nature of loss of freight, then of general average, and now it is called a substituted expense. It is really some sort of suggested liability which arises out of the parties having saved themselves from some hypothetical expense.

Acland, K.C. in reply.

BUCKNILL, J.—This is an application by way of appeal from the report of the registrar, on the ground that that report cannot be supported in law. The matter has been before the court on two occasions. On the last occasion the court referred the matter back to the registrar to find whether any part of the amount claimed by the Admiralty—namely, 276*l.* 18*s.* 4*d.*—had in fact been allowed to the *Uskmoor*, in the reference between the owners of the *Uskmoor* and the owners of the *Minnetonka*, for the damage sustained by the *Uskmoor* in consequence of a collision between those two ships, for which they were found both to blame. The registrar has found that this amount had not been dealt with in that reference. The *Uskmoor* was on a voyage from the Tyne to South Africa, laden with a cargo of coal, the property of the Admiralty. During the voyage she came into collision with the *Minnetonka*, in consequence of which the *Uskmoor* herself was damaged, and also, to a certain extent, the cargo on board. The

Uskmoor was then taken to the river Thames to be repaired, and it was ascertained that the repairs would take, it was estimated, about six to eight weeks, and the Admiralty and the owners of the *Uskmoor* very properly tried to see what could be done in the circumstances for the benefit of each other. On the 12th June the Admiralty wrote to the owners of the *Uskmoor* asking them what arrangements they had made with regard to the storage of the cargo on shore or in lighters during the repairs to the ship. The letter ended with this paragraph: "Until the receipt of the surveyor's (Mr. Lewis) report it will not be possible to form a definite opinion as to the best course to pursue, but I should be glad to have your views as soon as possible as to the advisability of selling the coal and considering the voyage terminated, so as to avoid the expense of storage and re-shipping." The expense of re-shipping would not fall entirely upon the cargo owners, but the expense of storage, subject to general average, would fall upon the cargo owners. That letter was answered by the owners of the *Uskmoor* on the 13th June, when they said the repairs would take about eight weeks, and it was impossible for them to advise the Admiralty as to the termination of the voyage, but that if the Admiralty wished to do so they would do so for the consideration of 7*s.* 6*d.* per ton "as full freight." Then on the 17th June Mr. Lewis wrote to the Admiralty, amongst other things, this: "Messrs. Runciman will now accept 1000*l.* in respect of the freight, which is a trifle more than Messrs. Hopkins, Son, and Cookes had advised you. They had written their letter to you before they could make sure whether it was 996*l.* or 1000*l.* All that is wanted from you now is a letter to Messrs. Runciman stating that you offer them 1000*l.* in respect of the freight and stating that you will give them another cargo to replace the present one at the 16*s.* rate or more if the freights should rise in the meantime, of course they giving you proper and sufficient notice when the vessel is expected to be ready, and Messrs. Runciman to have the option of refusing the offer." On the same day Messrs. Hopkins, Son, and Cookes wrote to Mr. Lowrey, the secretary of the Salvage Association, and they put the case in this way: "We beg to inform you that we have carefully considered the facts and circumstances of this case, and assuming the voyage is terminated in London and the ship-owners are paid 4*s.* 6*d.* per ton, equal 996*l.* 15*s.*, this amount will be apportioned as per annexed sheet as a substituted expense in lieu of hire of barges: Six weeks 664*l.* 10*s.*, shifting ditto 108*l.* 17*s.* 6*d.*, re-shipping cargo 424*l.* 10*s.* 10*d.*, total 1195*l.* 18*s.* 4*d.*; and in addition to the above expenses which will be saved, the expected deterioration by breakage of coal, estimated by Mr. Lewis at about 10 per cent. at least on Cape Town values, and 2 per cent. for loss of weight, is avoided. It will, of course, be necessary to obtain the agreement of all interests to this arrangement." Then Mr. Lowrey wrote on the 18th June to Messrs. Hopkins, Son, and Cookes: "The ship underwriters have approved our suggestion that the coals should be sold in London and that the loss of freight should be treated as a substituted expense." The keynote of this case is that the loss of freight should be treated as a substituted expense. Then comes the letter of the 18th June,

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setting out the figures of general average and freight, and there is the final letter from the Admiralty on the 20th June to Messrs. Runciman: "Your expression 'to pay the shipowners the sum of 1000*l.*' is understood as meaning that the sum of 1000*l.* will be apportioned on the basis stated in my letter of the 18th June, and a claim made by the owners upon the Admiralty for the portion thereof falling upon the cargo when the general average adjustment is completed." When this case first went before the registrar and merchants it was put in this way: That the shipowners and the Admiralty had agreed that the sum of 1000*l.* was to be paid for freight. To-day the claim is not for freight at all. It is not put as having anything to do with freight. That part of the case has been put on one side. It is put in this way: That the Admiralty have entered into an obligation, binding upon them, to pay to the owners of the ship 276*l.* odd, and that there was a good consideration for that binding contract between them for the abandonment of the voyage. When one comes to test the claim, to see what it really means, it comes to this, that if the voyage had not been abandoned and if the cargo had remained in barges, and if the Admiralty had become responsible to pay, as they would have become, for the hire of the barges, the amount would certainly have exceeded 276*l.* It may be that this is a sum of money which, in the circumstances of this case, the shipowners could recover from the Admiralty—I do not say it would be so or would not be so—but it does not follow that, because the Admiralty would be liable to the shipowners, therefore the Admiralty can put that liability over on to the backs of the owners of the *Minnetonka*, the wrongdoing ship. The only way in which the Admiralty can recover against the owners of the *Minnetonka* here is by showing a certain loss, or a sum of money lost; that is, a certain loss in consequence of a reasonable arrangement by the person having a claim minimising the claim which he has against the wrongdoer. But it must be a loss and a liability arising directly in consequence of the wrongdoing act of the *Minnetonka*. If it is not, then it is not recoverable. Is that the case here? I think not. The real facts as I find them to be and as I understand them to be, and as to them there is really no contradiction, are these: The voyage was abandoned. As between the shipowners, the *Uskmoor*, the cargo owners, and the Admiralty, a sum of money greater than 276*l.* was agreed to be paid. It is now said that that sum of money is a sum of money for which the Admiralty would have been liable in an event which has not in fact occurred, and that is a sum which directly represents a loss by the Admiralty occasioned by the wrongdoing of the *Minnetonka*. I think all these suggestions are not according to the real facts—that what really has happened is this, that the parties have put their heads together and come to some hypothetical figure not based upon fact, and not representing a direct loss or damage suffered by the Admiralty in consequence of the collision; and that therefore the Admiralty cannot make good this claim as against the owners of the *Minnetonka*. But there is something else which, though not absolutely conclusive, is very important to be considered, and that is that this 276*l.*, if the Admiralty could make the

owners of the *Minnetonka* pay it, would be payable to the *Uskmoor*, and the owners of the *Uskmoor* have already been paid all the loss they have sustained in consequence of the collision; and although it is possible to conceive a case where the owners of a ship may make a profit by the wrongdoing of the other party, in this case I think the owners of the *Uskmoor* would not be entitled to make such a profit, although, of course, the Admiralty could not make that answer if they had undertaken, for good consideration, to pay a sum of money to the *Uskmoor*. In conclusion, it seems to me that this case fails, because it has not been made out in law or in fact to be a loss sustained by the Admiralty directly in consequence of the wrongdoing act of the *Minnetonka*. Therefore my judgment must be against the appellants, and I confirm the report No. 1 of the registrar, and also report No. 2, with the result that those who have succeeded must have the costs of this appeal, and also of the second reference.

Solicitors for the plaintiffs, *Freshfields*.

Solicitors for the defendants, *Pritchard and Sons*.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, Feb. 25.

(Before COLLINS, M.R., ROMER, and
MATHEW, L.JJ.)

BARTRAM AND SONS v. LLOYD. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Principal and agent—Secret commission—Corrupt bargain—Confirmation by principal—Evidence—Necessity of full knowledge of all facts.

The defendant, acting through his agent, entered into a contract with the plaintiffs, who were shipbuilders, for the building of a ship. Before the contract was arranged the plaintiffs secretly agreed to give a commission to the defendant's agent.

At an interview which afterwards took place between the plaintiffs and the defendant as to the payment by him of money due under this contract, the plaintiffs informed him that they had agreed to pay commission to the agent, and the defendant, after being so informed, paid them a small sum on account. The plaintiffs afterwards brought an action to recover the balance due to them.

At the trial of the action Bruce, J. held that, by reason of the plaintiffs' secret agreement to give a commission to the defendant's agent, the contract was one which entitled the defendant to repudiate, but that by what had occurred at his interview with the plaintiffs he had confirmed the contract and debarred himself from repudiating it: (88 L. T. Rep. 286). On appeal:

Held, reversing the decision of Bruce, J., that the plaintiffs had not shown that there had been a full disclosure to the defendant of all the circumstances in connection with the plaintiffs' agreement to pay commission to the agent, and that

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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therefore there had been no such confirmation by the defendant of his contract as debarred him from repudiating it.

APPEAL by the defendant from the judgment of Bruce, J. at the trial of the action without a jury.

The action was brought to recover a sum of 7144*l.* as damages for breach of contract.

The plaintiffs were shipbuilders at Sunderland, and the defendant was a solicitor at Swansea.

By a contract dated the 16th July 1901 the defendant agreed to purchase, and the plaintiffs agreed to build, a steamer for 40,175*l.*

The defendant, being unable to carry out the contract, asked the plaintiffs to sell the steamer for the best price that could be obtained, and agreed that the balance of loss on the resale should be paid by him to the plaintiffs.

On account of this loss the defendant had paid to the plaintiffs 31*l.* only, and the sum of 7144*l.* was now claimed as damages due to the plaintiffs.

The defence raised was in substance that the defendant was entitled to treat the contract as not binding upon him on the ground that the plaintiffs surreptitiously and without the knowledge and in fraud of the defendant agreed to pay to one Thomas Campbell, who was acting as agent for the defendant, a percentage by way of commission on the purchase price of the steamer.

It appeared that Campbell carried on business as a broker for the sale of ships, but he was also employed by the defendant to act as his expert adviser in connection with the steamer which was the subject of the contract between the plaintiffs and the defendant.

On the 11th June 1901 Campbell wrote to the plaintiffs, inclosing particulars of a proposed steamer and asking the plaintiffs to make a tender. He added: "My friend now requests me to obtain prices and see the contract carried through. Of course, he wishes me to obtain prices from several other firms."

On the 12th June the plaintiffs replied, quoting the price of 40,000*l.* on a cash basis. They added: "Price also includes 1 per cent. commission."

On the 13th June Campbell wrote to the plaintiffs acknowledging their letter, and said: "I will be pleased if you could send me another quotation without mentioning commission."

On the 14th June the plaintiffs accordingly wrote to Campbell a letter in precisely the same terms as their letter of the 12th June, save that no mention was made of commission.

On the 16th June the contract was signed.

In Sept. 1902 the arrangement was made by which the plaintiffs were to sell the steamer for the best price that could be obtained, and the defendant was to pay them the balance of loss on the resale.

On the 19th Nov. the defendant, being unable to pay this sum, went to Newcastle-upon-Tyne and had an interview with the plaintiffs. At this interview the plaintiffs told the defendant that Campbell was claiming commission from them in respect of the contract of the 16th June 1901, and they pressed the defendant to pay them something, however small, as an instalment of the money due to them from him.

The defendant then paid them 1*l.*, and they served on him the writ of summons in the present action.

At the trial of the action Bruce, J. was of opinion that the work done by Campbell in connection with the contract of the 16th June 1901 exceeded the work ordinarily done by a broker, and that in consequence of the agreement by the plaintiffs to pay him a secret commission, the defendant was entitled to repudiate his contract with the plaintiffs as soon as he was informed of the agreement to pay commission. But the learned judge, after dealing with the evidence, said: "I therefore find that the defendant, with full knowledge of all the facts relating to the dealings between the plaintiffs and Campbell, chose to approbate his contract with the plaintiffs, and on this ground the defendant cannot now be allowed to rescind the contract sued upon. I must therefore give judgment for the plaintiffs for the amount claimed."

The case is reported 88 L. T. Rep. 286.

The defendant appealed.

The defendant in person.—The correspondence between the plaintiffs and Campbell before the completion of the contract of the 16th June 1901, with their agreement before that date to pay him commission and their re-writing of their offer, but omitting the mention of the commission, was not disclosed to me at the interview in Nov. 1902, nor did I know of it till I obtained discovery in this action. There was no complete disclosure of all the facts such as was necessary to enable the plaintiffs to rely upon an alleged confirmation by me of the contract which Bruce, J. has found that I was entitled to repudiate:

Morse v. Royal, 12 Ves. 335;

Cockerell v. Cholmeley, 1 Russ. & My. 418;

Moxon v. Payne, L. Rep. 8 Ch. App. 881.

He referred also to

Wood v. Downe, 18 Ves. 120;

Barron v. Willis, 82 L. T. Rep. 729; (1900) 2 Ch. 121.

Arthur Powell, K.C. and Adair Roche for the plaintiffs.—The agreement by the plaintiffs to pay commission to Campbell was not of such a nature as to entitle the defendant to repudiate his contract with the plaintiffs as being brought about corruptly:

Great Western Insurance Company v. Cunliffe, 30

L. T. Rep. 113, 661; L. Rep. 9 Ch. App. 525;

Bering v. Stanton, 35 L. T. Rep. 652; 3 Ch. Div. 502.

[COLLINS, M.R.—There is abundant evidence here that Campbell was not a mere broker, but was known by the plaintiffs to be acting as engineering expert and adviser to the defendant. Assuming that the defendant was entitled to repudiate the contract, yet the fact that it was induced by fraud would not render the contract void. It continued valid until the defendant determined his election by avoiding it:

Clough v. London and North-Western Railway

Company, 25 L. T. Rep. 708; L. Rep. 7 Ex. 26.

Here the defendant was informed at his interview with the plaintiffs in Nov. 1902 that they had agreed to pay commission to Campbell, and, knowing that, he paid them part of the money they claimed from him. That was an election by him, and his election is final:

Scarff v. Jardine, 47 L. T. Rep. 258; 7 App. Cas. 345.

After an election has once been made, the right

to repudiate a contract is not afterwards revived by the discovery of another incident in the same fraud :

Campbell v. Fleming, 1 A. & E. 40.

The question whether an election has been made is one of fact, and the learned judge at the trial, on that question of fact, has come to a conclusion favourable to the plaintiffs :

Curtis v. Williamson, 31 L. T. Rep. 678; L. Rep. 10 Q. B. 57.

They cited also

Bulch-y-Phom Lead Mining Company v. Baynes, 16 L. T. Rep. 597; L. Rep. 2 Ex. 324;

Cooper v. Phibbs, 16 L. T. Rep. 678; L. Rep. 2 H. L. 149;

Earl Beauchamp v. Wynn, L. Rep. 6 H. L. 223.

COLLINS, M.R.—This is an appeal by the defendant from the judgment of Bruce, J. at the trial of the action. The plaintiffs are shipbuilders, and the defendant who was formerly a solicitor was concerned in a business connected with ships. Through an agent, of the name of Campbell, the defendant entered into a contract with the plaintiffs by which they agreed to build a ship for him for 40,000*l.* Before the ship was finished the defendant found that in consequence of changes that had taken place in the conditions of the shipping trade it would be impossible for him to obtain any co-adventurers for the purpose of making a profit on the vessel. Thereupon he made an arrangement with the plaintiffs under which they were to sell the ship and he was to pay them the difference between the 40,000*l.* and the price that they could get on the sale. The plaintiffs accordingly sold the ship and have brought this action to recover from the defendant the sum of 7144*l.* being the amount of the difference between the 40,000*l.* and the price realised by the sale of the vessel. The defence raised to the action is this: the defendant says that his contract with the plaintiffs for the building of the vessel was made through Campbell acting on his behalf, and that since action brought he has ascertained that the plaintiffs had secretly agreed to pay Campbell a commission and he therefore repudiates the contract as having been brought about corruptly. Bruce, J. found at the trial that Campbell in making the contract on behalf of the defendant with the plaintiffs had not acted merely as an ordinary broker, that is, as an intermediate agent for two parties, but that there was a special relation between the defendant and Campbell which was known to the plaintiffs and which made it improper for Campbell to receive a commission from them. The learned judge was of opinion that the agreement by the plaintiffs to give Campbell a commission was such as would have debarred them from succeeding in the present action but for certain matters which happened after the making of the contract, and it was in view of these subsequent matters that the learned judge ultimately gave judgment in favour of the plaintiffs. Now, it appeared that in Nov. 1902 the defendant had admitted to the plaintiffs his inability to pay the sum they claimed from him and he went to Newcastle-upon-Tyne to see them and try to settle the affair. It was at the interview that he had with them there that the writ in this action was served upon him. Bruce, J. found that during the discussion which took place at this interview the plaintiffs informed

the defendant that Campbell was entitled to be paid a commission by them, and the learned judge was of opinion that as the defendant, after being so informed, had been induced by the plaintiffs to pay them *l.* as an instalment of the money due from him, this act of the defendant amounted to a confirmation by him of the contract which otherwise he would have been entitled to repudiate as having been obtained from him corruptly. He therefore held that the defendant had debarred himself from taking advantage of the fact that the contract had been brought about improperly by the plaintiffs. The real question that arises on this appeal is whether or not Bruce, J. was right in his conclusion of fact as to what happened at the interview between the plaintiffs and the defendant and whether anything that occurred there debars him from relying on the defence that he has raised. Now several authorities have been cited to us, and it is perfectly clear law that the adoption or ratification or confirmation by a person of a contract which he has the right to repudiate must be made with full knowledge of all the facts of the case. That is not denied. It is said that Bruce, J. found that the defendant was aware that the plaintiffs had agreed to pay a commission to Campbell, but I think he has not found that the defendant had full knowledge of all the facts. [His Lordship referred to the evidence, and said that though the defendant was told that the plaintiffs had agreed to pay a commission to Campbell he was not told that the arrangement as to the commission was made at the inception of the matter with the view of inducing Campbell to make the contract for the defendant, nor was he told of the correspondence as to the commission which passed between the plaintiffs and Campbell, or of the other facts on which the agreement was founded.] Under these circumstances, the defendant not being aware of all the facts as to the making of the contract, has he bound himself by what he did at the interview? Bruce, J. has found that the plaintiffs' agreement to pay commission to Campbell was improper, Campbell not being a mere broker but acting as expert adviser to the defendant, as the plaintiffs well knew. It seems that the plaintiffs were aware of a flaw in their position and prevailed on the defendant, at the interview, to pay them *l.* as evidence of a confirmation by him of the contract. I think that this payment was made by him without full knowledge of all the facts of the case, and that it does not deprive him of his right to repudiate the contract. It appears that he did not really know the facts until he obtained discovery in the action. I think that the effect of the half disclosure of the facts was not before the mind of Bruce, J., or his decision would have been the other way. For this reason I think that the appeal must be allowed.

ROMER, L.J.—I am of the same opinion. I agree that the plaintiffs' agreement to pay commission to Campbell was improper, and such as to entitle the defendant to repudiate the contract. But the plaintiffs rely on what occurred at the interview in November as a confirmation by the defendant of the contract. I think that in order to make out a proper confirmation the plaintiffs must establish a disclosure of all the material facts entitling the defendant to repudiate, and the disclosure should be such as fairly to bring

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home to the mind of the defendant a proper appreciation of the facts so as to put him to his election. The plaintiffs have not, in my opinion, satisfactorily established any such disclosure. The words of Lord Erskine, L.C. in *Morse v. Royal* (12 Ves. 355, at p. 373) seem to me very opposite. He says: "As to the doctrine of confirmation, it stands upon several authorities; where a man, having been defrauded, with complete knowledge chooses to come again in contact with the person who defrauded him; abandons his right to abrogate the contract; and enters into a plain, distinct, transaction of confirmation. But when the original fraud is clearly established by circumstances not liable to doubt, a confirmation of such a transaction is so inconsistent with justice, so unnatural, so likely to be connected with fraud, that it ought to be watched with the utmost strictness, and to stand only upon the clearest evidence; as an act, done with all the deliberation that ought to attend a transaction, the effect of which is to ratify that, which in justice ought never to have taken place." Those words are peculiarly applicable to the present case. It is impossible to suppose that the defendant could have had such a knowledge of the facts as to take upon himself deliberately the loss he would suffer under the contract. There was no possibility of his taking any benefit whatsoever by ratifying the contract. It is suggested that the defendant deliberately, and without any consideration, and without asking for any consideration for what he was doing, chose to say that he would pay a sum which he was not bound to pay. Under these circumstances it is difficult to believe in an alleged confirmation of the contract. It cannot be said that it was from a sense of honour that he took upon himself the liability under the contract. He did not know of the letters that had passed between the plaintiffs and Campbell, and if he had known of them, it would be impossible for anyone to say that he was bound upon any ground of honour to take the liability upon himself. I think that the appeal must be allowed, and judgment entered for the defendant.

MATHEW, L.J. concurred.

Appeal allowed.

Solicitors for the plaintiffs, *Pritchard and Sons*, agents for *James Wallace*, Sunderland.

Friday, March 4.

(Before COLLINS, M.R. ROMER and
MATHEW, L.JJ.)

BOARD OF TRADE v. SAILING SHIP GLENPARK
LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

*Shipping — Seamen — "Distressed seaman" —
Provisions for relief — Evidence of distress —
Receipt of wages by seaman — Merchant
Shipping Act 1894 (57 & 58 Vict. c. 60), ss. 190,
191, 193 — Merchant Shipping (Mercantile
Marine Fund) Act 1898 (61 & 62 Vict. c. 44),
s. 4.*

*The question whether a seaman who has been
shipwrecked abroad is a "distressed seaman"*

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

*within the meaning of sects. 190, 191, and 193
of the Merchant Shipping Act 1894 is a question
of fact.*

*A "distressed seaman" does not of necessity cease
to be a "distressed seaman" on his being paid
the wages due to him, when such wages are
enough to pay the expenses of his maintenance
abroad and passage home.*

*Decision of Bigham, J. (88 L. T. Rep. 693; (1903)
2 K. B. 324) affirmed.*

*Quere, whether the "sufficient evidence" of ex-
penses incurred for his benefit which is provided
for by sect. 193, sub-sect. 3, means "conclusive
evidence."*

APPEAL by the defendant company from the
judgment of Bigham, J. at the trial of the action
without a jury.

The action was brought by the Board of Trade
against the owners of the sailing ship *Glenpark*
to recover the sum of 99l. 18s. 11d., being the
balance of moneys paid by the plaintiffs in respect
of the maintenance and relief of certain seamen
alleged to have been "distressed seamen" within
the meaning of the Merchant Shipping Act 1894.

In May 1900 the *Glenpark* left Barry (Cardiff)
on a voyage to Cape Town and (or) any ports or
places within the limits of 75 degrees north and
60 degrees south latitude, the maximum time to
be three years' trading in any rotation and to
end in the United Kingdom or Continent of
Europe between the Elbe and Brest inclusive at
master's option.

On the 29th Jan. 1901 the *Glenpark*, in the
course of her voyage, left Port Germain, in South
Australia, on a voyage to Alcoa Bay, her crew
consisting of twenty-six hands all told—namely,
master, two mates, cook, steward, carpenter, sail-
maker, boatswain, five apprentices (one of whom
acted as third mate), twelve A.B.s, and one ordi-
nary seaman.

On the 1st Feb. 1901 the *Glenpark* struck on a
sunken rock near Wedge Island, in Spencer
Gulf, South Australia, and became a total wreck.
The crew lost the whole of their effects except the
clothes they were wearing, but were saved and
taken in the ship's boats to Port Victoria, in
South Australia, arriving there on the 2nd Feb.
1901. The log and the agreement with the crew
were lost with the vessel.

Between the 2nd and the 4th Feb. 1901 the
crew were subsisted at Port Victoria by the
Governor of South Australia on behalf of the
Crown, acting by the Marine Board of South
Australia, at a cost (excluding that incurred in
respect of the master) of 13l. 1s.

On the 4th Feb. 1901 the crew were provided
with passages from Port Victoria to Port Adelaide
by the same authority at a cost (excluding that
incurred in respect of the master) of 20l. 16s.
The crew on their arrival on the 4th Feb. at
Port Adelaide were (except the master) subsisted
there by the same authority at a cost of 26l. 5s.,
and were also provided by the same authority
with necessary clothing.

On the 6th Feb. 1901 the representatives of the
owners of the *Glenpark* at Port Adelaide, in the
presence of the superintendent of the Mercantile
Marine Board of South Australia, paid each
member of the crew the balance of wages due to
him under the agreement with the crew up to the
time the vessel was lost.

The majority of the crew obtained employment at Port Adelaide, but eight members thereof failed to obtain any employment and were provided with passages to the United Kingdom by the same authority at a cost of 63*l.* 2*s.* 6*d.*

The total expenses incurred on behalf of the crew (excluding the master) by the said authority amounted to the sum of 236*l.* 5*s.* 1*d.*

The Board of Trade, on behalf of the Crown, paid the sum of 236*l.* 5*s.* 1*d.* to the said authority as money due to them in respect of expenses incurred on account of distressed seamen within the meaning of sect. 193 of the Merchant Shipping Act 1894, and the Board of Trade contended that they were entitled on behalf of the Crown to recover the whole of that sum from the defendants under the same section.

The defendants paid to the plaintiffs, and the plaintiffs accepted, both without prejudice, various sums amounting in all to 136*l.* 6*s.* 2*d.* in respect of the expenses of members of the crew, fourteen in number, and with regard to the expenses of these members the defendants admitted liability; and no question of further payment in reference to such members now arose. As regards these fourteen members of the crew, the wages so paid to them were in every case less than the amount expended on their behalf as hereinbefore mentioned. The sum of 136*l.* 6*s.* 2*d.* was in fact greater by 1*l.* 5*s.* 6*d.* than the amount of the said expenses, but the difference was, for the purposes of this case, treated as immaterial. The balance of the total sum of 236*l.* 5*s.* 1*d.*—viz., 99*l.* 18*s.* 11*d.*—had never been paid to the plaintiffs by the defendants in whole or in part, and the plaintiffs now claimed that balance from the defendants in the present action. That balance represented the amount of expenses incurred on behalf of the eleven remaining members of the crew other than the fourteen members above-mentioned, the wages paid to whom were in every case greater than the expenses so incurred.

At the trial of the action Bigham, J. held that the eleven seamen in question were "distressed seamen" within sect. 193 of the Merchant Shipping Act 1894 notwithstanding the fact that the wages paid to them were in excess of the expenses of their maintenance abroad and passage home. The learned judge also held that under sect. 193, sub-sect. 3, the production of the account of expenses there mentioned and proof of payment were conclusive evidence of the right of the Board of Trade to recover such expenses.

The learned judge therefore gave judgment for the plaintiffs.

The case is reported 88 L. T. Rep. 693; (1903) 2 K. B. 324.

The defendants appealed.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) contains the following provisions under the heading, "Distressed Seamen":

Sect. 190. The Board of Trade may make regulations with respect to the relief, maintenance, and sending home of seamen and apprentices found in distress abroad, and may by those regulations (in this Act referred to as the distressed seamen regulations) make such conditions as they think fit with regard to that relief, maintenance, and sending home, and a seaman shall not have any right to be relieved, maintained, or sent home except in the cases and to the extent and on the conditions provided by those regulations.

Sect. 191 (1). The following authorities, that is to say, governors of British possessions, . . . may, in accordance with and in the conditions prescribed by the distressed seamen regulations provide for the maintenance, until a passage home can be procured, of the following seamen and apprentices (who are in this Act included in the term distressed seamen) namely, (a) seamen and apprentices to the sea service, whether subjects of Her Majesty or not, who by reason of having been discharged or left behind abroad or shipwrecked from any British ship, or any of Her Majesty's ships, are in distress in any place abroad; . . . (4) The authority shall be paid in respect of the expenses of the maintenance and conveyance of distressed seamen such sums as the Board of Trade may allow, and those sums shall, on the production of the bills of disbursements, with the proper vouchers, be paid as hereinafter provided.

Sect. 193, sub-sect. 1, as amended by sect. 4 of the Merchant Shipping (Mercantile Marine Fund) Act 1898 (61 & 62 Vict. c. 44) provides that when expenses on account of a distressed seaman for maintenance, necessary clothing, and conveyance home are incurred by or on behalf of the Crown, these expenses shall be a charge upon the ship, whether British or foreign, to which such distressed seaman or apprentice belonged, and shall be a debt to the Crown from the master of the ship or from the owner of the ship for the time being.

Sub-sect. 2 provides:

The debt, in addition to any fees which may have been incurred, may be recovered by the Board of Trade on behalf of the Crown either by ordinary process of law, or in the court and manner in which wages may be recovered by seamen.

Sub-sect. 3 provides:

In any proceeding for such recovery, the production of the account (if any) of the expenses furnished in accordance with this Act, or the distressed seamen regulations, and proof of payment of the expenses by or on behalf of the Board of Trade, shall be sufficient evidence that the expenses were incurred or repaid under this Act by or on behalf of the Crown.

Danckwerts, K.C. and Maurics Hill for the defendants.—To justify the payment of money for the relief of a distressed seaman under this Act, it is not enough to show that the seaman was "discharged or left behind abroad or shipwrecked," it must also be shown that he was "in distress." "Distressed" means "in want"—i.e., in want of something necessary which he is unable to procure for himself, as was *Aeneas* after his shipwreck: "*Ipse ignotus egens Libya deserta peragro*"; (*Æn.* I. 334). In the case of these eleven seamen they received wages which in each case were largely in excess of the expenditure which was actually necessary for their maintenance. With reference to sect. 193, sub-sect. 3, "sufficient evidence" does not there mean "conclusive evidence":

Barraclough v. Greenough, 8 B. & S. 623; L. Rep. 2 Q. B. 612.

"Sufficient" means *prima facie* sufficient:

R. v. Fordham, L. Rep. 8 Q. B. 501.

An enactment altering the law as to evidence, and creating statutory evidence whereby the rights of parties may be defeated, must be construed strictly:

Northard v. Pepper, 10 L. T. Rep. 732; 17 C. B. N. S. 39, at p. 50.

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The *Attorney-General* (Sir R. B. Finlay, K.C.) (the *Solicitor-General* (Sir E. Carson, K.C.) and *Henry Sutton* with him) for the Board of Trade. —There was some evidence before Bigham, J. that these seamen were in distress, and no evidence was offered in opposition. It would be monstrous to say that a seaman abroad is not in distress merely because his wages are enough to pay for a passage home, and to land him penniless in England. He may have a wife and family dependant on his earnings. [He was stopped.]

Maurice Hill replied.

COLLINS, M.R.—This is an appeal from a decision of Bigham, J., and the principal point raised is a very short one. The question is whether, under the particular circumstances of this case, certain persons were "distressed seamen" within the meaning of sect. 191 of the Merchant Shipping Act 1894. Now the question arises in this way: These sailors were shipwrecked near Australia, and they succeeded in getting in the first instance to Port Victoria, from which place they found their way ultimately to Adelaide. In the wreck they lost all their kit, in fact everything except the clothes in which they stood, but when they got to Adelaide the wages due to them up to that date were paid them by the agents of the shipowners. Now, it is not disputed that up to the time that the wages were paid at Adelaide these men were "distressed seamen," but it is contended by the shipowners that from and after the time that the wages were paid these men ceased to be "distressed seamen," and were therefore not within the provisions of the Merchant Shipping Act 1894, which entitle the British representative at the place where a "distressed seaman" may be to furnish him with the means for maintenance and to supply him with a passage home. Now the words under which the question arises are in sect. 191. [His Lordship read it.] It is said that these shipwrecked seamen do not come within the class of seamen there referred to because, having received their wages, they were not "in distress." It seems to me that the question whether they were, or were not, "in distress," notwithstanding the fact that they had received their wages, is a question of fact. It seems to me to be perfectly possible that a seaman who has lost everything except what he stands up in, and who has upon his shoulders the burden of a family, may very well be "in distress," although he has just been paid his wages. Wages paid to him in a foreign country afford him no provision for getting home again except at his own cost, and leave him, as I have said, with the burden of his family at home. On my reading of the section the fact that a man is shipwrecked is not conclusive evidence of his being "in distress." As was pointed out by my brother *Romer* in the course of the argument, a shipwrecked person may be a millionaire with plenty of money actually in his pocket so that he stands in no need of assistance from a banker or anyone else. You could not say that such a person was a "distressed seaman," and entitled under the Act to be maintained and provided with a passage home. Therefore the question whether a seaman who has been shipwrecked is "in distress" seems to me to be one of fact. That being so, what is the evidence in the present case? The evidence is that which I have stated, and then by sect. 193,

sub-sect. 3, the production of the account of the expenses furnished in accordance with the Act or the distressed seamen regulations, and proof of payment of the expenses by or on behalf of the Board of Trade is "sufficient evidence" that the expenses were incurred or repaid under the Act by or on behalf of the Crown. Bigham, J. seemed to think that "sufficient evidence" was equivalent to "conclusive evidence." Without giving any opinion on that point, it seems to me that the evidence is certainly sufficient, if it is not contradicted. In the present case I think that there was plenty of evidence—in the absence of anything more to the contrary than the fact that wages of a certain amount were paid—upon which the learned judge at the trial was justified in coming to the conclusion that these men were "distressed seamen" within the meaning of the Merchant Shipping Act 1894. In fact, on the evidence that was before him, I should have arrived at the same conclusion myself. Therefore on the facts of the case it seems to me that there is no ground for interfering with the decision of Bigham, J. On the question whether the words "sufficient evidence" in sect. 193, sub-sect. 3, mean "conclusive evidence" it is unnecessary that I should give any decision, and I therefore desire to reserve my opinion.

ROMER, L.J.—I am of the same opinion. Whether a shipwrecked sailor is or is not at a particular port a "distressed seaman" is a question of fact. He is not of necessity a "distressed seaman" because he has been shipwrecked. For example, as was pointed out by my Lord, a man who had been shipwrecked could not fairly be called a "distressed seaman" if he arrived with 500*l.* in his pocket at a place like Port Adelaide where every necessity can be obtained. On the other hand, I certainly am not prepared to hold that a shipwrecked sailor who has lost everything, coming to a place like Port Adelaide, ceases to be a "distressed seaman" because he is paid his wages, even if those wages turn out to have been sufficient to pay for the expenses of his maintenance there, and his shipment back to England. I do not think that a man could be said to be of necessity a distressed seaman because he may have been paid his expenses to England, landing him there without a penny or without enough to enable him to keep himself at all, even for the shortest possible time on his arriving in England, especially bearing in mind, as has been pointed out, that he may have a family in England dependant on him. It is a question of fact. Now, in the present case we have what the statute calls "sufficient evidence" that these seamen were "distressed seamen" at the time in question. Against that sufficient evidence there is no sufficient evidence to be placed. That being so, I come to the conclusion, on the question of fact, that these seamen were "distressed seamen." Like the Master of the Rolls, I express no opinion, because it is unnecessary that I should do so, upon the point whether "sufficient evidence" in sect. 193, sub-sect. 3, means "conclusive evidence."

MATHEW, L.J.—I am of the same opinion. It was not disputed that if the wages paid to the seaman were less than the amount necessary to bring him back to England he would be a "distressed seaman." He would certainly be so, if he

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were in that position. If that be so, it seems to me that it is a question of fact to be determined by the court how far wages paid to a man under those circumstances were available for the purpose of bringing him home. As I pointed out, it makes a serious alteration in the terms of the contract between the shipowner and the seaman. Now, what is the evidence here? We have before us the account upon which the authorities in Australia acted, and that account, it is said, is evidence that they must have been satisfied as regards each of these men that they continued to be "distressed seamen." If the case were that a seaman, shipwrecked abroad, must arrive destitute in this country if his wages were to be chargeable with the expense of bringing him home, I should approve of the judgment of the official who said that a seaman does not cease to be a "distressed seaman" by reason of the fact that if his wages were paid at once he would be able to discharge his present obligations. As to the meaning of the expression "sufficient evidence" in sect. 193, sub-sect. 3, it is unnecessary to express any opinion whether or not the words mean "conclusive evidence," because there was undoubtedly, in the present case, evidence before the court upon which the court was entitled to act, as it remained unanswered on the part of the shipowners. For these reasons I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for the plaintiffs, *Solicitor to the Board of Trade.*

Solicitors for the defendants, *Rowcliffes, Rawle, and Co., for Hill, Dickinson, and Co., Liverpool.*

Tuesday, March 8.

(Before COLLINS, M.R. ROMER and MATHEW, L.JJ.)

TAYLOR v. HAMSTEAD COLLIERY COMPANY LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Employer and workman—Injury by accident—Compensation—Scheme under Workmen's Compensation Act 1897—Bar to a right of action for damages for negligence—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), s. 1, sub-s. 2 (b); s. 3, sub-s. 1.

By a scheme which had been duly certified by the Registrar of Friendly Societies under sect. 3, sub-sect. 1, of the Workmen's Compensation Act 1897, a society was established to raise funds by the contributions of the employers and the workmen at certain collieries to make provision for the workmen in case of accidents; and the rules of the society provided that the contributions made by the employers to the society were to be in lieu of, and to exempt them from, any further claims which otherwise the members of the society might be entitled to prosecute as the result of accidents occurring during their employment.

A workman who had accepted this scheme and become a member of the society met with an injury by accident arising out of and in the course of his employment which resulted in his death.

His widow, after receiving certain sums as compensation under the terms of the scheme, brought an action against the deceased's employers under the Employers' Liability Act 1880 to recover damages for the death of her husband.

Held, reversing the decision of the Divisional Court (Wills and Kennedy, JJ.), that under sect. 1, sub-sect. 2 (b), of the Workmen's Compensation Act 1897 the acceptance of the scheme was a bar to her action for damages.

APPEAL by the defendant company from a judgment of the Divisional Court (Wills and Kennedy, JJ.), reversing a decision of the judge of the Birmingham County Court.

The action was brought by the widow of a deceased workman under the Employers' Liability Act 1880 and the Fatal Accidents Act 1846, to recover damages from the defendants, the employers of the deceased workman, in respect of an accident caused by the alleged negligence of the defendants whereby the workman was killed.

At the hearing before the County Court judge the defendants took certain preliminary objections—namely, that the plaintiff had accepted a registered scheme under sect. 3, sub-sect. 1, of the Workmen's Compensation Act 1897; that the representatives and dependants of the deceased workman had received and were then receiving payment under that scheme; that that relief was substituted for relief under sect. 1 of the Workmen's Compensation Act, and that therefore, under sect. 1, sub-sect. 2 (b), this action could not lie.

The learned judge required evidence to be given of the facts necessary to raise this point, and after hearing such evidence he found as facts (1) That there was a duly certified scheme within sect. 3, sub-sect. 1, of the Workmen's Compensation Act 1897; (2) that the deceased workman had accepted the scheme willingly and under no compulsion whatever, and with full knowledge of its terms, in substitution for and in place of the benefits he might claim under the Workmen's Compensation Act; (3) that this was a legal and effectual contract with the deceased workman and the defendants; (4) that the plaintiff had received up to the week before the hearing of the action, was receiving, and would in future receive, the full benefits under the scheme thus contracted for.

It appeared from the evidence that the payments were made to the plaintiff by the colliery company in the first instance, and that on the company handing the receipts for the same to the fund, the fund repaid the employers the money they had paid to the plaintiff.

The learned County Court judge held that this compensation under the scheme was compensation under sect. 3, sub-sect. 1, of the Workmen's Compensation Act, which the deceased workman had elected to claim, if and when occasion arose, and that consequently the employers were, under sect. 1, sub-sect. 2 (b), not liable both to pay that compensation (which as a fact they had paid and were paying) and also to proceedings under the Employers' Liability Act; that the fund repaid the employers was part of the contract by which the workmen contracted to take payments out of the fund in place of the compensation which otherwise they could have claimed under the Workmen's Compensation Act; and that to allow

(a) Reported by W. W. ORR and E. MANLEY SMITH, Esqrs., Barristers-at-Law.

them to recover in addition compensation under the Employers' Liability Act would be, it appeared to the judge, to allow them to recover compensation twice over—the very thing forbidden by sect. 1, sub-sect. 2 (b), of the Workmen's Compensation Act, and would set aside (without any evidence whatever of fraud or unfairness) the contract expressly meant to protect the employers against liability. Consequently he decided that the action would not lie—the word “workmen” including by the interpretation clause of the Workmen's Compensation Act, in the case of death, “his legal personal representative, or dependants, or person to whom compensation would be payable”—and he dismissed the action.

The plaintiff appealed.

The Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides:

Sect. 1 (1). If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act. (2) Provided that (b) When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid.

Sect. 3 (1). If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, is on the whole not less favourable to the general body of workmen and their dependants than the provisions of this Act, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act.

James Wilson for the appellant.—The learned judge was wrong in holding that the action was barred. The deceased workman never exercised the option given to him by the Act in sect. 1, sub-sect. 2 (b). There was not a valid election by him which would have prevented him from proceeding under the Employers' Liability Act when an accident arose, if the injury had not resulted in his death. That being so, there is no bar to the claim of the widow in this case. The acceptance of a scheme under sect. 3 of the Act does not debar a workman from bringing an action independently of the Act, the effect of adopting such a scheme being merely to substitute it for the compensation provided in sched. 1 of the Act. [He was stopped.]

C. E. Allan (*Shakespeare* with him) for the respondents.—The County Court judge was right.

It is submitted that sect. 1, sub-sect. 2 (b), is a bar to this action being brought. That sub-section says that where the injury was caused by the personal negligence of the employer nothing in the Act should affect any civil liability of the employer, but in that case the workman might, “at his option,” either claim compensation under the Act, or take such proceedings as he could have taken before the Act. It is contended that the workman did exercise his option in this case to take compensation under the Act, and that therefore, if he had not been killed, he could not have maintained any claim outside the Act. Sect. 3 provides for a scheme of compensation or insurance to be certified and approved by the Registrar of Friendly Societies, and also provides that the employer may contract with a workman that the provisions of the scheme shall be substituted for the provisions of the Act, and the section says that “thereupon the employer shall be liable only in accordance with the scheme.” The learned judge has found as a fact that there was in this case a duly certified scheme within sect. 3, sub-sect. 1, of the Act, and has also found as a fact that the deceased workman had accepted the scheme and that there was an effectual contract between the deceased workman and the employers. It follows from that, by sect. 3, sub-sect. 1, that the scheme becomes substituted for the Act, and, reading this substitution into the provisions of sect. 1, sub-sect. 2 (b), “the workman may, at his option, either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act.” The workman has got an option; he has got an election as to which he will choose, compensation under the Act of 1897 or compensation outside and apart from that Act. But he cannot elect to take both; he cannot in respect of the same injury both take compensation under the Act of 1897 and then claim compensation outside the Act, as under the Employers' Liability Act. The scheme being substituted for the Act, by acceptance of the scheme and by taking the benefits under it the deceased workman exercised his option to claim compensation under the Act of 1897, and if the accident had not resulted in his death he could not have claimed compensation outside the Act. The widow of the deceased can be in no better position than the workman himself was in. She also took the benefits of the scheme, and if she can sue under the Employers' Liability Act the defendants would be bound to pay compensation twice over for the same injury, but by sect. 1, sub-sect. 2 (b), the employer is not liable to pay compensation “both independently of and also under this Act.” The point is a new one, not having been raised before in this country, but it was considered by the Court of Session in Scotland in the case of *Little v. MacLellan* (2 Fraser, 387), where it was held that where there had been a receipt of payments as compensation under the Workmen's Compensation Act 1897 the workman could not afterwards bring an action under the Employers' Liability Act. [WILLS, J.—That case does not seem to touch the present case at all. All it shows is that if there is an election to take compensation under the Act of 1897 it is a bar to proceedings under the Employers' Liability Act.] Yes; that is all.

James Wilson was not called upon to reply.

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WILLS, J.—This case has been very well argued, and, shortly put, the contention for the defendants comes to this, that under the Workmen's Compensation Act of 1897, s. 1, sub-s. 2, the plaintiff, who complains of injury caused by the personal negligence of the employers or of a servant of the employers for whom the employers are liable, which gave rise to a cause of action, has a choice of two remedies—the one a remedy for compensation under the Workmen's Compensation Act 1897, and the other a remedy by a proceeding independently of the Act, which, for brevity, may be called the common law action. So far as that proposition is concerned, we are entirely in agreement with counsel for the defendants in his contention. But his contention went further, and it was said that although the plaintiff in this case had not proceeded under the Workmen's Compensation Act, yet she had proceeded under and availed herself of the benefit of a scheme which would have excluded the operation of the Act, and that therefore the state of circumstances is exactly the same as if she had proceeded under the Workmen's Compensation Act. If the Act had intended that the acceptance of benefits under a scheme should be on the same footing as compensation under the Act, it would have been easy for the Legislature to have said so. But the Legislature has not said so, and there appears to me to be no satisfactory ground for taking that view, and there is no ground for saying that a person taking a benefit under a scheme for compensation is in the same position as a person taking compensation under the Act. On looking at sect. 1, sub-s. 2 (b), we see that that was not the meaning or intention of the Legislature. That sub-section says that the employer shall not be liable to pay compensation for injury "both independently of and also under this Act," showing that it was the taking compensation under this Act, which was to be the bar to proceedings taken independently of the Act. Then as to the scheme of compensation, sect. 3, sub-sect. 1, does not say that the scheme is to be compensation under the Act; the scheme is not compensation under the Act, but is to "be substituted" for the compensation which the Act provides, and when we look at what the registrar has to take into account in certifying a scheme under that section, we see that there may be schemes which may be adopted which are not what the Act calls compensation. I think, therefore, that we should not be justified in reading into the Act a qualification that the acceptance of a scheme should be equivalent to compensation under the Act, a qualification which is not in the Act. When the question arises as to whether what the plaintiff has received under the scheme can be taken into consideration in estimating the damages, it may be that the sums she has received under the scheme ought to be taken into account. But however that may be, it seems to me that the receipt of such sums is not an answer to the common law remedy in respect of the injury.

KENNEDY, J.—I am of the same opinion. My brother Wills has so accurately expressed my views on the subject that it is not necessary for me to add anything, except to say that I am not quite sure whether compensation received under a scheme of insurance would not be an answer as to the quantum of damages; but on the grounds

upon which we decide this case, I so agree with my brother Wills that I do not wish to add anything.

Appeal allowed. Leave to appeal.

The defendant company appealed.

Upon the hearing of the appeal reference was made to the rules of the society of which the deceased workman had become a member on his acceptance of the scheme above mentioned.

The society was called the South Staffordshire and East Worcestershire Mining District Compensation Fund, and was composed of an unlimited number of ordinary members above twelve years of age employed in or about the collieries and ironstone mines of the South Staffordshire and East Worcestershire mining district.

It was registered as a friendly society in 1899, under the Friendly Societies Act 1896, and the scheme was certified by the Registrar of Friendly Societies to be on the whole not less favourable to the general body of workmen and their dependants than the provisions of the Workmen's Compensation Act 1897.

The printed rules of the society contained the following rule:

Rule 3. The objects of this society are the raising of funds by certain specified contributions from the employers and workmen of the collieries and ironstone mines of the South Staffordshire and East Worcestershire mining district, to make provision in cases of fatal and non-fatal accidents, as follows:—(a) a sum at the death of any member; (b) a weekly allowance to the widows and children of married members whose death was the result of an accident; (c) a weekly allowance to the dependants of members over sixteen years of age whose death is the result of an accident, such dependants being members of a workman's family as specified in the Fatal Accidents Act 1846; (d) a weekly allowance to members who suffer from non-fatal accidents. The society is formed under the powers given by sect. 3 of the Workmen's Compensation Act 1897, and the contributions made by the employers to this society are to be in lieu of and to exempt them from any further claims which otherwise the members of this society may be entitled to prosecute as the result of accidents occurring during their employment.

W. Shakespeare (Arthur Powell, K.C. with him) for the defendants.—The deceased workman accepted this scheme as one of the terms of his contract of employment. By that scheme he has contracted himself out of the Employers' Liability Act 1880, and in place of the benefits of that Act has accepted the benefits of the scheme. A workman may lawfully contract himself out of the Employers' Liability Act 1880:

Griffiths v. Earl of Dudley, 47 L. T. Rep. 10; 9 Q. B. Div. 357.

His widow is bound by his agreement under that Act. Secondly, under the provisions of the Workmen's Compensation Act 1897 the acceptance of the scheme is a bar to any other remedy being pursued in respect of an injury by accident which is the subject of compensation under that Act. Under sect. 1, sub-sect. 2 (b), an injured workman who is entitled to compensation must elect between his right to compensation under the Act and any other legal right of action which he may have. The only case in which he is entitled to pursue two different remedies is a case where an action for damages is brought and fails, and the workman then and there asks the

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judge that compensation may be assessed under the Act:

Edwards v. Godfrey, 80 L. T. Rep. 672; (1899) 2 Q. B. 333.

That case has been discussed by the Court of Appeal in Ireland:

Beckley v. Scott and Co., (1902) 2 I. R. 504.

By rule 3 of the scheme, and by sect. 3, sub-sect. 1, of the Act, compensation under the scheme is substituted for compensation under the Act, and a workman by accepting the provisions scheme instead of the provisions of the Act has exercised the option which he has under sect. 1, sub-sect. 2 (b). After electing to rely on the scheme he is in the same position as if he had elected to rely upon his right of compensation, and consequently cannot, after that, pursue any other remedy which otherwise he may have had. The claim under the scheme which was made in pursuance of the provisions of sect. 3 of the Workmen's Compensation Act 1897, is a claim "under the Act," and not a claim made "independently of the Act," within sect. 1, sub-sect. 2 (b).

James Wilson for the plaintiff.—Compensation under the scheme is not compensation "under the Act." The scheme merely prevents the workmen from claiming compensation under the Act. It does not profess to do anything more than that, and has no reference whatever to any right of action under the Employers' Liability Act. I admit that the sum received under the scheme may be taken into consideration in assessing the damages in the action that has been brought, but submit that the scheme is no bar to the action. The plaintiff has never exercised any option in accepting benefits from the fund as an alternative to her right of action.

COLLINS, M.R.—This is an appeal from a judgment of the Divisional Court overruling a decision of Judge Whitehorn at the Birmingham County Court. The appeal raises a question of considerable importance, because the point in dispute is one which concerns a great many collieries in the Midlands. A workman in the service of the defendant colliery company met with his death by an accident arising out of and in the course of his employment. His widow has brought an action against the company under the Employers' Liability Act 1880. At the hearing of that action before the County Court judge it appeared that at the defendant company's collieries a scheme had been adopted which provided a method for compensation in the case of injuries or deaths of workmen employed there. The defendant company took the point that the existence of this scheme was an answer to the action. The County Court judge arrived at certain findings of fact, and he held that the agreement of the deceased workman to the scheme and the acceptance by the plaintiff of compensation under it was a bar to the plaintiff's action. The County Court judge's findings of fact and his holding in law were as follows: [His Lordship read them.] Now, the enactment upon which the judgment of the Divisional Court turned was sect. 1, sub-sect. 2 (b), of the Workmen's Compensation Act 1897. That section is an expression by the Legislature that when injury has been caused to a workman by the negligence of his employer, or of someone for whom the employer is

responsible, the three remedies open to the workman—namely, his remedy at common law, his remedy under the Employers' Liability Act 1880, and his remedy under the Workmen's Compensation Act 1897—are not concurrent, but separate, remedies, and the workman must exercise his right of option between them and choose which one he will pursue. That was the view which was taken of that section by this court in *Edwards v. Godfrey* (*ubi sup.*). The headnote to that case in the Law Reports runs thus: "Where a workman, who has been injured by an accident arising out of and in the course of his employment, brings an unsuccessful action to recover damages against his employer, and is desirous of having compensation for his injury assessed under the Workmen's Compensation Act 1897, he must follow the procedure prescribed by sect. 1, sub-sect. 4, of that Act, and must apply then and there to the judge trying the action for an assessment of compensation; he cannot at a subsequent date initiate independent proceedings against his employer by a request for arbitration under that Act." *Smith, L.J.* said that sect. 1, sub-sect. 2 (b), gives to a workman, in cases where he would previously have had a right of action, an option, which he may exercise as he likes, of bringing an action at common law, or of resorting to the procedure for the assessment of compensation given by the Act itself. He said: "The respondent has availed himself of the right given him by that sub-section; he has exercised his option in favour of bringing a common law action, which has failed. Having been defeated in this action, there would, but for the provisions of sect. 1, sub-sect. 4, have been an end of any claim by the respondent against the appellant in respect of the injury. That sub-section, however, is in favour of the workman, and gives him a very great advantage where he has exercised his option and finds too late that he has exercised it in the wrong way; it gives him a *locus penitentiae*, and enables the County Court judge before whom the action is tried, if applied to by the plaintiff at the time, to assess compensation under the Act." That judgment was concurred in by *Williams and Romer, L.JJ.* Therefore that is a decision by the Court of Appeal that a remedy by action and a remedy by arbitration under the Workmen's Compensation Act 1897 are in a sense inconsistent, and that a workman must elect which remedy he will pursue, and, having pursued one course, he cannot afterwards pursue the other. I now come to sect. 3 of the Workmen's Compensation Act 1897, which deals with the power of a workman to contract himself out of the Act. Sub-sect. 1 provides that a scheme of compensation may be drawn up, and, if it complies with certain conditions, it may be certified by the Registrar of Friendly Societies, and then the employer may contract with his workmen that the provisions of the scheme shall be substituted for the provisions of the Act, and thereupon the employer shall be liable only in accordance with the scheme. The County Court judge has found that the scheme at the defendants' collieries has satisfied the condition of the Act and has been certified by the Registrar of Friendly Societies, and that the deceased workman had accepted the scheme willingly and without compulsion. That being so, the provisions of the scheme are sub-

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stituted for the provisions of the Act. If the widow here had claimed compensation under the Act she could not afterwards have taken proceedings under the Employers' Liability Act 1880. But it is said that she has not received compensation under the Act, but was only in receipt of benefits under the scheme. The answer is that the scheme is substituted for the provisions of the Act. It seems to me that a workman who has accepted the benefits of a scheme as a substitute for his rights under the Act is in precisely the same position as if he had taken the rights given him by the Act. The Divisional Court decided this case on a different ground. They referred to sect. 1, sub-sect. 2 (b), at the end of which it is enacted that "the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act except in case of such personal negligence or wilful act as aforesaid." They said that an action under the Employers' Liability Act 1880 is a remedy which is independent of the Act of 1897, and therefore it would exclude a claim for compensation under the latter Act; but then they said that a claim under this scheme is not a proceeding under the Act, but one which stands upon its own merits; and therefore they said there is no incompatibility between an action under the Employers' Liability Act 1880 and the acceptance of benefits under the scheme. But, though a claim for compensation under the scheme is not a proceeding under the Act, yet the acceptance of compensation under the scheme is undoubtedly a bar to proceedings for compensation under the Act, because its provisions are substituted for the provisions of the Act, and a workman who has taken the advantages of the scheme is in the same position as if he had received compensation under the Act. Here the deceased workman before the accident happened had by his contract with the defendant company accepted the scheme, and his widow has received payments under it. She is in no better position in this respect than he would have been, and she is in the same position as if she had instituted proceedings under the Workmen's Compensation Act 1897 and had obtained compensation. I agree with the decision of the learned County Court judge, and I think that the judgment of the Divisional Court must be reversed.

ROMER, L.J.—I am of the same opinion. When a scheme has been certified by the Registrar of Friendly Societies under sect. 3, sub-sect. 1, of the Workmen's Compensation Act 1897 and a contract between the employer and his workmen such as is referred to in that sub-section has been entered into, then, in my opinion, the workman, and those claiming through him under the provisions of the scheme, are bound by that contract to accept the provisions of the scheme as substituted for the provisions of the Act, and are in the same position as if he and they had availed himself or themselves of the provisions of the Act by claiming compensation under it, and in such a case they cannot afterwards avail themselves of any other remedy which they might have had either at common law or under any statute passed before the Workmen's Compensation Act

1897. That appears to be so from the provisions of the Act which have been referred to by my Lord, and in particular from the words at the end of sect. 3, sub-sect. 1, that "the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme." In the present case there is a scheme that has been certified by the Registrar of Friendly Societies, and rule 3 of that scheme is as follows: [His Lordship read it.] The defendant company contributed to the funds of the society, and the deceased workman was a member of the society, so that this clause applies here. The scheme carried out in substance the provisions of sect. 3 of the Act, and indeed we have the findings of the County Court judge that the deceased workman accepted the scheme willingly and under no compulsion whatever, and with full knowledge of its terms, in substitution for, and in place of, the benefits which he might claim under the Workmen's Compensation Act. So that there is nothing which prevents the scheme from being part of a binding and valid contract between the workman and his employers. Then, at the end of rule 3, we find it provided that the contributions made by the employers to the society are to be in lieu of and to exempt them from any further claim which otherwise the members of the society may be entitled to prosecute as the result of accidents occurring during their employment. The meaning of those words cannot be cut down. They mean what they say, and they carry out that which is enacted in sect. 3, sub-sect. 1, of the Act. They are, therefore, valid and binding. It follows that those who claim under the deceased workman to be entitled to the benefits of the scheme are debarred from bringing an action under the Employers' Liability Act 1880. The deceased workman has expressly contracted that, by the benefits of the scheme being taken, the defendants shall be exempted from any other claim in respect of an accident arising out of and in the course of the employment. As has been observed, the point upon which we are now deciding this case was not really brought to the attention of the Divisional Court, and therefore was not dealt with in their judgment. I agree that the appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. Sect. 3, sub-sect. 1, of the Workmen's Compensation Act 1897 points out the terms and conditions under which a workman may contract himself out of the benefits of the Act. The County Court judge has found that a scheme which satisfied the requirements of the section, and which was duly certified by the Registrar of Friendly Societies, was accepted by the deceased workman. In doing that the workman exercised the option which was offered him by sect. 1, sub-sect. 2 (b), of the Act, and he and his widow are bound thereby. Having exercised his option to rely upon the benefits given by a scheme certified under the Act, a workman cannot afterwards claim a right to any of his alternative remedies. He must abide by his election. Sub-sect. 4 of sect. 1 gives a workman a right, in case he should bring an action for damages and the action should be dismissed, to claim compensation under the Act of 1897, subject to certain conditions. That is the only case in which, after making his election,

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he is entitled to make use of an alternative remedy. This is a very important provision to employers, because it gets rid of any liability on their part to be subjected to a succession of proceedings in respect of one matter. We are bound by the decision of this court in *Edwards v. Godfrey* (*ubi sup.*), and it would be impossible to give effect to that decision unless we held that the option of the workman is limited, and must be exercised in the way that I have mentioned. The deceased workman and his widow were undoubtedly bound by his acceptance of the scheme. With reference to the case of *Beckley v. Scott and Co.* (*ubi sup.*), I will only add that I have been much struck with the cogent reasoning of the judgment of Holmes, L.J.

Appeal allowed.

Solicitors for the plaintiff, *A. H. Arnould and Son*, for *Stanbury-Eardley*, Birmingham.

Solicitors for the defendants, *Timbrell and Deighton*, for *W. Shakespeare and Co.*, Birmingham.

Wednesday, March 9.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

FRANK WARR AND CO. LIMITED v. LONDON COUNTY COUNCIL. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Compensation—Right to supply refreshments in a theatre—Use of cellars—Right to let spaces for advertisements—Licence—"Interest in land"—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s. 68.

The lessees of a theatre by a written agreement granted to a refreshment contractor at a fixed weekly rental, for the term of the lease of the theatre, the free and exclusive right to sell refreshments there, with the necessary use of the refreshment-rooms, bars, cloakrooms, and cellars of the theatre, together with the right, during the usual hours, of free access thereto as might be necessary and usual and proper for the purpose of exercising the rights thus granted, and also the sole and exclusive privilege during the term of advertising and letting spaces for advertisements in the refreshment and cloak rooms.

Held (affirming the judgment of Wright, J., reported 88 L. T. Rep. 689), that the agreement did not create any "interest in land" within the meaning of sect. 68 of the Lands Clauses Consolidation Act 1845, so as to entitle the refreshment contractor to compensation on the theatre being taken over under the Act.

APPEAL by the plaintiffs from the judgment of Wright, J. at the trial of the action without a jury.

The action was brought to recover the sum of 2568*l.* 9*s.* which had been awarded in an arbitration under the Lands Clauses Consolidation Act 1845 as the amount of purchase money and compensation to be paid by the defendants to the plaintiffs for the plaintiffs' interest (if any) in the Globe Theatre, London, which had been purchased compulsorily by the defendants under their statutory powers.

On the 3rd May 1900 the Countess of Kilmorey demised to William Greet and Edward Coryton

Engelbach the premises situated in Newcastle-street and Wych-street, Strand, known as the Globe Theatre, for the term of twenty-one years at the rent and subject to the covenants and conditions set out in the indenture of lease.

On the 16th June 1900 W. Greet and E. C. Engelbach entered into the following agreement with the plaintiffs in the present action, who carried on business as refreshment contractors :

An agreement made this 16th day of June 1900 between Messrs. W. Greet and E. C. Engelbach, lessees of the Globe Theatre, Newcastle-street, Strand, London (hereinafter called the landlords for themselves, their heirs, executors, or administrators), of the one part and Frank Warr and Co. Limited, refreshment contractors, of No. 6, Duke-street, Adelphi, Strand, London (hereinafter called the tenants for themselves, their executors and administrators) of the other part witnesseth that (1) the landlords hereby grant and let, and the tenants hereby take, for the term of the landlords' lease commencing the 1st day of Sept. 1900 the free and exclusive right to sell refreshments at the Globe Theatre, Newcastle-street, Strand, London, with the necessary use of the refreshment-rooms and bars and cloakrooms and wine cellars of the said theatre, together with the free right, during the usual hours, of the tenants, their servants and agents, of free access to and from all parts of the house, including the front of the theatre and premises, as may be necessary and is usual and proper according to the custom of the theatres for the purpose of exercising the rights granted by this agreement, and also the free and exclusive right during the aforesaid term of supplying to the visitors and other people attending the theatre wines, spirits, liqueurs, cigars, cigarettes, flowers, scent, and refreshments of all kinds, programmes, books of words, books of music, opera glasses, and all other articles, and of providing cloakrooms and other accommodation, and also the sole and exclusive privilege during the aforesaid term of advertising and letting spaces for advertisements which shall be confined to the refreshment and cloak-rooms and on all programmes used and offered for sale at the said theatre. (2) The tenants shall pay to the landlords in respect of the said right hereby granted the weekly rental of 35*l.* and 2*l.* for each matinee. (3) The tenants shall supply at their own expense suitable programmes for the use of the audience of the said theatre to be approved by the landlords; the advertisements in the theatre shall be confined to the refreshment bars and rooms and cloakrooms, and such advertisements shall be of such a nature as will not injure the character of the theatre and as are usually found in first-class theatres. (4) The tenants shall provide and maintain a proper and efficient staff of attendants for the service of the refreshment bars and rooms and cloakrooms, and for the sale of programmes, books of words, music, and other articles. (5) In the event of any incivility, misconduct, or breach of any of the rules and regulations of the theatre on the part of any of the employees of the tenants, the landlords or their representatives to have power to call upon the tenants to discharge any such employee. (6) The tenants shall be entitled to charge, receive, and retain all reasonable and usual fees and profits for the sale of refreshments, programmes, books of words, music, cloakroom and other articles supplied to the audience and others of the said theatre, and for the letting of advertising spaces. There is to be a fixed charge for programmes as follows: for boxes, stalls, dress and upper circle, the charge is to be 6*d.*; and for the pit and gallery the charge to be 2*d.*; and the cloakroom charge to be 6*d.* (7) The wines, liqueurs, and other refreshments supplied by the tenants shall be of good quality, and the refreshment bars and rooms and cloak rooms shall be conducted in a proper and orderly manner in accordance with the rules of the theatre and

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

the customs of the refreshment-rooms in first-class theatres. (8) If from any cause whatever no performance shall be given in the theatre on any day or days other than a Sunday in any week, the tenants shall be entitled in respect of each such day or days on which no performance shall be given to a remittance of one sixth part of the week's rent, such remittance to be deducted and allowed from the next payment of rent. (9) The tenants agree to print, provide, and distribute at their own cost programmes free of charge on the first night performance of any new or revised piece, but not on any opening piece or farce except a principal piece. (10) The landlords agree that they will not distribute or allow to be distributed any printed slip containing the full cast or synopsis of scenery, or anything that could be used instead of a programme. If at any time during the term herein granted any difference shall arise between the landlords and the tenants in regard to the construction of this agreement, such difference shall at once forthwith be referred to arbitration in all respects pursuant to the Arbitration Act 1889 or any statutory modification thereof. As witness the hands of the said parties. . . .

From the 1st Sept. 1900 until immediately before the defendants took possession of the Globe Theatre, the plaintiffs used and occupied the refreshment-rooms, bars, cloakrooms, and wine cellars as and when they required them, and exercised the rights, powers, and privileges conferred upon them by this agreement in accordance with the provisions of the agreement.

On the 17th Feb. 1902 the defendants gave to the plaintiffs a notice in writing that by virtue of an Act of 62 & 63 Vict. c. cclxvi., entitled an Act to empower the London County Council to make a new street from Holborn to the Strand, &c., the defendants required to take for the purpose of the works the premises mentioned and described in the schedule to such notice. The property mentioned and described in the schedule included the refreshment-rooms and bars, cloakrooms, and wine cellars at the Globe Theatre. By the notice the defendants required particulars of the plaintiffs' estate and interests in the premises and of the claims made by the plaintiffs in respect thereof. The defendants further gave the plaintiffs notice that they were willing to treat for the purchase of the said premises, and as to the compensation to be made for the damage that might be sustained by reason of the execution of the works.

On the 4th March 1902 the plaintiffs, in pursuance of the notice, served on the defendants a notice in writing by which the plaintiffs claimed compensation for their estate, share, or interest in the premises which the defendants required under their notice. The estate, share, or interest in respect of which the plaintiffs claimed was the exclusive right to sell refreshments together with the necessary use of the refreshment-rooms and bars, cloakrooms, and wine cellars held by them under the agreement of the 16th June 1900. The plaintiffs also claimed compensation for the bar and other fittings, fixtures, and furniture belonging to the plaintiffs on the premises.

On or about the 1st April 1902 the defendants under their statutory powers took possession of the Globe Theatre, in consequence of which the plaintiffs became unable to exercise any of the rights, powers, and privileges granted and let to them by the agreement of the 16th June 1900.

By an indenture dated the 16th April 1902, and made between the plaintiffs and the defendants,

the plaintiffs and defendants agreed to appoint an arbitrator to determine the amount of purchase money and compensation to be paid by the defendants to the plaintiffs for the interest (if any) of the plaintiffs in the land and hereditaments, and also the amount of damage (if any) for disturbance or loss of value in furniture and fixtures, or expenses of removal or other loss incidental to or by reason of the taking by the defendants of the lands and hereditaments to which the plaintiffs might be entitled by reason of the exercise by the defendants of their statutory powers. It was recited in the indenture that the defendants did not admit that the plaintiffs had any interest in the lands and hereditaments, but that they concurred in the appointment of the arbitrator without prejudice to their right to dispute in any action or other proceedings their liability to pay any purchase money or compensation to the plaintiffs for or by reason of the taking of such lands and hereditaments.

On or about the 27th May 1902 an arbitration was held to determine the amount of purchase money and compensation to be paid by the defendants to the plaintiffs.

On the 28th July 1902 the arbitrator published his award in writing by which he awarded to the plaintiffs the sum of 2586l. 9s. as purchase money and compensation to be paid by the defendants to the plaintiffs for the plaintiffs' interest (if any) in the lands and hereditaments, and the amount of damage (if any) for disturbance and loss in value of furniture and fixtures and expenses of removal and other loss incidental to or by reason of the taking by the defendants of the lands and hereditaments in exercise of the statutory powers conferred on them.

The defendants refused to pay to the plaintiffs the sum of 2586l. 9s. or any part thereof, and this action was brought to recover that amount.

At the trial of the action before Wright, J. without a jury the learned judge held that the plaintiffs had not acquired under the agreement of the 16th June 1900 any interest in land within the meaning of sect. 68 of the Lands Clauses Consolidation Act 1845, and he therefore gave judgment for the defendants.

The case is reported 88 L. T. Rep. 689.

The plaintiffs appealed.

The Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18) provides as follows:

Sect. 68. If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury. . . .

Witt, K.C. and J. D. Crawford for the plaintiffs.—Under the agreement of the 16th June 1900 the plaintiffs acquired an "interest in land" within the meaning of sect. 68 of the Lands Clauses Consolidation Act 1845. "Interest" is a word of wide signification, and means something more than "estate." The plaintiffs have the user of a defined piece of ground, at all times when it can be used, for a fixed period of years, for the purpose of carrying on there a business with a view to making a profit, and the

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fact that a profit is made is shown by the award of the arbitrator. It is not necessary for the plaintiffs to show that the profit issues out of the land. The expression *profit à prendre* is used in some of the older cases, not in its technical meaning, but descriptive of a licence enabling a licensee to do on land something out of which he may make a profit, and therefore allowing him to exercise the licence by means of his servants and agents, as distinguished from a licence to do something for pleasure, a licence of that kind being purely personal :

Wickham v. Hawker, 7 M. & W. 63.

In that case a grant to a person, his heirs and assigns, of free liberty with servants or otherwise to come upon certain lands and there hawk, hunt, fish, and fowl, was held to be a licence of profit and within sect. 2 of the Prescription Act (2 & 3 Will. 4. c. 71). A licence to search for and raise metals and carry them away and convert them to the licensee's own use passes an interest which is capable of being assigned :

Muskett v. Hill, 5 Bing. N. C. 694.

A grant of a right to shoot over land and take away part of the game has been held to be an interest in land within the meaning of the Statute of Frauds :

Webber v. Lee, 47 L. T. Rep. 215 ; 9 Q. B. Div. 315.

The same has been held with reference to a right under an agreement for the sale of building materials to be taken down and removed by the purchaser :

Lavery v. Purcell, 58 L. T. Rep. 846 ; 39 Ch. Div. 508.

A right granted to the lessee of certain mines and minerals to sink a pit anywhere within certain limits in land, the surface of which was not demised, has been held to be an interest which entitled the lessee of the mine to compensation under the Lands Clauses Consolidation Act 1845 :

Re Arbitration between Masters and Great Western Railway Company, 84 L. T. Rep. 515 ; (1901) 2 Q. B. 84.

They referred also on this point to

Temple Pier Company v. Metropolitan Board of Works, 12 L. T. Rep. 369 ;

Westminster Corporation v. Johnson, 89 L. T. Rep. 562 ; (1904) 1 K. B. 19.

There is no case directly in point against the plaintiffs' contention, but two cases were relied upon in the court below as being in the defendants' favour :

Bird v. Great Eastern Railway Company, 13 L. T. Rep. 365 ; 19 C. B. N. S. 268 ;

Edwards v. Barrington, 85 L. T. Rep. 659, affirming the decision of the Court of Appeal in *Daly v. Edwards*, 83 L. T. Rep. 548.

It is true that in *Bird v. Great Eastern Railway Company* the liberty granted to the plaintiff of shooting and fishing over a certain piece of land for the term of three years was held by the Court of Commons Pleas not to be an interest in land which could be the subject-matter of compensation under sect. 68. But there the plaintiff had nothing more than an equitable right, which in 1865 was not a matter for compensation. And

Willes, J. put it on the ground that the plaintiff could have had no right of action against his landlord if the landlord had done what the railway company was doing. *Edwards v. Barrington* is distinguishable. That was a question whether the landlord was entitled to re-enter on a forfeiture by a breach of covenant. There the leaning of the court was against declaring anything a forfeiture unless compelled to do so. Here the question arises under a statute passed with the object of giving compensation to persons whose rights have been interfered with, and the court ought to try and give a construction of the Act which will compensate the plaintiffs, whose rights have undoubtedly been injured by the acts of the defendants. From another point of view this agreement gives an interest in land. It gives the plaintiffs the "necessary use" of the refreshment-rooms and cellars. That must be equivalent to "exclusive use." The cellars, where large quantities of wines and spirits are kept, must of necessity be kept locked, and, in fact, the plaintiffs have always had a key. That is in evidence. The plaintiffs are therefore in sole occupation of the cellars. Even if the theatre be closed, the lessees would have no power under this agreement to turn them out. The cellars have in fact been demised to the plaintiffs. There was also a demise to them of the walls of the refreshment-rooms, &c., for the purpose of exercising their right to fasten advertisements on them.

Dickens, K.C. and *Edward Morten*, for the defendants, were not called upon.

COLLINS, M.R.—This is an appeal from a decision of Wright, J. in an action upon an award in favour of the plaintiffs, in a claim by them for compensation under sect. 68 of the Lands Clauses Consolidation Act 1845 in respect of an interest in land which they say has been taken or injuriously affected by the London County Council. The arbitrator has assessed the damages as upon an interference with the plaintiffs' rights, and the question in this action is whether there was such an interference with the plaintiffs' rights as to entitle them to any compensation under the Act. It is perfectly clear from the language of sect. 68 that the foundation of the plaintiffs' right to compensation is—to put it at its lowest—an interest in land. The plaintiffs say that they have an interest in certain lands—namely, the Globe Theatre—an interest arising under the agreement whereby they acquired the right to sell refreshments, and other incidental privileges, at the theatre. The question is whether or not that agreement was one which conferred on them an interest in land. It has been pressed upon us that under that agreement the plaintiffs took something more than a mere licence or privilege, but, notwithstanding the very able argument that has just been addressed to us, I am bound to say that I see no escape from the conclusion at which Wright, J. has arrived, and I agree with him that the decision of the House of Lords in *Edwards v. Barrington* (*ubi sup.*), which turned upon the effect of an agreement very like the one we have to deal with, is conclusive and binding upon us in this case. The question in *Edwards v. Barrington* was whether a certain agreement conferred an interest in land. The case before us in some respects different from that before the House of

Lords. The agreement in the present case is much more artificially drawn, because it appears to me to have been drawn by someone who understood the terms he was using, whereas in *Edwardes v. Barrington*, as the Lord Chancellor pointed out, the chief difficulty arose from the fact that the person who drafted the agreement obviously did not really understand the meaning of the words he used. Notwithstanding that words purporting to confer an interest in land were used in that agreement, the House of Lords came to the conclusion that, taking the whole agreement together, no interest in land was given to the so-called tenant. The question in that case was whether the transaction which the House of Lords held was not a demise, but gave a privilege to the grantee, was or was not a breach of covenant which would amount to a forfeiture of a lease. The words of the covenant were these: "Not at any time during the term hereby granted to assign, demise, or otherwise part with this indenture"—that, of course, means that which is comprised in this indenture—"or any estate or interest therein for all or any part of the said term to any person or persons whomsoever without the licence of the lessor or his assigns first had and obtained." The question was whether what had been done under the agreement that had since been made was a parting with an interest in land the subject of the indenture. The point was therefore really the same as that which has arisen in the case now before us, although, as Mr. Crawford very properly pointed out, it arose on the question whether or not there had been a breach of covenant resulting in a forfeiture. Unless the House of Lords had come to the conclusion that it did not pass an interest in land, they could not have held that there was no breach of covenant. Is there, then, any substantial difference between the agreement we have now to construe and the agreement in that case? It seems to me that, so far as there is any difference between them, this agreement is expressed much more clearly than that in limiting what is granted to a privilege as distinguished from a demise. It is carefully drawn so as to exclude the inference that anything in the nature of a demise was granted. [His Lordship read clauses 1, 2, and 8 of the agreement.] Though the word "let" is used, it seems to me that the subject-matter of the letting is most carefully defined so as to exclude any interest in the land. The lessees of the theatre do not let the cellars, but provide for the use of the cellars; instead of letting the refreshment-rooms, they provide for the privilege of using them; and so on. So far as the words go, care seems to have been taken to avoid any implication of a grant of any interest in land. There are certain clauses, such as those with regard to the advertisements, to which Mr. Crawford has particularly called our attention. It was suggested that the clause as to the advertisements might involve the right to the exclusive use of the parts of the wall on which the advertisements were hung, but, even if it could be thought that *prima facie* a demise of the land might be thereby involved, yet I think that the clause must be read with its context. To get at the true object of the parties the agreement must be read as a whole, and, taking the whole thing together, it seems to me that the inevitable conclusion is that what was intended to be carried out by this agreement

was to convey, not an interest in the land, but only a privilege. Now, the agreement in *Edwardes v. Barrington* (*ubi sup.*) was one of the same class of privilege—namely, the right to sell refreshments in a theatre—and, if it differs from the agreement in the present case, it differs in this only, that there was more indication there than here of an intention to grant a demise of the premises. Nevertheless the House of Lords came to the conclusion that what was granted was not an interest in land, but a privilege. The House of Lords affirmed the decision of the Court of Appeal (*Daly v. Edwardes*, 83 L. T. Rep. 548), and there Rigby, L.J. said: "On the whole, I think that the proper conclusion is that Frank Warr and Co. took no estate or interest in land, but that they were entitled, for all reasonable purposes, to consider themselves as having an exclusive licence to provide refreshments, and all that follows from that privilege, and nothing else at all." And Williams, L.J. said: "No one has contended, so far as I can understand, that the grant of a licence and right to the use of all the refreshment-rooms, bars, smokers, &c., during the term of this agreement would amount to an assignment or demise of any estate or interest in the subject-matter of the principal indenture, if in truth and in fact such grant of a licence and right was a grant upon the basis that the landlord should in fact retain dominion and control over the whole of the premises. In my judgment, although the lawyers have chosen to dress up this grant of a licence, or grant of a privilege, in the dress of a lease of land, yet when one comes to look closely at the provisions of this document it is plain that it is really a grant of a privilege and licence merely masquerading as a lease." Those words apply exactly here except that, in my judgment, this agreement does not even masquerade as a lease. It does not on its face suggest that it is a demise of an interest in land. The judgment of the Court of Appeal was approved in the House of Lords, and it seems to me that it is indistinguishable in any sense favourable to the appellants from their case, and that we are therefore concluded by that authority and that it decides this case. That relieves me from discussing in any detail the arguments of Mr. Crawford and his learned leader, Mr. Witt, as to the distinction between a mere licence to go on land and a licence to take a profit out of that land; the distinction between a *profit à prendre* and an ordinary licence. It seems to me, although it is not necessary to decide it here, that Mr. Witt's principal proposition upon that matter breaks down. He was obliged to contend that a licence to make a profit on the land by trading on the land was in itself equivalent to a right to a *profit à prendre*. It does not seem to me that it is. I think that the profit must be a profit out of the land itself, and it is because it is something out of the land itself that a licence to a *profit à prendre* has been held to be within the Statute of Frauds, as being an interest in land. I have not seen any authority which shows that a *profit à prendre* includes a right to make a profit by carrying on a trade under a particular licence on a particular piece of land. For these reasons I think that this appeal fails.

ROMER, L.J.—I am of the same opinion. On the question of the construction of the document under which the plaintiffs claim, I think that, like

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the document which had to be construed in *Edwards v. Barrington* (*ubi sup.*), it only gave a licence, strictly and properly so called, to the persons claiming under it. It did not create any estate or interest in land in their favour. Certainly the document created no demise in favour of the plaintiffs, nor did it amount to a parting with the possession which the lessees of the theatre had at the time when they made the agreement in question. The possession of the theatre, and every part of it, to my mind, remained with the lessees, subject only to such rights to use certain parts of it for certain purposes as were conferred upon the plaintiffs by the agreement. In the next place, there was no easement, properly so called, created over the land in favour of the plaintiffs; no grant of any *profit à prendre* out of the land; no incorporeal hereditament of any kind that I can see; in fact, nothing at all which at law or in equity would constitute a known estate or interest in the land. The true object and effect of the document was very clearly pointed out by Rigby, L.J., referring to the document which he had to construe, in the passage which my Lord has read from his judgment in *Daly v. Edwards* (*ubi sup.*). In arriving at that conclusion, I have not forgotten the argument that was based by the appellants on the words "necessary use of the cellars." To my mind, it would not have made any difference if the "exclusive use" had been conferred on the plaintiffs instead of the "necessary use," because the words "exclusive use" were used in the document which was relied upon in *Edwards v. Barrington* (*ubi sup.*). But, as a matter of fact, the words "necessary use" only mean use so far as is necessary for the purpose of enabling the plaintiffs to supply refreshments in the theatre on proper occasions when the theatre is being used for its ordinary purposes, and certainly in this document those words cannot be said to have created an absolute parting with the possession of that cellar from the lessees to the plaintiffs. The fact that the plaintiffs may have had confided to them a key for the purpose of preventing strangers coming in does not, to my mind, make the slightest difference. It appears, so far as the construction of the document is concerned, to have been a voluntary act on the part of the lessees, and certainly could not amount to the creation of any estate or interest in the land in favour of the plaintiffs which was not conferred by the document itself. Now, if this document only created a licence in favour of the plaintiffs, as I think it did, it may be as well (since the effect of a licence has been discussed in the argument) to refer to what was said as to the general effect of a licence, properly so called, in the notes to the case of *Thomas v. Sorrell* (Vaughan, 330, at p. 351). It is there said: "A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful." Then the learned writer gives instances, and then proceeds to point out how, in addition to a licence, there may be given a right to take something out of the land. He instances (*inter alia*) "a licence to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his

own use," and then he says that these "are licences as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed, and tree cut down, they are grants." That is to say, that in those two cases the person not only had a licence properly so called, but also a right to *profits à prendre*; that is to say, a right to take something out of the soil. Now, in the present case let me see shortly if the licence here extends at all beyond what I have called a licence strictly and properly so called. The only part of the document which can be referred to as supporting that contention is that which gives the right to use the cellars and to put up advertisements in certain rooms. Are not these licences properly so called, or do they amount to an interest created in the land, to a grant of something coming out of the land? It is clear to my mind that they create nothing more than a licence properly so called. The possession of the cellars not being parted with, the right to use them could be exercised without any grant of any right or interest in the cellars. The right to put up advertisements in certain parts of the theatre could be enjoyed as a licence without implying the necessity of a grant of any part of the walls of the rooms. Nothing is necessary under this document in order to give full effect to such rights as were conferred on the plaintiffs, which would imply any grant or creation of any estate or interest in land in their favour, or any *profits à prendre* out of the land. But then it is said that, admitting that licences, generally speaking, create no interest in land, a distinction ought to be drawn between licences which are merely to be exercised for the purpose of pleasure and licences which are to be exercised for purposes of profit. Now, undoubtedly there is a difference between the two in two respects. If a licence is granted merely to go on land for the purposes of pleasure, that, if construed strictly and in the absence of a sufficient context, will not be held to confer anything but a personal licence—that is to say, it will not extend to the licensee's servants or agents. But where you find that the intention was that the licensee should do something which may result in obtaining a profit, the licence will be construed as extending not only to the licensee personally (I am, of course, excepting special cases), but also to his servants and possibly also to his agents. There is another distinction, which depends on the meaning to be given to the word "profits." There is the undoubted distinction, which I have already pointed out, between a licence to go on land for pleasure and a licence to go on land for the purpose of profit, if you mean by that profits to be obtained out of the land. But if the profits are to be obtained merely by something which the licensee may do in the exercise of the licence, and nothing has to come out of the land, then all I can say is that I cannot, either on principle or on authority, see any distinction that can be drawn, or that ought to be drawn, between a licence for pleasure and a licence for purposes which may result in profits; and I think that the attempt of the appellants to draw a distinction between them for the purposes of this case entirely fails. It could not be, for example—and it is not at all a bad test—that whereas a licence to certain persons to come on a field to play cricket is a licence creating no interest in land, a licence to

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a person also to come on the cricket field and sell refreshments to those engaged in the game is a licence which creates an interest in land. I think no such distinction ought to be drawn, and, as I have said, it is not supported either by principle or authority. That decides this case. But it may be that, although there is no interest in land within the meaning of sect. 68 of the Lands Clauses Consolidation Act 1845 for which the defendants are bound to compensate the plaintiffs, it does not of necessity follow that there may not be breaches of the contract with the plaintiffs for which they may not have some right of action against someone. That may be so; I do not say that it is so; and certainly nothing that I am saying here must be held to encourage the plaintiffs in bringing any such action against anybody. One reason why I should think that it would be doubtful, to say the least of it, whether any such action would be successful is this: As far as I can see, although it is not necessary to decide the point in the present case, there is nothing in the agreement with the plaintiffs to compel the leasees to keep the theatre open as a theatre, or to use it as a theatre, during any defined portion of their term. All I want to point out is that there may be a distinction between a contract giving an interest in land which may be the subject of compensation under sect. 68 and a contract which gives an interest, though not an interest in land, which if interfered with may give rise to an action for damages. I only say that to prevent there being any misunderstanding upon that point. With these observations I leave the case, and I agree that the appeal should be dismissed.

MATHEW, L.J.—I am of the same opinion. The document of the 16th June 1900 did not amount to a demise, but only created privileges and licences to do certain things. The case of *Edwards v. Barrington* (*ubi sup.*), in the House of Lords, offered an awkward obstacle to the appellants, and a new line was taken in their argument. It was said that the agreement granted certain privileges from which the appellants could derive *profits à prendre*, and that that was enough to give an interest in land within sect. 68 of the Lands Clauses Consolidation Act 1845 which would entitle them to be compensated by the defendants. No single authority was cited in support of the proposition thus put forward by Mr. Witt. He said that it was only necessary to look at the language of sect. 68 to see that such an interest as was conferred upon the plaintiffs by this agreement was intended to be protected by the section. The section speaks of an interest in land "which shall have been taken or injuriously affected by the execution of the works." It seems to me that it is impossible to read those words without seeing that a contract such as this out of which profits may come from the use of land is not within the language of the section. Then Mr. Crawford argued that there was enough in the agreement to show that there was a demise, or that there was an intention to create a lease. In my opinion the language used in this document could not be further from that purpose. The agreement, by clause 1, gives the appellants "the necessary use of the refreshment rooms and bars and cloakrooms." It was not contended that that amounted to a demise of those rooms.

But then come the words "and wine cellars." It was contended that that was quite a different matter, and that the interest created in the wine cellars was an interest in land. The first observation to be made is that there is clearly no exclusive grant or demise of the cellars, because all that is given is the "necessary use" of them. That phrase cuts down any interest in the cellars which might otherwise be given by this agreement, and limits it to what is wanted for the subordinate purpose of enabling the agreement in other respects to be carried out. It seems to me that the use of the word "necessary" absolutely negatives any implication that there is a demise of the cellars, and it cannot be doubted that if the plaintiffs had used these cellars for any purpose other than the purposes of this theatre they would have been violating their agreement, and practically would be trespassers. So much for that. Then there was another argument of the same kind based upon the right of advertising and letting spaces for advertisements in the refreshment and cloak rooms. In the first place what is given is described in the agreement as a "privilege." That certainly excludes the notion of any demise of the walls of the refreshment and cloak rooms to be used for any purpose of advertising, and the whole agreement appears to me to be properly and consistently construed if this particular privilege be treated as subordinate and subsidiary to the main purpose of the agreement. The case of *Edwards v. Barrington* (*ubi sup.*), in the House of Lords, was a more formidable case than this; that is to say, it was more difficult there to avoid construing the document as containing a demise. But the House of Lords felt no hesitation in saying that the whole scope of the agreement was obvious, and that the clauses particularly relied on must be treated as subordinate to that paramount purpose. That being so, it seems to me that the case in the House of Lords is conclusive, and, for these reasons and the reasons given by my learned brethren, I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, Hannay and Reynolds.

Solicitor for the defendants, W. A. Blaxland.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

July 28, Aug. 4, and Nov. 12, 1903.

(Before BYRNE, J.)

Re IBO INVESTMENT TRUST LIMITED. (a)

Companies—Winding-up—Petition—Taxation—Copies of evidence—Costs of contributories successfully opposing.

Upon a winding-up petition, where charges of fraud were brought against director contributories, the common order as to costs was made in dismissing the petition. The contributories who had successfully opposed claimed that they were entitled to recover from the petitioner the costs of taking copies of the evidence filed by

(a) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

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him, and objected to the registrar's disallowance of them.

Held, that, unless a special order as to costs were made at the hearing, contributories appearing to oppose were not entitled to such costs.

SUMMONS to review taxation.

In Oct. 1902 a shareholder presented a petition for the compulsory winding-up of the Ibo Investment Trust Limited, and the petition contained many charges of fraud against the directors of the company and personal charges against shareholders. The petition was successfully opposed by the company, by creditors, and by two sets of contributories, directors and non-directors, and in dismissing it on the 10th Dec. 1902 Byrne, J. gave costs to the company, and one set of costs only to the contributories opposing.

The registrar in taxing the bill of costs of one set of contributories disallowed the following items: (1) payment for copies of evidence in support of the petition, in opposition thereto, and in reply; (2) perusals of such evidence; (3) copies of such evidence for counsel; (4) fees to counsel.

Objections were taken to these disallowances on the following grounds:

The ground of the objection is that, personal charges of fraud having been made against the contributories both in the petition and in the evidence in support thereof and the magnitude of the interests involved, the contributories were entitled to defend themselves and their interests against the petitioner's personal attack on them, and it was impossible for counsel representing them to adequately oppose the petition without having the evidence in support of opposition and reply, and it was therefore necessary to take copies of such evidence and supply copies to counsel, and to mark an adequate fee to counsel with his papers. It is submitted that a petitioner is in the same position as a plaintiff in an action (see *Annual Practice* 1903, vol. 2, pp. 450, 451), and, where fraud is charged, the persons against whom the charges are made are entitled to take copies of all evidence filed in support or opposition. The petition having been dismissed with costs, it is submitted that the taxing officer is in error in adopting the same principle of taxation as where costs are to be paid out of the assets and only allowing a nominal sum for successful contributories, the result of the taxation in this case being that the whole amount allowed is not sufficient to pay one of their junior counsel's fees, and that, although one set of costs only has been allowed by the order, it should be a proper and a full bill.

The registrar's answer to the objections was as follows:

1, 2, 3, and 4. It is not the practice to allow contributories or creditors appearing on a petition the usual charges consequent on taking copies of the evidence filed by the petitioner and the company, unless for some reason such evidence has to be answered by, or is in answer to, evidence filed by such contributories or creditors, or unless some other sufficient grounds are shown for the allowance of such charges. In this case allegations were made with reference to the conduct of the company by its directors, and the defence of such charges was undertaken by the company, all the evidence in answer to such charges being prepared and filed on behalf of the company, and the costs relating thereto have been allowed in the company's bill of costs. The hearing of a petition to wind-up a company in which charges are made against it by reason of the act of its directors is not a proceeding like an action in which fraud is alleged against defendants, who have consequently to defend themselves, but the allegations

are made against the company, and the company alone is respondent to the petition; the directors need not appear at all, and if they do it is not the practice of the court to go into and adjudicate upon their conduct in the same way as it would were the court trying an action in which the directors were defendants charged with fraud. I know of no case in which the winding-up judge has allowed directors appearing on a winding-up petition in which fraud was alleged any extra costs for defending their conduct as directors. It is the usual practice to allow them (if the petition is unsuccessful) a set of costs as contributories or a share in such set of costs, as was done in this case. These directors applied at the hearing of this petition for a separate set of costs, but that was refused, and they were told they would get a share of the contributories' costs. Were contributories and creditors allowed the charges consequent on taking copies of evidence filed by the petitioner and company, there would be several sets of solicitors taking copies of the same evidence—clearly an extravagant practice. It is not usual for the contributories and creditors to answer such evidence, and they did not do so in this case. The petition itself nearly always contains sufficient information to enable contributories and creditors to decide whether they will support or oppose, and that is all they are required to do. It cannot be said that the petition in this case was deficient in such information. Wright, J. long ago laid down the practice that he would not hear long speeches on behalf of contributories or creditors on the merits, but made them confine themselves to either supporting or opposing the petition. The fight is between the petitioner and the company. In this case the directors are represented by the same solicitors as the company. In accordance with the usual practice, their names ought to have been put on the company's brief: (see *Re Brighton Marine Palace and Pier Company*; (1897) W. N. 12). When they applied for a separate set of costs and were refused, the judge intimated that as contributories they would get a share of the contributories' set of costs. It was not brought to the judge's attention (the official in court not being aware of it at the time) that the same solicitor represented the company and directors, or doubtless the usual practice would have been followed, and the directors would then have had no share in the contributories' set of costs. The fact that the same solicitors represented the directors and the company was noticed when the order came to be settled; but, having regard to the judge's intimation when deciding the question of costs, the order was settled in accordance with such intimation. I have disallowed the objections.

This summons was accordingly taken out by the contributories, asking that these objections might be allowed, and that the certificate might be varied accordingly.

Gatey for the summons.—These costs should be allowed, as the applicants were bound to defend themselves against the charges of fraud brought against them in this evidence.

Buckmaster, K.C. and *Kirby* for the petitioner.—These objections should be disallowed, and the ordinary rule as to one set of costs followed, no special order having been made at the hearing of the petition, which would only be under very special circumstances.

Gatey replied.

BYRNE, J. stated the nature of the application, and of the objections to the registrar's disallowances, and continued:—The petition, as I have every reason to remember, was one which I do not think I should describe unfairly if I said that it was stuffed with charges of fraud. Counsel for the petitioner in his discretion

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selected six charges of fraud, and certain portions only of the evidence relating to those charges was read, and the whole of it was not gone into before the court. Counsel for the applicants is entitled to say that it was a petition containing charges of fraud against certain directors and contributories. The petition came on and was dismissed. An application was made to me at the time to allow a separate set of costs for the director contributories appearing. I declined to do so, and only one set of costs was allowed in the ordinary form to the contributories. [His Lordship read the order, and, after shortly stating the facts as to the taxation, continued:] The learned registrar, in answer to the objections of the contributories, has pointed out (and justly) that the proceedings by petition for winding-up a company, in which charges are made against the directors, is not, as respects persons appearing upon the petition other than the company, analogous to an ordinary action in which fraud is charged against defendants. The case has to be made out by the petitioner, and the defence to the petition falls upon the company, which has to adduce evidence for that purpose. In this case the contributories did what appears to me to have been the right thing to do—they swore affidavits in support of the opposition by the company. As the company gets all the proper costs of the evidence furnished, and of all proper payments and charges in respect of giving evidence for the party to any litigation, payment for giving evidence is a matter between the party taking the evidence and the witness giving it. When the case came on, the company contested it, and they opposed the petition with the evidence so furnished to them. The contributories and creditors may appear, if they like, upon the petition, at the risk, of course, of having to bear their own costs, for the purpose of expressing their approval or disapproval of the petitioner's application, and opposing or supporting it, as the case may be; but, beyond that, any hearing by the court of evidence in support of the merits of the case is, I apprehend, quite a matter of discretion. I am told it was the practice of one of my predecessors never to allow parties so appearing to be heard upon the merits, but they were merely to be heard to say whether they supported or opposed. Now, I lay down no general rule on the subject, but I want to point out, before adding more, that it would be a curious thing if a petitioner, in making a necessary allegation against the company to support his petition, had to make charges involving other persons that those persons should have conferred on them the same rights as they would have had if they were defendants to an action brought against the company and themselves. The petitioner would have no right to get costs against them, whereas they would, on the footing of their being allowed their costs as hostile litigants, be entitled, if the court should so direct, to get costs against the petitioner. I do not want to lay down any rule as to what the discretion of the court may be in a matter of costs of persons appearing on the hearing of the petition; but I think it is clear that the common order does not give to contributories so appearing any other costs than those the registrar is prepared to allow in the present case, and that, if more is wanted, it must be asked for at the time of the hearing of the petition. In my judgment the reasons given by the learned registrar appear

to be sufficient for the course he has taken, and I cannot accede to the demand for a review of the taxation under the circumstances. I therefore dismiss the application.

Solicitors: Pritchard and Sons; Ashurst, Morris, Crisp, and Co.

Saturday, Feb. 6.

(Before FARWELL, J.)

MORTON v. BANK OF ENGLAND. (a)

Local authority—Formation of school district and incorporation of board of managers—Sale of property belonging to board of managers and investment of proceeds—Dissolution of district by Local Government Board—Postponement of dissolution—Transfer of Consols—Bank of England—Orders of Local Government Board—Poor Law Amendment Act 1844 (7 & 8 Vict. c. 101)—Metropolitan Poor Act Amendment Act 1869 (32 & 33 Vict. c. 63), s. 1—Dissolved Boards of Management and Guardians Act 1870 (33 & 34 Vict. c. 2)—National Debt Act 1870 (33 & 34 Vict. c. 71), s. 22.

The Local Government Board made an order dissolving a metropolitan school district under the Metropolitan Poor Act Amendment Act 1869 as from a date therein mentioned.

By subsequent orders the date of dissolution was further extended, but ultimately the district was dissolved.

At the date of dissolution a sum of Consols was standing at the Bank of England to the credit of the board of managers of the dissolved union. The Local Government Board made an order directing the last acting managers of the dissolved district to transfer the Consols to certain poor law authorities in the order named in the proportions therein mentioned.

The Bank of England refused to recognise the validity of the order or the powers of the last acting managers to transfer the Consols, insisting that if the corporate board of managers was in existence it could only transfer the Consols under its seal, and that if it was not in existence a vesting order was required.

An action having been brought by the last acting managers for a declaration of their right to transfer:

Held, that, on the dissolution of a district constituted under the Poor Law Amendment Act 1845, the corporate board of such district constituted under sect. 45 of that Act continues to exist, while the Dissolved Boards of Management and Guardians Act 1870, s. 12, does not automatically vest the property of the district in the last acting managers, and consequently that the plaintiffs could transfer the Consols under their seal as a corporate board.

It is doubtful whether, when once the Local Government Board has dissolved a district under the Dissolved Boards of Management and Guardians Act 1870, it has power to set it up again or to continue the managers for more than a period of twelve months except for a certain purpose specified on the face of the order.

WITNESS ACTION.

By an order under the hands and seal of the Poor Law Board (which is now represented by

(a) Reported by J. ARTHUR PRICK, Esq., Barrister-at-Law.

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the Local Government Board), bearing date the 12th March 1849, and made under the Poor Law Amendment Act 1844 (7 & 8 Vict. c. 101), the St. Olave's Union and the respective parishes of St. Mary Magdalene, Bermondsey; St. Giles, Camberwell; and St. Mary, Rotherhithe, were combined into a district designated "The South Metropolitan School District" for the management of classes of infant poor therein specified, and a board of management was constituted for the district, and the number of members to be elected on such board from the unions and parishes of the district was thereby fixed. The members of the board were incorporated under sect. 45 of the Act.

By further orders dated the 10th Oct. 1849, the 3rd July 1854, the 8th June 1868, the 27th Aug. 1869, the 13th Jan. 1870, and the 11th March 1873, and issued by the Poor Law Board and by the Local Government Board respectively, the constituent parts of this school district were varied, and on the 30th March 1898 it comprised the Greenwich, St. Olave's, Stepney, and Woolwich Unions, and the parish of St. Giles, Camberwell.

This board of management, in pursuance of an order of the Local Government Board bearing date the 16th Oct. 1897, sold certain property belonging to them. The net proceeds of this sale, which amounted to 16,010*l.* 10*s.* 10*d.*, were directed, by an order of the Local Government Board dated the 27th Oct. 1898, to be forthwith invested in the purchase of Two and Three-quarter per Cent. Consols in the name of the board of management, and on the 22nd Nov. 1898 a request to open a corporate stock account impressed with the common seal of the board of management was lodged with the chief accountant of the Bank of England.

In Sept. 1902 the sum of 14,485*l.* 0*s.* 5*d.* Consols represented the proceeds of this investment, and there was a further sum of 844*l.* 13*s.* Consols transferred to the same account by an order of Byrne, J. dated the 27th Oct. 1902), making together 15,329*l.* 13*s.* 5*d.* Two and a Half per Cent. Consolidated Stock.

By the order of the Local Government Board of the 27th Oct. 1898 it was ordered and declared as follows:

And we declare that the said board of management shall stand possessed of the said stock, when purchased, upon trust to transfer and dispose of the same, and the principal moneys thereby secured, in such manner for the permanent advantage of the South Metropolitan School District as we by an order under our seal of office may direct.

By the order of Byrne, J. on the 28th Nov. 1902 it was ordered as follows:

That the funds in court [that is to say, the before-mentioned sum of 844*l.* 13*s.* Two and a Half per Cent. New Consols] be dealt with as directed in the schedule thereto by the Local Government Board by means of an order under sect. 1 of the Metropolitan Poor Act Amendment Act 1869.

These Consols were in 1903 standing in the books of the Bank of England in the name of the South Metropolitan District School Board.

By an order of the Local Government Board bearing date the 30th March 1898 the South Metropolitan School District was ordered to be dissolved as from the 30th Sept. 1899.

By subsequent orders, dated respectively the 1st Sept. 1899, the 20th Sept. 1900, the 22nd March 1901, and the 23rd Aug. 1901, the date of dissolution was altered, and the school district was finally dissolved as from and after the 29th Sept. 1902.

Upon the dissolution of the district the real and personal property of the board other than the afore-mentioned Consols were realised under the authority of the Local Government Board, and the liabilities of the board of management were discharged. The Consols represented the board's surplus assets.

By an order bearing date the 10th Aug. 1903, and made, as stated therein, "in pursuance of the powers given to it" by the statutes in that behalf, the "last acting managers" were directed to pay forthwith the sum which each of the unions and parish named in the schedule to the order were directed to receive thereunder.

The schedule was as follows:

	£	s.	d.
To the Guardians of the Poor of St. Giles, Camberwell, Parish	8234	19	0
To the Guardians of the Poor of Greenwich Union	2294	4	7
To the Guardians of the Poor of St. Olave's Union	2523	4	11
To the Guardians of the Poor of Stepney Union	957	14	0
To the Guardians of the Poor of Woolwich Union	1269	0	11
	15,329	13	5

By an order bearing date the 22nd Sept. 1903 the Local Government Board made an order declaring that the persons who were acting as the managers of the school district at the time of dissolution, or the survivors of them, should be empowered to act in all matters lawfully intrusted to them for a further period not extending beyond the 25th Dec. 1903.

The clerk to the board of acting managers wrote on the 26th May 1903 to the Bank of England in reference to the transfer of the Consols, and a long correspondence ensued.

The bank refused to recognise the validity of the order of the Local Government Board of the 10th Aug. 1903, or the right of the members of the board of management to transfer the Consols.

The managers accordingly issued a writ by which they claimed (*inter alia*) a declaration that they were entitled as joint tenants to the Consols, and that they were entitled to require the bank to transfer them into their joint names; and, alternatively, that they were entitled as last acting managers of the dissolved school district to transfer the Consols in the books of the bank into the names of the several sets of poor law guardians mentioned in the order of the Local Government Board of the 10th Aug. 1903 in the shares and proportions respectively mentioned in this order.

The defendants in their defence submitted that the Local Government Board had no power to make the order of the 10th Aug. 1903, and that, if the Local Government Board had such power, the order did not operate to dissolve the corporation created by the Poor Law Amendment Act 1844 (7 & 8 Vict. c. 101), s. 45—viz., the South Metropolitan District Board of Management—but only

the South Metropolitan School District; that if this corporation was undissolved the Consols could only be transferred under its corporate seal, and that if in fact it was dissolved the Consols could only be transferred by an appointment of new trustees and a vesting order under the Trustee Act 1893.

The Metropolitan Poor Act Amendment Act 1869 (32 & 33 Vict. c. 63), s. 1, provides:

The Poor Law Board as and when they shall see fit may dissolve an asylum or school district contained wholly or partly in the metropolis, and upon such dissolution shall adjust the rights and liabilities of parishes and unions comprised therein respectively, and provide for the compensation of the officers and other persons employed therein respectively in like manner as when a union is dissolved under the authority of the thirty-second section of the Poor Law Amendment Act 1834, and so much of that section as requires the concurrence of two-thirds of the guardians in the dissolution of any union is hereby repealed; and prior to issuing any order dissolving such district, the said board may by their order empower the managers of any such district to sell and dispose of any land, buildings, or other property belonging to them and apply the proceeds thereof in the discharge of the debts and liabilities then outstanding against such managers, and to distribute the surplus which may remain among the parishes or unions comprised therein, according to their original proportions; and if the said district shall be dissolved before the same shall be sold, the said board may by their order empower the persons who were the managers of the district at the time of its dissolution, or the major part of them, to make such sale and convey the land to the purchaser thereof and to apply and distribute the produce accordingly.

The Dissolved Boards of Management and Guardians Act 1870 (33 & 34 Vict. c. 2):

SECT. 1. When the Poor Law Board shall have dissolved or shall dissolve any district the component parts whereof shall not have been formed into one union or shall have dissolved or shall dissolve any union, or shall have added or shall add any parish in which the relief to the poor shall be or shall have been administered by a board of guardians to a union or to another parish, the persons who were acting as managers or guardians at the time of dissolution or addition and the survivors of them shall continue in office for the purpose of paying and discharging the debts and liabilities of such district, union, or parish, and of receiving and recovering moneys or other property due to the said district, union, or parish, as the case may be, in like manner as the board of management or board of guardians could have done if no dissolution or addition had taken place; and the said managers or guardians shall be empowered to make all necessary orders for contributions upon the parishes comprised within the district or union so dissolved, or upon the proper authorities of the parish so added, as the case may require, and to enforce the same as the board of management or board of guardians could have done previous to the dissolution or addition respectively: provided that the limitation of time for the payment of debts imposed by the statute of the twenty-second and twenty-third Victoria, chapter forty-nine, shall not apply to the cases of districts or unions dissolved, or of parishes added to a union, before the passing of this Act, where such limitation had not taken effect previous to the dissolution or addition thereof as aforesaid; and provided that no such managers or guardians shall be empowered to act in the manner aforesaid for a longer period from the date of dissolution or addition, unless the Poor Law Board by their order shall authorise them to continue to act for some special purpose.

SECT. 12. Upon the dissolution of any district or union, or the addition of any parish in which the relief

to the poor shall have been or shall be administered by a board of guardians to a union or to another parish, the real and personal estate vested in the managers or guardians of such district, union, or parish respectively shall be transferred to and vested in the persons who were acting as managers or guardians respectively at the time of such dissolution or addition, to be held by them as joint tenants according to the nature of such property and in trust for the parishes comprised in such district or union or for the parish, as the case may be, until the same shall be sold, let, or otherwise disposed of under the authority of the third section of the Union and Parish Property Act 1835, and any Act extending the same: Provided that nothing herein contained shall apply to any parish provided for by the fifth section of the Metropolitan Poor Act Amendment Act 1869, or by a local Act.

Bramwell Davis, K.C. and J. B. Matthews for the plaintiffs.—Under sects. 44 and 45 of the Poor Law Amendment Act 1844 a district board constituted a corporation under the Act has power to purchase and hire property. Under the Dissolved Boards of Management and Guardians Act 1870, ss. 1, 2, which deals with the property of dissolved districts and unions, the property of any dissolved district or union is to be transferred to and vested in the persons who were acting as managers or guardians respectively at the time of such dissolution, and its effect is to vest the property automatically in these last acting managers, and accordingly in this case these managers have power to execute a transfer:

Corporation of Hyde v. Bank of England, 46 L. T. Rep. 910; 21 Ch. Div. 176.

It would be ridiculous to suppose that the district was dissolved, and that the board of management continued to exist.

Uppjohn, K.C. and Howard Wright for the defendants.—The effect of the order of the Local Government Board was to dissolve, not the board of managers, but the district. The board of managers still continues to exist, and can only properly transfer the Consols by its corporate seal:

Dissolved Boards of Management and Guardians Act 1870, s. 11.

The plaintiffs' argument is opposed to sect. 12 of this Act, which provides that the property shall be transferred to and vested in the last acting managers, which clearly implies a vesting order. The defendants do not admit the validity of the order of the 10th Aug. 1903.

Bramwell Davis, K.C. in reply.

FARWELL, J.—It is by no means easy to find one's way through the maze of these Acts of Parliament; but I have come to a clear conclusion on the one before me, which is the only one with which I am concerned. By the Poor Law Amendment Act 1840, s. 40, the commissioners formed school districts. By sect. 42 it is provided that a board shall be constituted for every district. Now, these are obviously two different and distinct things. The district is one thing and the board for the district is another. By sect. 45 every such district board is incorporated for the purpose of holding property and of suing and being sued. Then the Metropolitan Poor Act Amendment Act of 1869 authorises the Poor Law Board, as and when they shall see fit, to dissolve any school district. Now, that is obviously the district and not the board or the incorporated

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entity. Then the Dissolved Boards of Management and Guardians Act 1870 contains a preamble, "Whereas it is expedient that better provision should be made for the proceedings of boards of management and boards of guardians, when the districts or unions for which they have acted respectively are dissolved." That clearly again treats the board as existing after the dissolution of the district. It provides that when the Poor Law Board shall have dissolved any district, the persons who were acting as managers at the time of dissolution shall continue in office for the purpose of practically winding-up the affairs of the district, and paying its debts, and receiving and recovering its property, with a proviso that "No such managers or guardians shall be empowered to act in the manner aforesaid for a longer period than twelve months from the date of dissolution or addition, unless the Poor Law Board by their order shall authorise them to continue to act for some special purpose." Then, by sect. 12 of that Act (down to this point the district being dissolved, but the corporate board remaining), it is provided that, upon the dissolution of any district, the real and personal estate vested in the managers shall be transferred to and vested in the persons who were acting as managers at the time of such dissolution, to be held by them as joint tenants in trust for the parishes comprised in such district. Now, obviously the meaning of that is, the district is dissolved by splitting it into its various component parts, all of which would have some share in the property which had formerly been held by the corporate body in trust for the district. Then the provision is that the real and personal estate vested in the managers shall be transferred to the district. The phrase is a little unfortunate, because it is not strictly accurate to say that it is vested in the managers; it is vested in the board of management, which has been incorporated; but I think that, inasmuch as there may be cases in which the managers are not incorporated, because the Act extends to various other districts, asylums, and unions, the reasonable construction is that the property vested in the managers, whether it be vested in them as individuals or as a corporation, shall be transferred and vested. Now, in my opinion, that is not, as has been argued, an automatic vesting order, with the phraseology of which we are familiar. The words in such an order are "shall vest in," and we all understand what that means. But when you say "shall be transferred and vested in," it is the expression "vested in," instead of "vest in," which points to an act to be done by the persons mentioned, who are ordered to do the acts necessary for that purpose. That appears to me to be a simple and reasonable solution of the matter. It has been suggested that it is absurd to have the corporate body still existing. I do not see the absurdity. It is obvious that the property on the dissolution of the district must be somewhere or other, and that, if you *ipso facto* dissolve both district and board at the same moment, the title to the real estate in land would, I suppose, vest in the Crown, and the title to the Consols in the bank would vest—I do not know, but I suppose—also in the Crown as *bona vacantia*. But, at any rate, the Legislature appears to me to have adopted a much more convenient course by keeping the corporate body in existence either

by implication from the 1st section of the Act of 1870 for so long a period as there remains anything to be done, or, according to the common law rule, so long as any one of the corporate body remains alive. I should prefer myself, if it were necessary to decide, that it was the first. I do not think that it is necessary for me on this occasion to determine to whom the property is to be transferred. On the face of it, it is to be to the persons who were acting as managers at the date of the dissolution. Now, the order of dissolution in this case is dated the 29th March 1898, and it directs the dissolution to take place as from the 30th Sept. 1899. A question has been raised, which is one of very considerable importance, as to the power of the local government board to undo that dissolution and set up the board again, and then to dissolve it again or to continue the managers for a period of more than twelve months, except for a special purpose specified on the face of the order. I do not think that it is necessary for me to determine that, because I think that it is sufficient for me to declare that the plaintiffs are not entitled to claim, as they do, that the property is vested in them under this particular section; but that it would be necessary for the transfer to be executed under the corporate seal of the board, and therefore, when that transfer is presented to the Bank of England, the bank will no doubt, with their usual care and skill, consider whether the persons to whom the transfer is proposed to be made are the right and proper persons. But I hope that they will not come to me again. [His Lordship, at the request of counsel for the plaintiffs, prefaced the order by a declaration that the court, "being of opinion that the corporation created by sect. 4 of the Act of 1844 was still subsisting," dismissed the action with costs. His Lordship expressed an opinion that it would be well if the Local Government Board considered whether the second proviso in the Act 33 & 34 Vict. c. 2 enabled the Local Government Board to continue managers for any purpose or only for a special purpose. His Lordship further expressed his view that the Local Government Board might consider whether, when they had once made an order for dissolution, they had power to make such further orders as they had made in this case.]

Action dismissed.

Solicitors: *B. Avery; Freshfields.*

Tuesday, Feb. 23.

(Before SWINFEN EADY, J.)

Re FRENCH-BREWSTER'S SETTLEMENT;
WALTERS v. FRENCH-BREWSTER. (a)*Merger—Settlement—Charge of portions—Devolution of unraised portion upon owner of estate charged therewith—Benefit of owner of estate.**By a marriage settlement real estates of the husband were settled upon trusts for the husband, the wife, and the children of the marriage, and portions for the younger children were charged on the estates and secured by a term created thereon, the ultimate limitation of the estates being to the settlor in fee, who covenanted that, so long as the interests and terms thereby created should subsist, the estates comprised in the*

(a) Reported by J. TRUSTAM, Esq., Barrister-at-Law.

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settlement should continue to be of a specified annual value. On the death of a younger child, whose portion had vested, but had not been raised, intestate and unmarried, the portion devolved upon the settlor as sole next of kin, but he did not take out administration to his son's estate, and on his death his testamentary dispositions (which, however, were executed at a date prior to his son's death) contained no reference to the portion.

On an originating summons taken out by the trustees of his will, the question was raised whether the portion which devolved upon him on the death of his son sank into the estates upon which it was charged and of which the settlor was absolute owner subject to the interests and terms created by the settlement, or whether it continued to subsist and formed part of his personal estate:

Held, that it was for the benefit of the settlor that the portion should sink into the estates, and that it had merged in the inheritance thereof.

Re Radcliffe; Radcliffe v. Bewes (66 L. T. Rep. 363; (1892) 1 Ch. 227) distinguished.

By a settlement of the 27th Sept. 1876, made on the marriage then intended and shortly afterwards solemnised between Robert Abraham Brewster French-Brewster and Geraldine French-Brewster, then and therein described as Geraldine Cooper, certain estates in Ireland belonging to Robert Abraham Brewster French-Brewster were vested in trustees for the term of ninety-nine years from the solemnisation of the marriage upon the trusts thereafter declared and subject thereto to the use of Robert A. Brewster French-Brewster for life, and after his decease to the use that Geraldine French-Brewster should receive the yearly rentcharge of 1000*l.*, and subject and charged as thereinbefore mentioned to the use of trustees for the term of 100 years from the death of Robert A. Brewster French-Brewster upon the trusts thereafter declared, and subject thereto to the use of trustees for the term of 1000 years from the death of Robert A. Brewster French-Brewster upon the trusts thereafter declared, and subject thereto to the use of Robert A. Brewster French-Brewster, his heirs and assigns. And it was thereby declared that the premises were limited to the trustees of the term of ninety-nine years upon trust that they should during the joint lives of Robert A. Brewster French-Brewster and Geraldine French-Brewster pay her such sum as would make up the annual sum of 300*l.* by way of pin money. And it was thereby declared that the premises were limited to the trustees of the term of 100 years upon trust to secure the payment of the rentcharge of 1000*l.* And it was thereby declared that the premises were limited to the trustees of the term of 1000 years upon trust that if there should be any child or children of the then intended marriage (other than a first or only son or any other son or sons for the time being entitled to the first estate in tail in the lands therein mentioned) who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, then the trustees should after the death of Robert A. Brewster French-Brewster by mortgage or sale as therein mentioned raise for the portion or portions of such child or children as aforesaid other than a first or only or

other son or sons so entitled as aforesaid such sum of money as was thereafter mentioned (that was to say): If there should be but one such child (other than as aforesaid), the sum of 10,000*l.* to be paid to such child at his age of twenty-one years, or being a daughter at her age of twenty-one years or day of marriage, which should first happen, if the same should happen after the death of Robert A. Brewster French-Brewster, and if the same should happen in his lifetime then immediately after his death. And if there should be but two such children (other than as aforesaid), the sum of 15,000*l.* And if there should be three or more such children (other than as aforesaid), the sum of 20,000*l.*, the said sum of 15,000*l.* or 20,000*l.*, as the event might happen, to be paid to all or such one or more exclusively of the other or others of the children for whose portions the same should be raised as aforesaid at such age or time or respective ages or times (not previous) as to a son to his attaining the age of twenty-one years, or as to a daughter to her attaining that age or marrying, which should first happen, as Robert A. Brewster French-Brewster should by deed or will or codicil appoint, and in default of such appointment in equal shares.

And the settlement contained a covenant by Robert A. Brewster French-Brewster that he had power to grant and assign all the premises thereinbefore expressed to be granted and assigned to the uses and upon the trusts thereinbefore declared, and that the same premises then were and should continue, so long as the estates and terms of years thereby created or any of them should subsist, to be of the full clear yearly value of 1800*l.*

There was issue of the marriage between Robert A. Brewster French-Brewster and Geraldine French-Brewster four sons and no other children—viz., Robert A. French-Brewster, who attained twenty-one in his father's lifetime; Henry Gerald French-Brewster, who also attained twenty-one in his father's lifetime, and died in Jan. 1901 intestate and unmarried, leaving his father his sole next of kin; Arthur Ord French-Brewster, who attained twenty-one in June 1903; and another son, who died in infancy in his father's lifetime.

In 1891 the marriage was dissolved, and by a deed of covenant dated the 2nd June 1891 Robert A. Brewster French-Brewster covenanted to pay Geraldine French-Brewster an annual sum of 2500*l.* for life in lieu of the money payable to her under the settlement of the 27th Sept. 1876, and securities of the value of 11,298*l.* 13*s.* 9*d.* were vested in trustees to secure the annual payment of the additional 1500*l.*

Robert A. Brewster French-Brewster then married his second wife, Annie Veronica French-Brewster, but there was no issue of his second marriage.

By his will and codicil, both executed in 1895, neither of which contained any reference to the charge on his Irish estates comprised in the settlement of the 27th Sept. 1876, Robert A. Brewster French-Brewster gave his second wife an annuity of 1000*l.* for life, divided his real estates among his sons then living, and bequeathed all his residuary personal estate and effects to his trustees upon trust to pay his debts and legacies and to invest the residue in the purchase of lands to be

CH. DIV.] *Re FRENCH-BREWSTER'S SETTLEMENT; WALTERS v. FRENCH-BREWSTER.* [CH. DIV.]

settled to the use of his eldest son for life, with remainder to his sons in tail, with divers remainders over.

On the death in Jan. 1901, intestate and unmarried, of Henry Gerald French-Brewster, the second son of Robert A. Brewster French-Brewster, 7500*l.*, one moiety of the unraised sum of 15,000*l.* charged on his Irish estates by the marriage settlement of the 27th Sept. 1876 in favour of the younger children of his first marriage, devolved upon Robert A. Brewster French-Brewster as sole next of kin, but he did not take out letters of administration to his son's estate.

Robert A. Brewster French-Brewster died on the 20th May 1901, and his will, with the codicil thereto, was proved in Nov. 1901. His executors then took out administration to Robert A. French-Brewster.

After his death the rents of his Irish estates comprised in the settlement of the 27th Sept. 1876, together with the income of the securities vested in the trustees of the deed of covenant of the 2nd June 1891, proved insufficient to satisfy the annuity of 2500*l.* payable to Mrs. Geraldine French-Brewster, and it was a disputed point whether the uncertain value of those Irish estates amounted to the yearly sum of 1800*l.*; also the property passing under his will was insufficient for payment of the annuity of 1000*l.* bequeathed to Mrs. Annie Veronica French-Brewster.

In July 1902 an originating summons was taken out by Mrs. Annie Veronica French-Brewster for the administration of his estate, and judgment was obtained on the 12th Aug. 1902.

This was an originating summons taken out on the 17th July 1903 by the trustees of the marriage settlement of the 27th Sept. 1876 and the deed of covenant of the 2nd June 1891, the defendants being Mrs. Geraldine French-Brewster, the executors and trustees of the will of Robert A. Brewster French-Brewster, Robert Abraham French-Brewster and Arthur Ord French-Brewster, the two surviving sons of Robert A. Brewster French-Brewster, who were the devisees under his will, asking (*inter alia*) whether by reason of the death of Henry Gerald French-Brewster, a younger child of Robert A. Brewster French-Brewster, leaving his father his sole next of kin, the sum of 7500*l.* (being that moiety of the unraised portions charge of 15,000*l.* mentioned in the marriage settlement which became vested in Henry Gerald French-Brewster) had merged in the fee simple of or other estate and interest in the hereditaments and premises settled by the marriage settlement which (subject to the jointure, rentcharge, and portions charge thereby created) belonged absolutely to Robert A. Brewster French-Brewster, or whether it was still raisable for the benefit of his personal estate.

Eve, K.C. and *E. J. Elgood*, for the plaintiff trustees, stated the facts.

Martelli for Mrs. Geraldine French-Brewster.

Vernon Smith, K.C. and *A. E. Russell* for the executors and trustees of the will of Robert A. Brewster French-Brewster.

R. H. Hodge for Arthur Ord French-Brewster.—The 7500*l.* to which Robert A. Brewster French-Brewster became entitled on the death of his son Henry Gerald French-Brewster sank into

the Irish estates out of which it was raisable. Where the owner of the fee simple of an estate becomes entitled to a charge thereon, *prima facie* the charge merges in the inheritance unless the owner does some act to keep it alive:

Swinfen v. Swinfen (No. 3), 29 *Beav.* 199.

The presumption that the charge merges in the inheritance may be rebutted by showing an intention on the part of the owner that it should not merge, and three tests have been stated as applicable for the purpose of ascertaining whether the owner entertained such intention: First, any actual expression of such intention, which does not exist in the present case; secondly, whether the acts done by the owner are only consistent with the charge being kept on foot, but there is no such act by Robert A. Brewster French-Brewster; and, thirdly, whether it is for the interest of the owner that the charge should be kept on foot, which is not the case here:

Tyrwhitt v. Tyrwhitt, 32 *Beav.* 244.

In the present case all indications of intention are in favour of the merger of the charge—viz., the fact that the will of Robert A. Brewster French-Brewster contains no reference to the charge; the fact that he did not take out letters of administration to his son's estate; and the fact that it is for his benefit that the charge should merge in the Irish estates, as he covenanted that their annual value should amount to 1800*l.*, and created other subsequent charges upon them:

Oliver v. Lord Vaux and others, 6 *De G. M. & G.* 638.

Hon. *Frank Russell* for Robert Abraham French-Brewster.—The charge of 7500*l.* forms part of the personal estate of the testator, and has not merged in the estates upon which it is charged, because that charge and the estates were not held by the testator in the same right, as he was only entitled to the charge upon taking out administration to his son, and subject to payment thereof of his son's debts and liabilities:

Re Radcliffe; Radcliffe v. Bewes, 66 *L. T. Rep.* 363 (1892) 1 *Ch.* 227.

It appears from the case of *Re Somes; Smith v. Somes* (74 *L. T. Rep.* 49; (1896) 1 *Ch.* 250) that in the case of *Re Radcliffe; Radcliffe v. Bewes* (*ubi sup.*) there were practically no debts owing by the son, and that the father was to receive a substantial benefit, so that by executing the release of his power the father augmented the interest he already took under his son's intestacy, he being sole next of kin.

R. H. Hodge in reply.—In the present case the father did not take out administration to his son's estate, but he became beneficially entitled to the 7500*l.*, and that was sufficient to cause it to merge into the estate on which it was charged and to which the father was entitled:

Swabey v. Swabey, 15 *Sim.* 106;

Forbes v. Moffatt, 18 *Ves. Jan.* 384; 11 *R. R.* 222;

Swinfen v. Swinfen (*ubi sup.*).

SWINFEN EADY, J.—The only remaining question is whether the portion of 7500*l.*, which vested, but which the father became beneficially entitled to, on the decease of his second son intestate in the father's lifetime, has sunk into the land out of which it was to be raised or must be treated as still subsisting and forming part of the father's

CHAN. DIV.] REX v. JUSTICES OF WEST RIDING OF YORKSHIRE; *Ex parte* ELLIS. [K.B. DIV.]

personal estate. In my opinion it was clearly for the benefit of the father that it should sink into the estate, having regard to the father's covenant that the premises should continue to be of the full clear yearly value of 1800*l.* The extinction of this charge would reduce the father's liability upon this covenant, and the lands charged would become a better security for the remaining moiety of the portion of 15,000*l.* Again, the father never manifested any intention of keeping alive the charge, and, although the son died in Jan. 1900 and the father not until the 20th May 1901, the father did not take out any letters of administration to the son. The objection urged to the merger or extinguishment of the charge is that the father did not own the estate and the charge in the same right—he was entitled to the estate beneficially, but was only entitled to the charge upon taking out administration to his son, and that any debts of the son would first have to be paid before the title of the father to the residue was cleared. The answer to this objection is that no question of merger arises until all debts and other claims (if any) against the son's estate have been discharged. It is only in respect of the interest which the father takes beneficially in the son's estate that merger arises, so that no prejudice can be occasioned to third parties. It is not claimed that if the father had taken out letters of administration to his son merger would at once have taken place, irrespective of any liabilities of the son. The father would not in that case have been entitled to the land and the charge in the same right, and there would not have been any merger to the prejudice of the son's creditors: (*Re Radcliffe*; *Radcliffe v. Bewes*, *ubi sup.*). This, however, does not affect the question before me, which is whether the father's own beneficial interest in the 7500*l.*, as the sole next of kin of the son, has not merged, and in my opinion it has. Having once arrived at the conclusion that it was for the benefit of the father that it should merge, I see nothing to prevent the extinguishment of the charge taking place. It is established by unquestionable authority that where the owner of land becomes entitled beneficially to a charge thereon as next of kin of a person entitled to the charge, the charge will sink if it is for the benefit of the person entitled to the land that it should, even although some person other than the owner of the land becomes the legal personal representative of the owner of the charge, and even although the charge be secured by an outstanding term vested in trustees for the purpose of raising the charge. This was decided by Lord Loughborough, in 1793, in the case of *Lord Compton v. Oxenden* (2 Ves. Jun. 261). In that case a lunatic was entitled to land, and his sister, Elizabeth Blomfield, was entitled to two sums of 1500*l.* each secured upon it, one of which two sums was secured by a trust term. She died intestate, leaving her brother her sole next of kin. After the lunatic's death, a bill was filed by his next of kin claiming that these two sums of 1500*l.* each formed part of the lunatic's personal estate and had not sunk into the land, and, on the other hand, it was insisted by Sir Henry Oxenden, the heir-at-law of the lunatic, that he inherited the land free from any charge in favour of the personal estate. It was urged on behalf of the plaintiff that the two sums of 1500*l.* each would have been

liable for the debts of Elizabeth, and that, in the absence of any election by the lunatic, it ought not to be held that the charge had merged merely because as sole next of kin of his sister the lunatic had become entitled to the benefit of the charge. Lord Loughborough, however, held that the heir took the land, discharged from the burden which had become merged in the inheritance; and that it made no difference that one of the two sums was secured by a trust term. This case is precisely in point, and the circumstances are undistinguishable from the present. Again, in *Forbes v. Moffatt* (*ubi sup.*) Sir William Grant said: "Upon the subject" (of merger or extinguishment of a charge) "a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law and sometimes preserve it, when at law it would be merged." Again, in *Swabey v. Swabey* (*ubi sup.*) it was held by Shadwell, V.O. that certain charges on real estate were kept alive so far as was necessary for the payment of certain debts and legacies and subject thereto sank into the inheritance, and that the next of kin had no equity to have the balance of the amount of the charges raised and paid to them. Accordingly I decide that the 7500*l.* in question in this case has sunk into the inheritance.

Solicitors: *Gush, Phillips, Walters, and Williams*; *Martineau and Reid*; *Robert Todd*.

KING'S BENCH DIVISION.

Feb. 1 and 2.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

REX v. JUSTICES OF WEST RIDING OF YORKSHIRE; *Ex parte* ELLIS. (a)

Justices—Quarter sessions—Appeal from licensing justices—County solicitor—Disallowance of profit costs of justices clerk.

A county solicitor was appointed for the West Riding of Yorkshire, and paid a salary out of the county funds. His duty was to represent the justices in all judicial business affecting their acts as justices, including the defence of appeals from their decisions under the Licensing Acts.

Held, that the quarter sessions were not entitled to disallow the profit costs of a clerk to justices, who had been retained to act for such justices upon an appeal against a decision under the Licensing Acts, merely because he was employed by the justices instead of the county solicitor.

CAUSE shown against orders nisi for writs of mandamus and certiorari by the justices of the Quarter Sessions of the West Riding of Yorkshire.

On the 5th Feb. 1903 the justices of the East Morley division refused to grant the certificate by way of renewal of the full licence of the Crown Point Hotel. The licensee gave notice of appeal to the quarter sessions, which appeal was dismissed with costs.

The justices duly retained their clerk as their solicitor to act on their behalf in the conduct of the appeal.

The justices for the East Morley division having also refused to grant their certificate by way of

(a) Reported by W. DE B. HARRERT, Esq., Barrister-at-Law.

K.B. Div.] REX v. JUSTICES OF WEST RIDING OF YORKSHIRE; *Ex parte* ELLIS. [K.B. Div.]

renewal of the White Hart Hotel the licensee duly appealed, and the justices at quarter sessions allowed the appeal.

The justices duly retained their clerk in this case also to act on their behalf in the conduct of this appeal.

It has been the custom for more than a century in the West Riding of Yorkshire to appoint a county solicitor, and that officer is now appointed under sect. 66 of the Local Government Act 1888. It is the duty of that solicitor, who receives a salary out of the county funds, to represent the justices in all judicial business affecting their acts as justices, including the defence of appeals from their decisions under the Licensing Acts; and the fact that such was the duty of the solicitor was published in the records of the court, and was well known to all the justices and justices clerks in the Riding, and as a matter of practice the county solicitor had always acted for the justices on appeals from their decisions, and this practice was sanctioned by quarter sessions.

In the case of the Crown Point Hotel the quarter sessions ordered the appellant, the licensee, to pay to the clerk of the peace for the time being of the Riding, to be by him paid over to the justices, the parties entitled to the same, a certain sum by way of costs, which sum was, in the opinion of the court, sufficient to indemnify the justices from all costs they had been put to by reason of the appeal, and it was "further ordered that . . . it be an instruction to the clerk of the peace in ascertaining the amount to be paid to the said justices to exclude the personal professional charges" of the clerk to the justices, who had been employed instead of the county solicitor.

In the case of the White Hart Hotel the treasurer of the Riding was ordered to pay to the justices such sum as was sufficient to indemnify them from all costs and expenses to which they were put in consequence of the appeal, and it was ordered that the personal professional profit charges of the clerk to the justices should be excluded "as being costs not properly incurred by the said justices in the said matter, and not necessary or proper in the opinion of the court to indemnify the said justices."

By the Alehouse Act 1828 (9 Geo. 4, c. 61), s. 29:

In every case where notice of appeal against the judgment of any justice in or concerning the execution of this Act shall have been given, and such appeal shall have been dismissed, or the judgment so appealed against shall have been affirmed, or such appeal shall have been abandoned, it shall be lawful for the court to whom such appeal shall have been made, or intended to be made, and such court is hereby required to adjudge and order that the party so having appealed, or given notice of his intention to appeal, shall pay to the justice to whom such notice shall have been given, or to whomsoever he shall appoint, such sum by way of costs as shall in the opinion of such court be sufficient to indemnify such justice from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal; and if such party shall refuse or neglect forthwith to pay such sum, it shall be lawful for the said court to adjudge and order that the party so refusing or neglecting shall be committed to the common gaol or house of correction, there to remain until such sum be paid. And in every case in which the judgment so appealed against shall be reversed, it shall be lawful

for such court, if it shall think fit, to adjudge and order that the treasurer of the county or place in and for which such justices whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment, shall pay to such justice or to whomsoever he shall appoint such sum as shall in the opinion of such court be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been so put: and the said treasurer is hereby authorised to pay the same which shall be allowed to him in his accounts.

And by the Licensing Act 1902 (2 Edw. 7, c. 28), s. 20:

In every case of appeal against the decision of any licensing justice the court to which such appeal is made shall adjudge and order that the treasurer of the county or place in and for which such justice whose decision is appealed against shall have acted on the occasion when he gave such decision, shall pay to such justice such sum as in the opinion of the court shall be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been so put, and which cannot be recovered from any other person, and the said treasurer is hereby authorised to pay the same, which shall be allowed to him in his account. The order of the appellate court may be made either at the sessions when the appeal is heard or at the next ensuing sessions, and the costs may be taxed either in or out of sessions.

Danckwerts, K.C. (*Compston* with him) showed cause.—The justices in quarter sessions have, under the statutes, to give the licensing justices who appear upon the appeal such costs in their opinion as are sufficient to indemnify them. The two sections that have reference to these cases are sect. 29 of the Alehouse Act 1828 and sect. 20 of the Licensing Act 1902. The first applies where the appeal has been dismissed, and the second where the appeal has been successful. In both sections the sum to be allowed is what is sufficient in the opinion of the court to indemnify the justices for costs properly incurred. If the justices of the Licensing Sessions can employ their own clerk where a county solicitor is provided, the county has to pay twice over as it is liable for its solicitor's salary as well. This office of county solicitor has existed for a very large number of years, and the solicitor is now appointed under sect. 66 of the Local Government Act 1888. He referred to

Reg. v. Winder, 83 L. T. Rep. 171; (1900) 2 Q. B. 666;

Roberts v. Jones, (1891) 2 Q. B. 194.

It was held in *Reg. v. Justices of London* (62 L. T. Rep. 211; (1895) 1 Q. B. 616) that when an appeal is dismissed the Court of Quarter Sessions has a discretion as to the costs of justices who make themselves party to the appeal, and that if they have exercised their discretion by refusing to give the costs of their appeal to licensing justices the High Court cannot interfere by *mandamus*. The present case is not one for *mandamus*, for the justices have exercised their discretion and have given such costs as they think are necessary to properly indemnify the licensing justices. Further, they have not exceeded their jurisdiction and therefore it is not a matter for *certiorari*. He also referred to

Reg. v. Middlesex Justices, 35 L. T. Rep. 402; 2 Q. B. Div. 516;

Husley v. West London Extension Railway, 60 L. T. Rep. 642; 14 App. Cas. 26.

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LEWIS (app.) v. DURHAM UNION (resps.).

[K.B. Div.]

Bruce Williamson, for the licensee of the Crown Point Hotel, did not contest the rules.

Macmorran, K.C. (*Greenwood* with him) for the licensing justices.—The sum to be allowed must be what the justices in quarter sessions have considered to be sufficient to indemnify the justices. He referred to

Reg. v. Worcestershire Justices, 83 L. T. Rep. 272 ;
(1900) 2 Q. B. 576 ;

Reg. v. Winder (sup.).

Whatever costs are reasonable should be paid to the justices by way of indemnity, but here the Court of Quarter Sessions took upon themselves to give a direction to the clerk of the peace with reference to the principle upon which he was to tax which is beyond their jurisdiction. The orders are bad on their face in so far as they contain directions which are *ultra vires* and so *certiorari* is an appropriate remedy. With regard to the rules for the writs of *mandamus* the justices at quarter sessions have not in fact exercised their statutory powers. [*Danckwerts*, K.C. referred to *Henderson v. Merthyr Tydfil Urban District Council* (1900) 1 Q. B. 434.]

LORD ALVERSTONE, C.J.—This case is by no means free from difficulty, but, having heard the arguments on each side, I have come to the conclusion that these orders go too far and cannot be supported. It was admitted that the effect of sect. 20 of the Licensing Act 1902 was to place justices in the same position with regard to being indemnified from the costs incurred when their decisions were reversed as they were under sect. 29 of the Alehouse Act 1828 when their decisions were upheld. The two cases before the court are therefore in the same position, and it is only necessary to refer to sect. 29 of the Act of 1828. [His Lordship read that section and continued:] I think Mr. Danckwerts has made good his position that if the justices must be taken to have acted under that section and had fixed a sum, ascertained by them or their clerk for them, which in their opinion would indemnify the licensing justices from the costs which they had been put to in consequence of having been served with the notice of appeal, this court could not have interfered by *certiorari* or *mandamus*. In that case the justices would have exercised their discretion, and the court could not therefore interfere. But looking at the orders and affidavits I do not, however, think that that was the way in which the case comes before us, or was intended to come. I agree that the same question arises on both the orders, except that I may say that there does not seem to be the same reason for making the order in the case where the appeal was unsuccessful as in that of a successful appeal, for in the latter case the justices' costs would have had to be paid out of the public funds. The form of the order made in the unsuccessful appeal shows that it was not an ordinary order as to costs, but was an order made, as was stated on the face of it, "in view of particular matters brought before the court." It is now clear on the affidavits what is meant by "in view of particular matters brought before the court." It appears clear, therefore, that the order is not a taxation of the costs of the justices, but is a special order because the court thought that the licensing justices should have engaged the county solicitor to act for them on the appeals.

It seems to me, therefore, that the case is taken out of the mere question of taxation, and raises the question as to whether the Court of Quarter Sessions can take the case out of the section (29), because the justices have employed a solicitor other than the county solicitor. The question raised is whether there is a legal obligation on the licensing justices to employ the county solicitor. I have no doubt that there is no statute or rule of law which compels the licensing justices to employ a particular solicitor. Sect. 66 of the Local Government Act 1888 cannot affect the rights given by sect. 29 of the Act of 1828. I am of opinion that the order drawn up under the circumstances of the case is not an order under sect. 29, and so is in excess of the jurisdiction of the quarter sessions, and therefore the objections raised against the rules being made absolute do not hold good. The order must, therefore, be quashed, and, since the magistrates have not considered the question of costs, the matter must be sent back to them.

WILLS, J.—I am satisfied that the magistrates had no jurisdiction to force the licensing justices to employ a particular solicitor to act for them. It is quite clear that the licensing justices cannot be deprived of their right to be indemnified as to their costs merely because they did not employ a special solicitor. The Court of Quarter Sessions has assumed certain powers which they do not possess. What has been done as appears on the face of the orders themselves was not a matter of taxation, but was an application of a false principle.

KENNEDY, J.—I agree, and I have nothing to add.

Orders absolute.

Solicitors: *Farmer, Rawson, and Co.*; *Clements, Williams, and Co.*, for *Trevor Edwards*, *Wakefield*; *Walker and Rowe*, for *E. O. Wooler*, *Burrows*, and *Burton*, *Leeds* and *Morley*.

Friday, Feb. 5.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, J.J.)

LEWIS (app.) v. DURHAM UNION (resps.).(a)

Rating—Volunteer drill hall and storehouse—Part occasionally let for other purposes—Exemption from rates—Crown purposes.

Certain premises were used as a storehouse, drill hall, &c., for a volunteer battalion, the whole of the property being in the occupation of, and vested in, the commanding officer. Certain portions of the premises were occasionally let for lectures, balls, &c., but such letting was subservient to the use of the premises for military purposes.

The appellant was the caretaker, and did not reside on the premises, but the musical and dramatic licences were taken out in the name of the appellant. The appellant was rated in respect of such portions of the premises as were let out for the above-mentioned purposes.

Held, that, although the appellant was not the proper person to be rated, as he was only a servant, yet those portions of the premises which were let out were properly rateable.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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LEWIS (app.) v. DURHAM UNION (resps.).

[K.B. Div.]

CASE stated by the order of Bucknill, J. pursuant to 12 & 13 Vict. c. 45, s. 11, judgment in conformity with the decision of the court to be entered on motion by either party at the Durham Quarter Sessions.

The facts were as follows:—

The question to be raised concerns the rateability of certain premises situated in the parish of St. Giles, in the city of Durham, and being numbered 40, 41, and 42, in the street of Gilesgate, used as a storehouse, drill hall, sergeant instructors' residence, officers' and non-commissioned officers' quarters.

The whole of the property is in the occupation of the officer commanding the 4th Volunteer Battalion the Durham Light Infantry, the appellant being only a caretaker, whom the overseers of the poor for the parish entered as the occupier in the rate-book.

The appellant is a servant and is paid a weekly wage for attending to the premises, and does not reside on the premises.

The whole of the property is freehold and is vested in the commanding officer for the time being of the 4th Volunteer Battalion Durham Light Infantry, which consists of about 1000 officers and men. It is subject to a mortgage of 6000*l.*, granted to the Public Works Loan Board under the authority of the Secretary of State for War.

The buildings in question consist of two floors and a basement, with a large drill hall between the front and back portions thereof extending to the roof. The primary purpose of the premises is that of a drill hall and storehouse for rifles, clothing, and other arms and property, such as camp equipment, of the battalion.

The premises have been duly certified as a storehouse by the authorities under 26 & 27 Vict. c. 65, s. 26.

The owners have a music licence from the Durham city justices and a dramatic licence from the Durham county justices in respect of so much of the premises as are used for music or theatrical purposes, and these licences are in the name of the appellant.

Certain portions of the premises are occasionally let for lectures, trade exhibitions, concerts, balls, dramatic, and other performances, such letting is subservient, however, to the use of the premises for military purposes. The portions so let come into competition with other buildings in the city of Durham which are let in the same way. These buildings are rated according to their annual value.

The respondents have rated such portions of the premises as are let for the above purposes on a gross estimated rental of 60*l.* and a rateable value of 50*l.*, the portions of the premises used exclusively for volunteer or military purposes are not rated.

The appellant contended that the whole of the premises are exempt from rateability under sect. 26 of 26 & 27 Vict. c. 65, and that they are also exempt as being in the occupation of the Crown for the purposes of the Crown, that the premises were erected and are primarily used for the purposes of the Crown, and the letting being only a secondary or subsidiary use thereof when not required for the purposes of the Crown, and that the premises are not liable to be rated for any amount whatever. He also contended that

as the profits obtained from the letting of the hall are appropriated to the repayment of the 6000*l.* borrowed from the Public Works Loan Board, there is no beneficial occupation of the premises to render them liable to be rated; and, further, that the person so rated is not the occupier nor in any way beneficially interested in the premises.

The respondents, on the other hand, contended that to entitle the premises to be exempt from rateability under the section above referred to they must be occupied exclusively as a storehouse, or for some purpose reasonably incident thereto, and must also "be occupied" merely for public purposes, that such portions of the premises as are let are not so occupied, and that the exemption, therefore, does not extend to these portions. They further contended that when so let they are not used for the purposes of the Crown, that the appellant is the licensee of the premises and responsible for their proper management when used under the licences, and that he is therefore properly rateable in respect thereof; and that to the extent of the sums received for the letting there is a beneficial occupation which renders him liable to be rated irrespective of the purposes to which these sums are applied.

Ryde for the appellant.—These premises are occupied for Crown purposes, and so are exempt from the rate. The mere fact that some part of the premises are let for other purposes does not do away with the exemption. Liability to be rated depends upon occupation, and here the premises are occupied for Crown purposes. In *Hornsey Urban District Council v. Hennell* (86 L. T. Rep. 423; (1902) 2 K. B. 73) it was held that premises used as the headquarters of and for the purposes of a volunteer battalion were owned and occupied by the commanding officer as a servant of the Crown, and for the purposes of the Crown. He also referred to

Jones v. Mersey Docks and Harbour Board, 11 H. of L. Cas. 443;

Smith v. Birmingham Guardians, 7 El. & Bl. 483.

Any profit that is made from these premises being let goes to the Crown, and is applied to Crown purposes—that is, the expense of the battalion. The mere fact that money is made in this way does not do away with the exemption. *Rayner v. Drewitt* (82 L. T. Rep. 718) cannot be relied upon as an authority against the appellant here, for the point taken in this case could not have been taken there, for it was a summons to enforce the rate, and not an appeal against the rate. He also referred to

Coomber v. Berkshire Justices, 47 L. T. Rep. 687; 50 L. T. Rep. 405; 9 Q. B. Div. 17; 10 Q. B. Div. 267; 9 App. Cas. 61.

The appellant is not the proper person to be rated, as the occupation of the servant is the occupation of the master:

Ree v. Tynemouth, 12 East, 46.

Simey for the respondents.—The appellant here is rightly rated because so far as the premises are rateable as being let for these other purposes the licences for these other purposes are in his name. As to the other point, these premises are not exclusively used for Crown purposes, and *pro tanto* they are not occupied by the Crown or used for Crown

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purposes and so they are rateable. He referred to

Pearson v. Assessment Committee of Holborn Union, 68 L. T. Rep. 351; (1893) 1 Q. B. 389.

This case is covered by the decision in *Rayner v. Drewitt* (82 L. T. Rep. 718), and there is no distinction between that case and this one. Here there is an occupation in two capacities. In respect of the first the premises are not rateable and have not been rated. In respect of the second they are clearly not exempt, and it can make no difference that the proceeds of these lettings are used for the purpose of repaying the loan. He referred to

Reg. v. Fuller, 8 El. & Bl. 365;

Hornsey Urban District Council v. Hennell, 86 L. T. Rep. 423; (1902) 2 Q. B. 73;

Lancashire Justices v. Cheetham, 8 B. & S. 548; L. Rep. 3 Q. B. 14.

Ryde in reply.—The case of *Lancashire Justices v. Cheetham* (sup.) is the only one against me, and, since the case of *Coomber v. Berkshire Justices* (sup.), it is clear that Cockburn, C.J. misapprehended the effect of *Jones v. Mersey Docks and Harbour Board* (sup.).

LORD ALVERSTONE, C.J.—I think that Mr. Ryde has endeavoured to get us to adopt a test and reject a test inconsistent with the decided cases. I thought at one time during the argument that if you had occupation of premises for Crown purposes, and a utilisation of those premises for other than Crown purposes, such a user was not the same as an occupation and the exemption of the premises was not done away with. But, having gone through the cases, I have come to the conclusion that we have to distinguish between Crown property and property used for Crown purposes, and the view I have expressed was the right one, that the proper word is "used" and not "occupied." Now, the case of *Pearson v. Assessment Committee of Holborn Union* (68 L. T. Rep. 351; (1893) 1 Q. B. 389) decides that premises occupied by a volunteer corps, and being reasonably necessary for such service, are occupied by servants of the Crown for the purposes of the Crown and therefore are exempt from rates. I agree with Mr. Ryde that that case shows that the exemption is not limited to the specific portion of the premises that is used as a storehouse for the depositing and safe keeping of arms and ammunition, but includes all such parts of the premises as are reasonably necessary for the service of the corps, but, as Collins, J. points out, "they are exempt as being in the occupation of servants of the Crown for the purposes of the Crown." That case established that premises could be exempt if used for volunteer purposes. One must go back and consider whether mere occupation by the servants of the Crown is the sole test, and one must consider whether there must be something amounting to occupation for other purposes by other persons before the exemption is got rid of. Lord Blackburn in *Jones v. Mersey Docks and Harbour Board* (11 H. of L. Cas. 443), at p. 464, says: "Long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied

for such purposes by the servants of the great departments of State, such as the Post Office, *Smith v. Birmingham* (7 El. & Bl. 483); the Horse Guards, *Lord Amherst v. Lord Somers* (2 T. R. 372); or the Admiralty, *Reg. v. Stewart* (8 El. & Bl. 360), in all which cases the occupiers might strictly be called the servants of the Crown, but also to property occupied by local police, *Justices of Lancashire v. Shelford* (Ell. Bl. & Ell. 225); to courts and buildings occupied for the assizes and for the judges' lodgings, *Hodgson v. Local Board of Carlisle* (8 El. & Bl. 116); or occupied as a county court, *Reg. v. Manchester* (3 El. & Bl. 336); or for a jail, *Reg. v. Shepherd* (1 Q. B. 170). In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty, but the purposes are all public purposes of that kind, which, by the Constitution of this country, fall within the province of Government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered in *consimili casu*." The enunciation of that proposition affords ground for the rule that it must be an occupation for the purposes of the Crown, in order to give the exemption. But it is said that if you have that occupation you do not lose the exemption by a user of the premises for other purposes. Lord Cairns in *Greig v. University of Edinburgh* (L. Rep. 1 H. L. Sc. 348) says: "The general principle, as I understand it, approved of by your Lordships in these cases is this, that the Crown, not being named in the English and Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor." In that case Lord Cairns lays down the test that where the property is used by other persons, and not by the Crown itself, the use of such other persons must be exclusively in and for the service of the Crown. Then the case of *Lancashire Justices v. Cheetham* (L. Rep. 3 Q. B. 14), if not inconsistent with the other cases, is binding on us. It may not be a right decision, but it was there held that justices who by a local act were empowered to build assize courts and to let them for other purposes, were rateable in respect of the net profits so made by such letting as to that extent they had a beneficial occupation within the principle established by the case of *Jones v. Mersey Docks and Harbour Board* (sup.). It may be that that case is open to criticism, but it is an instance of a user by servants of the Crown of premises for purposes other than the Crown purposes for which they were built. Then the case of *Worcestershire County Council v. Worcester Union* (76 L. T. Rep. 139; (1897) 1 Q. B. 480) lays it down that county buildings which are used partly but not exclusively in and for the service of the Crown are rateable to the relief of the poor. It is impossible to say that in order to get rid of the exemption for rates the user for other purposes must amount to an occupation. I also think that *Rayner v. Drewitt* (82 L. T. Rep. 718) is an authority in favour of the view I am now taking. Applying these principles to these facts, I think that on the main point which has been argued before us the decision was right that

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this property was liable to be rated, for I cannot think that the mere fact that the money obtained by letting the hall was used to repay the loan from the Public Works Loan Board can make that use of the premises a use for Crown purposes. With regard to the other point, the appellant here was not the person rateable in respect of the premises. It is clear that the occupation of the servant is the occupation of the master, and nothing in the present case shows that there should be any exception to the rule. The mere fact that the licences for these premises have been granted to the appellant does not make him rightly rateable.

WILLS, J.—I am of the same opinion. Where the occupation of property is only constructively a Crown occupation, the exemption from rating only exists where the whole beneficial occupation enures for the benefit of the Crown. Where it enures for another purpose, then to that extent, *pro tanto*, the premises are rateable.

KENNEDY, J.—I am of the same opinion, and I think that this case is substantially decided by the decision in *Worcestershire County Council v. Worcester Union* (76 L. T. Rep. 139; (1897) 1 Q. B. 480).

Appeal allowed.

Solicitors: *Crossman, Pritchard, Crossman, and Block*, for W. H. Oliver, Durham; *George Reader and Co.*, for William Lisle, Durham.

Friday, Feb. 5.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

BAGG (app.) v. COLQUHOUN (resp.). (a)

Summary jurisdiction—Practice—Justices divided in opinion—Adjournment—Case reheard by further justices—Jurisdiction.

An information having been heard before two justices they retired to consider their decision.

Upon their return to court they announced that they were divided in opinion, and they decided to adjourn the hearing to a future day to be heard before themselves and other justices.

Held, that the intimation that they were divided in opinion did not preclude the justices from adjourning the hearing of the information.

CASE stated by five justices on an information preferred by the respondent against the appellant under the Licensing Acts 1872-4 for selling and exposing for sale intoxicating liquor during the time that the premises were directed to be closed.

The information first came on for hearing on Tuesday, the 18th Aug. 1903, before two of the before-mentioned five justices, and, after hearing the whole of the evidence in examination and cross-examination then adduced on behalf of the respondent and appellant respectively, the two justices retired to consider their decision, and upon their return they announced in open court that they were divided in opinion. Whereupon the solicitor appearing for the appellant asked that the information should be dismissed, but the two justices decided that a more satisfactory decision could only be arrived at upon rehearing with other of their fellow-justices, and they agreed

to adjourn the information to a future day, when they and other justices on the rota for that day would be convened to rehear the information.

In reply to the solicitor for the appellant, who asked whether they were unanimous in agreeing to the adjournment, they stated that they were.

The information again came on for hearing on Tuesday, the 15th Sept. 1903, when the two justices who had previously heard the information and failed to arrive at a satisfactory decision and three other justices who were on the rota for that day were present, and the information was heard and determined, and the appellant was convicted of the offence.

When the information was called on for hearing on the 15th Sept., counsel who appeared for the appellants objected to the jurisdiction of the justices then present to rehear the information, as it had been heard and determined by the two justices on the 18th Aug. last, and that, as the two justices could not agree, and as the information was a criminal information upon which the defendant and present appellant could have been fined on conviction and in default of distress could have been imprisoned, they could not or should not have adjourned the information, but should then have dismissed it, and he cited in support of this contention the following cases: *Reg. v. Ashplant* (52 J. P. 474) and *Kinnis v. Graves* (78 L. T. Rep. 502).

The solicitor who appeared for the appellant replied on the point of law, and contended that, although it was a criminal information, it was competent for the two justices who were divided in opinion to adjourn the hearing to a future date, when the information could be reheard by them and any other justices then present, and that no decision or determination was come to by the two justices when they agreed to adjourn the information, and in support of his contention he cited the following cases: *Reg. v. Ashplant* (52 J. P. 474) and *Ex parte Evans* (58 J. P. 260).

The five justices determined that they had power to rehear the information, and counsel who appeared for the appellant thereupon asked them to state a case and adjourn further proceedings *sine die* until such case was disposed of, but they refused to do so and determined to hear the evidence, whereupon counsel who appeared for the appellant, not consenting to the exercise of their jurisdiction, retired from the case, and the respondent called and examined one witness, who was not cross-examined by the appellant's counsel, and the justices convicted the appellant as before-mentioned.

After the appellant had been convicted, counsel for the appellant again applied to the justices to state a case, which they agreed to do.

The justices were of opinion that although the information was a criminal one, punishable after conviction by fine or imprisonment, they had a right to rehear the information; that the two justices who had previously heard it had not determined the matter of the information, but had agreed to adjourn the same for rehearing before themselves and others of their brother justices so that a more satisfactory determination could be arrived at; and that, as the evidence given on behalf of the respondent was not disputed, they decided that the appellant was guilty of the offence with which he was charged, and so they convicted him accordingly.

(a) Reported by W. DE E. HERBERT, Esq., Barrister-at-Law.

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S. T. Evans, K.C. (Ivor Bowen with him) for the appellant.—The powers of justices to adjourn are contained in sect. 16 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), which says that “before or during such hearing of any such information or complaint it shall be lawful” to adjourn the hearing of the same, and the same powers are conferred upon a court of summary jurisdiction, when not a petty sessional court, by sect. 20 (11) of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49). This adjournment was not “before or during such hearing,” but after the hearing. Where justices are divided equally, the summons ought to be dismissed. He referred to

Reg. v. Ashplant, 52 J. P. 474;

Ex parte Morgan Evans, 8 Times L. Rep. 641; on appeal, 70 L. T. Rep. 45; (1894) A. C. 16.

[KENNEDY, J. referred to *Jones v. Williams* (36 L. T. Rep. 559) and Lord ALVERSTONE, C.J. to *Kinnis v. Graves* (78 L. T. Rep. 502).]

Avory, K.C. (Lewis M. Richards with him) for the respondent.

Lord ALVERSTONE, C.J.—In this case no question of *mandamus* to rehear arises. I have no doubt that the words “before or during such hearing” include what in the ordinary proceedings of the court would take place before a final decision was given. It would be lamentable if, when justices announced that they were divided in opinion, that would be such a termination of the hearing that they could not deal any further with the case. An intimation that they were divided in opinion would not preclude them from adjourning the case any time before their decision was drawn up.

WILLS, J.—I adhere to the opinion that I expressed in *Kinnis v. Graves* (78 L. T. Rep. 503), where, the Bench being equally divided, the justices on the advice of their clerk, dismissed the information. I there said: “I cannot help saying, however, that in my opinion such a course was not quite wise. What would have been done, had the case been before the High Court, would have been to adjourn the summons and reconstitute the court so as to obtain a decision which would be the decision of a majority—an effective decision.” It is quite clear that the power of the justices to adjourn the matter was not taken away by the words “during such hearing.”

KENNEDY, J. agreed.

Appeal dismissed.

Solicitors: *Riddell and Co., for Viner, Leeder, and Morris, Swansea; Helder, Roberts, and Co., for Laurence Richards, Swansea.*

Friday, Feb. 5.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

HENNEN (app.) v. LONG (resp.). (a)

Food and drugs—Milk—Warranty—Addition of preservative by purchaser—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 6, 25.

A purchaser of milk with a written warranty, who has added a preservative to such milk, cannot rely upon sect. 25 of the Sale of Food and Drugs Act 1875, even although the addition of such

preservative is not complained of as an adulteration.

CASE stated on an information preferred by the appellant against the respondent under sect. 6 of the Sale of Food and Drugs Act 1875.

Upon the hearing of the information the following facts were admitted or proved in evidence before the justices:—

On the 10th June 1903 the appellant purchased one pint of new milk, for which he paid 2d., from the respondent.

The appellant then divided the milk in accordance with the Act, and one part he took to the public analyst, whose certificate showed that the sample was deficient in fat to the extent of 3 per cent., and contained added water to the amount of 5·2 per cent. at least, and that the sample contained boric acid as a preservative.

On the 9th July 1903 the appellant received from the respondent's solicitors a written notice that on the hearing of the information the respondent would rely on the defence that the respondent purchased the milk in question as the same in substance and quality as that demanded of him by the appellant, and with the written warranty—namely, that it was new milk unadulterated and with all its cream—to that effect, and that he had no reason to believe at the time he sold the milk that it was otherwise, and that he sold the milk in the same state as he purchased it. The notice also gave the name of the person from the respondent received the milk.

The respondent gave evidence, and he admitted that he had put into the milk in question an ounce of milk preservative to each ten gallons of milk. He stated that, although by the directions on the packet in which the milk preservative so used by him as aforesaid was contained it appeared that the preservative should be dissolved in water before being put into milk, he had not followed the directions, but had put the same into the milk in a dry condition without dissolving the same. The respondent stated that he had not discovered that the preservative left any sediment.

It was proved by the borough analyst on behalf of the appellant that dry boric acid would dissolve in milk but slowly, and would very likely leave a sediment, but that there was no sediment in the sample of milk in question and which he analysed.

The respondent contended that the agreement was a warranty, and was a complete defence under sect. 25 of the Sale of Food and Drugs Act 1875.

The appellant contended that sect. 25 of the Act of 1875, required the respondent, relying on the agreement as a warranty, to prove also that he had no reason to believe at the time he sold it that the milk was other than of the nature, substance, and quality demanded by the appellant, and that he sold it in the same state as when he purchased it; that by the respondent's own admission the milk in question was not in the same state as when he purchased it, by reason of his having added matter thereto as aforesaid; and that the warranty was therefore not an answer to the charge, and the respondent was not entitled to be discharged from the prosecution.

The justices, being equally divided as to whether the warranty constituted under the circumstances a defence entitling the respondent

(a) Reported by W. DE B. HERRERT, Esq., Barrister-at-Law.

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to be discharged from the prosecution, dismissed the information.

S. H. Emanuel for the appellant.

The respondent did not appear.

LORD ALVERSTONE, C.J.—This case must go back to the justices. It was said that the warranty was a defence, as only boric acid was added, and the milk was sold in the same state as when it was purchased, because the boric acid had nothing to do with the adulteration alleged. When, however, one looks at sect. 25 of the Sale of Food and Drugs Act 1875, it is not the written warranty only that affords a defence, but the defendant must show the other matters required by the section. When it was found that the respondent had put in boric acid, the case to be tried was not under sect. 25, but under the protective words of sect. 6. The milk here was not sold in the same state as the respondent purchased it, and the justices ought not to have held that the warranty was a defence.

WILLS, J.—I am of the same opinion, and I only desire to add a few words. Sect. 25 of the Act is plain that the article must be sold in the same state as when the defendant purchased it, and no question can be raised as to whether or not the substance or matter added did any harm or not. If the warranty is going to be relied on, the defendant must show that what was sold was exactly what was purchased.

KENNEDY, J.—I think the section is quite clear, and I do not see how there is any doubt about the matter. In order that a defendant may be discharged from the prosecution, he must prove that he purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor and with a written warranty to that effect; that he had no reason to believe at the time when he sold it that it was otherwise; and that he sold it in the same state as when he purchased it. If a man adds boric acid to milk after he has received it, how can he sell it in the same state as when he purchased it when he sells milk plus acid?

Appeal allowed.

Solicitors: *Prior, Church, and Adams*, for *R. R. Linthorne*, Southampton.

Friday, Feb. 5.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

LINZELL (app.) v. FELIXSTOWE AND WALTON URBAN DISTRICT COUNCIL (reps). (a)

Local government—By-law—Building—“Place of habitual employment for any person in any business”—Stables of building contractor.

By by-law No. 2 certain buildings which should not be constructed or adapted to be used “as a place of habitual employment for any person in any manufacture, trade, or business” were to be exempt from the by-laws relating to new buildings.

Held, that a building divided into three parts, consisting of a rain goods store, a timber store, and stables, used by a building contractor, was not a building used “as a place of habitual employ-

ment for any person in any manufacture, trade, or business” even although part consisted of the stables.

CASE stated on an information preferred on behalf of the respondents charging the appellant with having erected a new building contrary to by-law 10 of the by-laws in force of the urban district of the respondents.

By by-law 2:

The following buildings shall be exempt from the operation of the by-laws relating to new streets and buildings: . . . (i) Any building which shall not . . . be constructed or adapted to be used either wholly or partly for human habitation or as a place of habitual employment for any person in any manufacture, trade, or business. . . .

By-law 10 related to new buildings.

The appellant was a building contractor, and the building in question, which was erected in timber and roofed in wood, was divided by partitions which did not extend above the eaves of the roof. One end was used as a cement store and rain goods store, the middle portion was used as a timber store, and the other end was a stable. In this stable the horses, employed by the appellant in his trade, were kept.

The respondents contended that the building was constructed or adapted to be used as a place of habitual employment for any person in any manufacture, trade, or business, and that therefore it was not exempted.

The justices were of opinion that the building was not exempted under the by-law, and they therefore convicted the appellant.

Ashton for the appellant.

R. Cunningham Glen for the respondents.

LORD ALVERSTONE, C.J.—This case seems to be a striking instance of the absolute necessity of using some discretion and common sense in drafting these by-laws. I sympathise very much, if I may be allowed to say so, with Mr. Glen's contention. I think it is ridiculous that stables should be exempt from drainage regulations. It is most desirable that stables should be subjected to drainage regulations; but, in the name of all that is common sense, why cannot the by-laws say stables if they mean stables? When you look at the framing of this by-law, it does not tend to assist the builder or anybody else to know what they may do. By-law 10 begins by including every building. So far there is no difficulty. Then there are a long series of exemptions in by-law 2, and any building is exempted which shall not exceed 30ft. in height and does not contain more than 125,000 cubic feet. We then get a general exemption which exempts certain buildings. The buildings in question consist of one structure in timber, roofed in wood, and divided by partitions. One end is used as a cement store, the middle portion as a timber store, and the other end as a stable. It is stated by the respondents that no part of the building, except the stables, is adapted to be used for the habitual employment of a person in a manufacture, trade, or business. I think the magistrates have stated this case not as a finding on the facts, but they have stated the facts as regards the building, and ask whether they come within the words of the by-law. It seems to me the building is not within the words “a place for the habitual

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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employment of a person in a manufacture, trade, or business," because horses are groomed and kept by a horsekeeper, who is employed by the builder. I must say if the building is exempt under the portion of the by-law relating to 30ft., in order to bring it in again under some other words, they ought to be more reasonably clear than "as a place adapted to be used for the habitual employment of any person in a manufacture, trade, or business." It cannot be that because a man grooms a horse that that is a trade or business. While I agree that it is desirable that there should be by-laws which should include the drainage of stables, I think this by-law is not sufficient to make out that this building, which is not 30ft. high, comes within it. I think, therefore, the appeal must be allowed.

WILLS, J.—I agree.

KENNEDY, J.—I am of the same opinion.

Appeal allowed.

Solicitors: *Field, Roscoe, and Co., for Leighton and Aldous, Ipswich; Baker, Lees, and Co., for F. B. Jennings, Felixstowe.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Feb. 12.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re HANCOCK; *Ex parte* HILLEARY. (a)

APPEAL IN BANKRUPTCY.

Bankruptcy—Right to annul adjudication—Debtor presenting his own petition—Endeavour to avoid committal order—Abuse of process of court—Property vesting in trustee—Personal earnings of debtor—Weekly wages—Commission—Bankruptcy Act 1883 (45 & 47 Vict. c. 52), s. 41.

The weekly wages and commission earned by a bankrupt between the commencement of his bankruptcy and his discharge are personal earnings of the bankrupt and belong to his trustee, except so much as is necessary for the maintenance of the bankrupt and his family.

Re Roberts (81 L. T. Rep. 467; (1900) 1 Q. B. 122) followed.

A debtor, with the intention of evading a committal order made against him upon a judgment summons, presented his own bankruptcy petition, upon which a receiving order was made. His income was about 300l. a year from weekly wages and commission, and the judgment creditor was his only creditor, the debt amounting to about 200l., being the balance of a judgment obtained against him.

Held, that the presentation of the petition by the debtor was not an abuse of the process of the court.

APPEAL by certain creditors from the refusal of the registrar to rescind a receiving order founded on the bankrupt's petition.

The bankrupt was in employment as a salesman in a cabinet factory, and received a weekly salary

of 5l. and certain commission, his total income amounting to about 300l. a year.

In 1899 the creditors obtained judgment against the debtor for 214l. and costs, and they afterwards obtained an order against him for payment of that sum by instalments of 4l. a month.

On three occasions committal orders were obtained against the debtor in default of payment of amounts due in respect of the 4l. a month, and he then paid the amounts due.

On the 8th Aug. 1903 a further committal order was obtained in respect of an overdue instalment, and on the 14th Aug. he presented his petition under sect. 8 of the Bankruptcy Act 1883, alleging he was unable to pay his debts, and was afterwards adjudicated a bankrupt, and a receiving order was made.

The only creditors who proved were the judgment creditors, and for the balance of the judgment debt.

H. Reed, K.C. and Stephen Lynch for the appellants.—The presentation of this petition by the debtor was an abuse of the process of the court. It was done to avoid the effect of the committal order. Unless there was proof that he had means, the order would not have been made. The case of *Ex parte Painter; Re Painter* (71 L. T. Rep. 581; (1895) 1 Q. B. 85) is in favour of the debtor, but that case was distinguished in *Re Betts; Ex parte Official Receiver* (84 L. T. Rep. 427; (1901) 2 K. B. 39), which is a similar case to this, and there the receiving order was rescinded. The debtor ought not to be allowed to avoid the committal order made against him by filing a petition in bankruptcy. Here the debtor's weekly wages cannot be administered in the bankruptcy. [VAUGHAN WILLIAMS, L.J.—After payment of what is necessary for the support of the debtor and his family, the trustee will be entitled to the balance: (*Re Graydon*, 74 L. T. Rep. 175; (1896) 1 Q. B. 417).] The report of the trustee is that there are no assets. They also referred to

Bankruptcy Act 1883, ss. 7, 8, 9, 53.

Muir Mackenzie for the debtor.—This case is within *Ex parte Painter* (*ubi sup.*), and there has been no abuse of the process of the court. *Re Betts* (*ubi sup.*) was a very different case. There the court considered that the debtor had been committing a series of frauds on his creditors, he having twice before at short intervals presented a bankruptcy petition with the object of evading committal orders. This is a very different case. The debtor owes a debt of 200l., which he cannot pay, and it is no abuse of the process of the court to seek the protection of the Bankruptcy Acts and so avoid being sent to prison and perhaps losing his employment. The trustee will be entitled to retain for the creditors so much of the debtor's earnings as is not necessary for the maintenance of himself and his family:

Re Graydon, 74 L. T. Rep. 175; (1896) 1 Q. B. 417;

Re Roberts, 81 L. T. Rep. 467; (1900) 1 Q. B. 122;

Shoolbred v. Roberts, 83 L. T. Rep. 37; (1900) 2 Q. B. 497;

Re Shine, 66 L. T. Rep. 146; (1892) 1 Q. B. 522.

Reed, K.C. in reply.

VAUGHAN WILLIAMS, L.J.—I think the decision of the registrar was perfectly right, and that there

(a) Reported by W. C. Bess, Esq., Barrister-at-Law.

is no ground for saying that the making of the receiving order or the adjudication on the debtor's own petition was an abuse of the process of the court. In *Re Roberts* (*ubi sup.*) it was decided that under sect. 41 of the Bankruptcy Act 1883, which vests in the trustee all property belonging to the bankrupt at the commencement of the bankruptcy or acquired by him before discharge, all personal earnings of the bankrupt between the commencement of his bankruptcy and his discharge belong to his trustee, save only what is necessary for the support of the bankrupt and his family. Having regard to that decision, which was by no means the first decision to that effect, it is quite plain that these creditors can obtain payment of their debt out of the balance of the personal earnings of the bankrupt after payment of what is necessary for the support of himself and his family, and nothing brought about by this adjudication ought to prejudice the creditors in any degree. The very money which they seek to get from time to time by committal orders will come to them by reason of this adjudication. Under these circumstances it seems to me impossible to say that the presentation of this petition was an abuse of the process of the court. It is true the result of the receiving order will be that the debtor will not be liable from time to time to the pressure of a committal order, but I am not prepared to say the Legislature did not intend that a debtor who was being subjected to such pressure might relieve himself by obtaining an adjudication in bankruptcy against himself. But, as I have already pointed out, this is not a case in which the debtor could thereby achieve the result of relieving himself from payment of the debt due to his only creditors. On the contrary, that debt will or may be paid to these creditors by the statutory means which the Legislature intended to apply in a case such as this. I think, therefore, that it is impossible in the present case to say that the presentation of this petition was an abuse of the process of the court.

STIRLING and COZENS-HARDY, L.JJ. concurred.

Solicitor for the appellant, *R. J. Gooch*.

Solicitor for the respondent, *Thomas Charles*.

Wednesday, Feb. 17.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

ROBERTSON v. BUCHANAN. (a)

APPEAL FROM THE CHANCERY DIVISION.

Covenant—Sale of medical practice—Covenant not to set up in practice within certain distance—Residence beyond distance—Attending former patients within distance.

Where on the sale of a medical practice the vendor covenants not to "set up in practice" within the distance of two miles from the house at which he carried on the practice sold, he does not commit a breach of that covenant by attending at their request for remuneration two or three of his former patients within that distance, though it is not essential to the breach of such a covenant that the vendor should reside within the prohibited area; he may reside beyond the

distance and yet commit a breach of the covenant by acts done within it.

Decision of Joyce, J. affirmed.

By an indenture dated the 14th March 1901, and made between J. Buchanan of the one part and J. Robertson of the other part (after reciting a lease of No. 337, Brixton-road, and its assignment to J. Buchanan, and that J. Buchanan had agreed to sell and assign to J. Robertson the premises together with the practice of a physician and surgeon then or lately carried on by J. Buchanan upon the premises at the price of 750*l.*), J. Buchanan, in consideration of the said sum of 750*l.*, assigned to John Robertson the residue of the said lease of No. 337, Brixton-road, and also his practice as a physician and surgeon carried on by him at that address, and the goodwill, benefits, and advantages thereof; and Buchanan covenanted with Robertson

That he the said John Buchanan will not for a period of ten years computed from the 14th day of February last, except with the consent of the said John Robertson, set up in practice as a physician and surgeon either alone or jointly with any other person or persons whomsoever within the distance (as the crow flies) of two miles of No. 337, Brixton-road aforesaid.

At the beginning of 1903 J. Buchanan took up his residence at No. 259, Vauxhall Bridge-road, which, it was alleged, was only 554 yards outside the prescribed radius, and practised as a physician and surgeon, having plates with his name on them on the door and gate of the premises.

Robertson afterwards commenced this action against Buchanan, and alleged that the defendant had since been soliciting and attending some of his old patients within the prescribed radius, and claimed an injunction to restrain the defendant from setting up in practice as a physician or surgeon within two miles of No. 337, Brixton-road, in breach of the covenant contained in the indenture of the 14th March 1901, and an injunction to restrain the defendant from soliciting or canvassing the former patients of the defendant in his practice of physician and surgeon sold by him to the plaintiff.

The plaintiff then moved for an interim injunction.

In his affidavit in support of the motion the plaintiff relied on two cases in which he alleged the defendant had solicited two old patients.

The defendant in his affidavit denied that he had solicited any of his old patients. He deposed that he had attended one lady only at her express written request. As to the other case, he said the lady was a personal friend on whom he happened to call, and at her request he gave her a prescription and received no fee for doing so.

The defendant also deposed that at the time of the sale he refused to enter into a covenant restraining him from carrying on practice within a certain limit, but offered not to set up in practice within a radius of two miles if the plaintiff agreed that he might carry on practice by visiting patients if requested without restriction; and that he expressly pointed out to the plaintiff that under the proposed arrangement he would be entitled to attend the plaintiff's next-door neighbour if requested, though he could not have a house or surgery for practice within the radius.

This was denied by the plaintiff.

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

The motion came before Joyce, J. on the 17th Dec. 1903, when no order was made except that the costs be costs in the cause.

The plaintiff appealed, and the notice of appeal claimed an injunction to restrain the defendant from setting up in practice or practising as a physician or surgeon within the prohibited area.

It was agreed that the appeal should be treated as the trial of the action.

Hamilton, K.C. and G. Lawrence for the appellant.—The defendant, having covenanted not to "set up in practice" within this radius, is not entitled to take a house just outside it and attend patients within it. A covenant not to "set up" in practice is equivalent to a covenant not to start and carry on practice. A general practitioner may practise in more than one place; that is, he may have his residence at one place and also carry on practice at another place. This covenant can be broken by the defendant attending patients within the radius although he resides outside it:

Mitchell v. Hender, 23 L. J. 273, Q. B.

It is not essential to the practice of a surgeon or physician that he should have any house at all:

Palmer v. Mallett, 58 L. T. Rep. 64; 36 Ch. Div. 411;

Turner v. Evans, 2 De G. M. & G. 740; 2 Ell. & B. 512.

It is immaterial whether the words used are "set up" or "compete." The covenant means that the defendant, having sold his practice to the plaintiff, will not destroy the value of what he has sold. The purchaser is entitled to the practice he has paid for:

Rogers v. Drury, 57 L. J. 504, Ch.

Younger, K.C. and E. G. Palmer for the defendant.—All the plaintiff has purchased is the right of the defendant to set up in practice within the limited district, and to solicit his old patients. The sale of the goodwill prevents the solicitation; the covenant does not—it only refers to the undertaking of the defendant not to place himself within two miles of the old address. The proximity of a doctor to his patients is of importance. "Set up" does not mean the same as "carry on." In the cases referred to, the words were "carry on." The defendant has not set up in practice within two miles of the old address. In *Trego v. Hunt* (73 L. T. Rep. 514; (1896) A. C. 7) it was held that where the goodwill of a business is sold (without further provision), the vendor may set up a rival business though he may not canvass the customers of the old firm, and this covenant was to provide against that. They also referred to

Kemp v. Bird, 37 L. T. Rep. 53; 5 Ch. Div. 974;
Gophir Diamond Company v. Wood, 86 L. T. Rep. 801; (1902) 1 Ch. 950;

Key and Elphinstone's Precedents in Conveyancing, Agreement to serve as an Assistant to Medical Practitioners, sect. 7, 7th edit., p. 29;

Hamilton, K.C. in reply.

VAUGHAN WILLIAMS, L.J.—The parties, I understand, have agreed this appeal shall be treated as the trial of the action. I am not sure that I am very pleased that that is the case, because I have no doubt that, when the parties agreed that that should be so, they in-

tended to obtain, and thought that they would obtain, in our judgment on this appeal a construction of this agreement which would prevent all disputes in the future. I am rather afraid that, having regard to the evidence and the position taken up by the two parties, there may still be matters on which these two gentlemen may fall out if not guided by common sense and a friendly spirit. If these two gentlemen, in respect of the particular words of this covenant, intend to give on the one side and the other true effect to the bargain made between them, each side giving full measure, I do not think that they will find much difficulty; but if after our judgment they approach it in a litigious spirit, I think it may yet be open to them to throw away a good deal of money. What has happened here? There has been a sale of this business formerly carried on by the respondent at No. 337, Brixton-road. No doubt something was intended to be sold, and, having regard to the view which the law has taken of what passes on the sale of the goodwill of a business, purchasers have to protect themselves by express covenant. Otherwise they may find that as a matter of law what the one intended to sell and the other to buy does not actually pass. Our duty is to look at this covenant and see what it says. The business is the business which the respondent carried on as recited in the indenture. [His Lordship read the recital and assignment contained in the indenture, and continued:] There undoubtedly is a sale of the practice then carried on by the respondent at this particular house in the Brixton-road. I do not suppose that either party would suggest for a moment that it was not the intention on both sides that the respondent should sell, and the appellant should buy, the connection which the respondent had formed during the time that he had resided and carried on business as a general practitioner at No. 337, Brixton-road, and I assume that both parties intended to give effect to that sale. Then I turn to the covenant. [His Lordship read it, and continued:] What is the meaning of those words, not to "set up in practice"? I do not think that they mean the same thing as not to "practise" simply. I think if the words had been not to "practise" it would have been very difficult, if not impossible, for the respondent to justify attending a single patient for remuneration within the limits named. I think that the parties had this intent in their minds, and I am partly confirmed in that conclusion by the evidence. The defendant did not covenant not to "practise," but covenanted not to "set up in practice." In my judgment they are very different things, and a man may well commit a breach of a covenant not to practise by an act which would not constitute a breach of a covenant not to set up in practice; and I believe that distinction was present to the minds of the parties. Then, on the evidence before us, has there been a breach of this covenant? In my opinion there has been no breach. It is plain on the respondent's evidence that in the case of the two patients whom he did attend he went at their own invitation because he had been their medical adviser previously, and under these circumstances, though he did practise, he did not set up in practice within the prescribed limits. I invited counsel on behalf of the respondent to do something, which I still hope the respondent will be

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willing to do—viz., to give an assurance that it was not his intention to carry on a practice by any acts of his own within this district. I cannot doubt that if the respondent were to drive about daily in this district so as to fall in with those who are well acquainted with him the result may be that he would speedily get back the whole of his former patients by informing them of the fact that he was living only just over two miles from No. 337, Brixton-road. It seems to me that if he acted in this way or in a similar way, though falling short of actual solicitation, he would be guilty of a breach of this covenant even if he did not reside or keep a place of business within the district. It seems to me that that conclusion is entirely consistent with the natural grammatical meaning of these words. Counsel for the respondent, who argued for a more restricted meaning of the covenant, never succeeded in getting through with a translation of the covenant without using the word "set up" as a transitive verb with the house as its object. Here it is clear that the word is not transitive, but is used in the middle sense. It is the speaker himself who is setting himself up, and, in my judgment, he does it if he goes and habitually practises in the district, quite irrespectively of whether he has a house or not. Therefore, though I think that the respondent is entitled on the evidence before us to say that there is no case at present for an injunction, so far as I am concerned, it is only on the basis that his real intention is not to set up practice in this district, but only to attend an old patient here and there, from doing which he is not, in my opinion, debarred by his covenant.

STIRLING, L.J.—The plaintiff in this action, the purchaser of a medical practice, seeks for an injunction to restrain the defendant, the vendor, from committing a breach of a covenant contained in the conveyance. The covenant is this: [His Lordship read it, and continued.] I desire to confine myself to the facts in evidence, and what the defendant has done is to visit two or three old patients who invited him to attend them professionally without any solicitation on the part of the defendant. Does that in itself constitute a breach of this covenant? I think not. I think that a man who visits two or three old patients is not setting up in practice within the proscribed area. But a passage in the defendant's affidavit was referred to in which the defendant states his version of what took place when the covenant was under discussion, and, according to his affidavit, he pointed out that he would be entitled to attend the plaintiff's next-door neighbour, and it is said that that is a claim on the part of the defendant to attend every person who invites him to do so, and it is said that that is evidence that the defendant threatens and intends to visit in the way which is pointed out, and that therefore an injunction ought to be granted. I think not. I think we must look at this as a matter of common sense. I think I am at liberty to take this into consideration, that people who live two miles from a doctor do not send for him except under special circumstances. But I do not say that if the defendant received from a large number of persons resident within the area invitations to visit them professionally, he might not by responding to them commit a breach of this covenant. I think, therefore, that

it has not been established that the defendant has been guilty of a breach of this contract, or that he threatens or intends to do so, and the appeal must be dismissed.

COZENS-HARDY, L.J.—I agree.

Solicitors: *Baker, Blaker, and Hawes; Downer and Johnson.*

Friday, Feb. 26.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re OLDFIELD; OLDFIELD v. OLDFIELD. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Precatory trust—Absolute gift followed by expression of desire.

The decisions of the Court of Appeal in Re Diggles (59 L. T. Rep. 884; 39 Ch. Div. 253), Re Hamilton (72 L. T. Rep. 748; (1895) 2 Ch. 370), and Re Williams (76 L. T. Rep. 600); (1897) 2 Ch. 12) are not inconsistent with the rule laid down by Lord Alvanley in Malim v. Keighley (2 Ves. 333, 335) as to what creates a trust in the case of a gift, which was approved of by the House of Lords in Knight v. Boughton (11 Cl. & F. 513, 548).

Testatrix devised and bequeathed all her real and personal property equally amongst her two daughters as tenants in common for their own absolute use and benefit, and appointed them her executrices. She then continued: "My desire is that each of my said two daughters shall during the lifetime of my son pay to him one-third of the respective incomes of my said two daughters accruing from the moneys and investments under this my will."

Held, that the expression of the testatrix's desire was not sufficient to cut down the former absolute gift, and no trust was created in favour of the son.

Decision of Kekewich, J. affirmed.

MARY OLDFIELD, of Crawford, Burley-in-Wharfedale, in the county of York, widow, by her will provided as follows:

I hereby revoke all testamentary instruments heretofore made by me. I give, devise, and bequeath all my real and personal property over which I have any power of appointment or otherwise unto and equally amongst my two daughters Kate Oldfield and Sarah Florence Oldfield as tenants in common for their own absolute use and benefit, and I appoint my said two daughters Kate Oldfield and Sarah Florence Oldfield to be the executrices of this my will. My desire is that each of my said two daughters shall during the lifetime of my son pay to him one-third of the respective incomes of my said two daughters accruing from the moneys and investments under this my will.

The testatrix died in 1903, leaving personal estate only.

After her death a summons was taken out by J. R. Oldfield, the son mentioned in the will, to have it decided whether the will created an effectual trust in favour of the plaintiff during his life of one third share in the income of the estate of the testatrix.

The summons was heard by Kekewich, J., who held there was no trust in favour of the plaintiff, and he appealed.

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

Levett, K.C. and Gatey for the appellant.—On the words of this will there is a presumption of a trust, and the respondents must show no trust was created. The last clause of the will is sufficient by itself to create a trust. It comes within the rule stated by Lord Alvanley, M.R. in *Malim v. Keighley* (2 Ves. 333; affirmed on appeal, *Ib.* 529a), which was approved of by the House of Lords in *Knight v. Boughton* (11 Cl. & F. 513, 548). The old decisions were not followed by the Court of Appeal in *Re Hamilton* (72 L. T. Rep. 748; (1895) 2 Ch. 370), *Re Williams* (76 L. T. Rep. 600; (1897) 2 Ch. 12), and *Re Diggles* (59 L. T. Rep. 884; 39 Ch. Div. 253); and in *Re Hamilton* (*ubi sup.*) Lindley, L.J. purports to overrule *Malim v. Keighley* (*ubi sup.*), the case of *Knight v. Boughton* (*ubi sup.*) in the House of Lords, in which it is approved, not having been cited to him. They also referred to

White and Tudor's Leading Cases in Equity, 7th edit., vol. 2, p. 335;

Harding v. Glyn, 1 Atk. 469;

Foley v. Parry, 2 M. & K. 138;

Mason v. Limbury, cited Amb. p. 4;

Cruys v. Colman, 9 Ves. 319;

Liddard v. Liddard, 28 Beav. 266;

Knight v. Knight, 3 Beav. 148, 172.

[COZENS-HARDY, L.J. referred to *Hill v. Hill* (76 L. T. Rep. 103; (1897) 1 Q. B. 483).]

Ingen, K.C. and E. Ford for the respondents.—There is a complete will here, including the appointment of executrices, by which the property is given absolutely to the respondents. Then follows the expression of a desire that they will pay a part of their respective incomes, not out of the income from the testatrix's estate, to the appellant. Where there is an absolute gift it requires a very strong evidence of intention to create any trust:

Re Diggles (*ubi sup.*);

Re Williams (*ubi sup.*).

Levett, K.C. in reply.

VAUGHAN WILLIAMS, L.J.—In my opinion this appeal must be dismissed. I will say a word or two in the first place upon the case in the House of Lords of *Knight v. Boughton* (*ubi sup.*), to which our attention was called. It was argued by counsel for the appellant that, though it is quite true to say that the decision of the Court of Appeal in *Re Hamilton* (*ubi sup.*), and also in *Re Williams* (*ubi sup.*), and also in *Re Diggles* (*ubi sup.*), departed from the old decisions in which it was held that a catalogue of words in a will, one of which was "desire," without more, raised a trust unless there was something in the will expressly to negative that construction, yet the Court of Appeal in all those cases was mistaken; that it had not been called to their attention that the case of *Malim v. Keighley* (*ubi sup.*), in which Lord Alvanley, M.R. laid down the rule that "wherever any person gives property and points out the object, the property, and the way in which it shall go, that does create a trust unless he shows clearly that his desire expressed is to be controlled by the party and that he shall have an option to defeat it," was affirmed expressly by the House of Lords in *Knight v. Boughton* (*ubi sup.*). Now, I may point out that *Malim v. Keighley* was brought to the notice of Lindley, L.J. in *Re Hamilton* (*ubi sup.*), and that he purported to overrule it.

Counsel says he would not have done so if he had been aware that *Malim v. Keighley* had been affirmed by the House of Lords in *Knight v. Boughton* (*ubi sup.*). No doubt the House of Lords affirmed the passage I have just quoted from the judgment in *Malim v. Keighley*, and which is also quoted in *Re Hamilton* (*ubi sup.*), but it all depends on how you read the words of Lord Alvanley. If you read those words as meaning "the way in which the property shall go" (in the imperative), there is nothing, to my mind, in any of those cases to show that that would be contrary to what was affirmed by the House of Lords in *Knight v. Boughton* (*ubi sup.*). Having said that, I will now deal with the case before us. [His Lordship then read the first clause in the will, comprising the gift to the daughters absolutely, and continued:] Thus far we have very strong words to show the intention of the testatrix was that these two ladies should not only have the legal estate in everything she had to leave, but should have that legal estate for their own absolute use and benefit. That being so, if I found that any express trust had been intended to be created controlling the use of the property by these two daughters, I should have expected to find clear and very strong words to that effect. What are the words which are said to create a trust? They are these: "My desire is that each of my said two daughters shall during the lifetime of my son pay to him one-third of the respective incomes of my said two daughters accruing from the moneys and investments under this my will." Now, in the first place, I would point out that the income with regard to which the testatrix has expressed her "desire" does not extend to real property; and, in the next place, it does not extend to the estate of the testatrix—to that which she was leaving—but to the income which would come to the daughters respectively "from moneys and investments under this my will." Those "investments" cannot, in my opinion, mean the investments belonging to the testatrix up to the time of her death in the sense of money being property with regard to which a trust was to be raised before anything came to the daughters. This is a desire expressed with regard to the income of the share which each daughter was to take absolutely under the first clause of the will. Under these circumstances, one has to ask oneself this: Would anyone desiring to create a trust have created it by the use of such language as is used by this testatrix? Is it not more probable that, if she had intended to create such a trust, she would have left her property to the daughters, charging one-third of the income of the property with a trust in favour of the son, and then have given the residue of the income or of the property, subject to the life interest to the son, to the daughters? In my judgment there is nothing in this expression of desire sufficient to cut down the absolute gift for the use and benefit of the daughters which is comprised in the first part of the will. Accordingly, I am of opinion that the decision of the learned judge should be affirmed and the appeal dismissed.

STIRLING, L.J.—I am of the same opinion. With regard to the law, so far as it is necessary for the decision in this case, there does not seem to be much difficulty. It is sufficient to refer to the recent decision of the Court of Appeal in *Re*

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Williams (ubi sup.), and I do so because there was a difference of opinion among the learned judges in that case in the application of the law; but, looking at the judgments of Lindley and Rigby, L.J., although they differed in opinion upon the construction of the will before them, what they lay down as being the law is substantially the same. Lindley, L.J. says this (76 L. T. Rep. 602; (1897) 2 Ch. 18): "There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to show an intention to impose an obligation, and is definite enough to enable the court to ascertain what the precise obligation is and in whose favour it is to be performed. There is also abundant authority for saying that, if property is left to a person in confidence that he will dispose of it in a particular way as to which there is no ambiguity, such words are amply sufficient to impose an obligation." Then, after referring to the cases, he proceeds: "But still in each case the whole will must be looked at; and unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist; yet, moreover, in some of the older cases obligations were inferred from language which in modern times would be thought insufficient to justify such an inference." Then, when I turn to what Rigby, L.J. says, I find that he cites (76 L. T. Rep. 605; (1897) 2 Ch. 29) the passage which was quoted to us from the judgment of Lord Langdale in *Knight v. Knight* (3 Beav. 172) in which the general rule is stated to be that a trust is created, first, if the words are, on the whole, to be considered as imperative; secondly, if the subject of the recommendation or wish is certain; and, thirdly, if the objects or persons intended to have the benefit of the recommendation or wish are also certain; and an instance is given of the application of the rule. Upon that passage from Lord Langdale's judgment Rigby, L.J. comments thus: "In the instance so given by Lord Langdale it is to be assumed that there is nothing in the will to prevent the words of request from being imperative. Very slight indications throwing doubt upon this might be sufficient to lead to a contrary construction." Now, those two propositions, one stated by Lindley, L.J. and the other by Rigby, L.J., seem to coincide as regards the law applicable to the present case; and all we have to consider is whether the expression "I desire" is such as to impose an obligation on the defendants in this case. The testatrix commenced her will in these words: [His Lordship then read the first clause of the will, and continued:] Under those words the two daughters take as tenants in common and not, as trustees usually do, as joint tenants; they take for their own absolute use and benefit—that is, with full power to deal with the property as they may think fit. Then, after appointing them executrices, the testatrix goes on thus: [His Lordship then read the clause commencing "my desire," and continued:] Now, does that create a trust? If so, it is entirely inconsistent with the previous clause by which this property is given to the two ladies for their own absolute use and benefit. If a trust is created, what is it? It does not impose a joint obligation upon these two ladies, as would be the case if they were trustees, but each daughter is to pay the son out of her own income, so that, if

it were a trust, it would be a separate obligation upon each daughter to take her own income and pay out of it one-third to the son during his life. I cannot think that this is what was meant. Looking at the whole will, I am of opinion that it was only intended to express a wish; and that it was intended each daughter should have the use and enjoyment of her own income, and that the expression of the wish should not impose an obligation.

COZENS-HARDY, L.J.—I am of the same opinion, and for the same reasons.

Solicitors: Church, Rendell, and Co., agents for A. F. Seldon, Barnstaple; C. W. Dommett and Son, agents for F. R. Paull, Harrogate.

Tuesday, Feb. 9.

(Before VAUGHAN WILLIAMS, L.J., sitting in Lunacy.)

Re PURVIS (a Person of Unsound Mind). (a)

ORIGINAL APPLICATION.

Lunacy—Practice—Vesting order—Direction to transfer stock—Title of proceedings—Lunacy Act 1890 (53 Vict. c. 5), s. 116, sub-s. 1 (d), ss. 133, 333—Rules in Lunacy 1892, rr. 9, 57, 58, schedule, form 1.

An order in Lunacy containing a direction made under sect. 133 of the Lunacy Act 1890 should be intitled "In the matter of the Lunacy Acts 1890 and 1891," as well as in the matter of the particular lunacy. But this is not to apply to a case under sect. 116, sub-sect. 1 (d), where the title contains a reference to the statutes 53 Vict. c. 5 and 54 & 55 Vict. c. 65.

An order was made by a master in Lunacy directing (*inter alia*) that certain stock which was standing in the name of Peregrine Purvis, a person of unsound mind, in the books of the Bank of England, should be transferred into court.

The order was intitled "In the matter of Peregrine Purvis, a person of unsound mind"; but the title did not contain any reference to the Lunacy Acts.

The bank objected to acting on the order, upon the ground that they would not be protected under sect. 333 of the Lunacy Act 1890, unless the order contained a reference to the statute.

An application was accordingly made to compel the bank to act upon the order, which application came on to be heard before Williams, L.J., sitting in chambers as judge in Lunacy.

Buckmaster, K.C. and Walters for the applicants.

Latham, K.C. and Howard Wright for the respondents, the bank.

VAUGHAN WILLIAMS, L.J. (without deciding any question as to the rights of the parties) said that it would be expedient that in future an order in Lunacy, containing a direction made under the authority of sect. 133 of the Lunacy Act 1890, should be intitled in the matter of the Lunacy Acts 1890 and 1891, as well as in the matter of the particular lunacy; but that this was not to apply to a case under sect. 116, sub-sect. 1 (d), of a person who, through mental infirmity arising

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from disease or age, is incapable of managing his affairs, where the title contained a reference to 53 Vict. c. 5 and 54 & 55 Vict. c. 65.

Solicitors for the applicants, *Marchant, Benwell, and Marchant*.

Solicitors for the respondents, *Freshfields*.

Jan. 12, 13, and March 7.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

KEITH v. R. GANCIA AND CO. LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Landlord and tenant—Mortgage—Lease by mortgagor after mortgage—Foreclosure—Payment of rent to mortgagee—Licence to tenant to grant underlease—Sale by mortgagee subject to tenancy—Estoppel in pais.

A lessee mortgaged leaseholds by subdemise in 1881, and in 1892 granted an underlease to a third party. In 1894 the mortgagee foreclosed, and the underlessee paid rent to him. In 1899 the mortgagee died, and his executors granted to the underlessee licence to grant a sublease of part of the premises, which he accordingly did. In 1900 they sold the premises, the assignment being made subject to the underlease.

Held, that the mortgagee's executors having led to the belief that the reversion expectant upon the determination of the underlease was vested in them were estopped from averring the contrary; and that therefore the purchaser was not entitled to say that the underlease was not binding upon him.

Decision of Joyce, J. affirmed.

By a lease dated the 11th Dec. 1880 certain vaults situated under the Princess' Theatre, Oxford-street, and the offices belonging thereto, were (with other hereditaments) demised to Walter Gooch, as to part thereof for a term of sixty and a quarter years from the 6th April 1880, as to another part thereof for the term of sixty years from the 9th July 1880, and as to the residue thereof for the term of fifty-nine and a quarter years from the 6th April 1881, at the rent therein mentioned.

By a deed dated the 9th March 1881 Walter Gooch demised the premises comprised in the lease of the 11th Dec. 1880, to W. T. Neve for the residue of the several terms of years granted thereby, except the last three days of each term, by way of mortgage for securing payment of 20,000*l.*, with interest thereon.

The deed gave the mortgagee a power of sale, and it was provided that in the event of a sale the mortgagor would stand possessed of the last three days of the terms respectively in trust for the purchaser.

The premises comprised in the lease became before the 24th March 1892 vested in Harriet Gooch for the residue of the several terms of years, but subject to the mortgage to Neve.

By an underlease dated the 24th March 1892 Harriet Gooch purported to demise the vaults and offices (part of the premises comprised in the lease of the 11th Dec. 1880) to the defendant company (R. Gancia and Co. Limited), from the 25th March

1892, for twenty-one years at the yearly rent of 140*l.*

This deed provided that if the defendant company should be wound-up under the provisions of the Companies Acts the lessor might re-enter upon the demised premises, and thereupon the term thereby granted should absolutely determine.

The defendant company entered into possession of the premises thus demised to them.

On the 21st March 1895, in an action by Neve against Harriet Gooch in the Chancery Division, an order was made that she should thenceforth stand absolutely foreclosed from all right and equity of redemption of and in the premises comprised in the mortgage of the 9th March 1881.

From the date of that order until the death of Neve the defendant company paid to him the rent of 140*l.* reserved by the lease of the 24th March 1892.

Neve died on the 8th March 1899.

On the 9th Aug. 1900 Neve's executors assigned to the plaintiff, B. F. Keith, the premises comprised in the lease of the 11th Dec. 1880 for the residue then unexpired of the several terms of years thereby granted (except the last three days of each of the terms), and for all such estates and interests in the nominal reversions expectant on the determination of the same terms respectively as the executors had power to assign; and the assignment was expressed to be made subject (as to such parts of the premises as were subject thereto) to, but with the benefit of, the deed of the 24th March 1892.

Subsequently to the 9th Aug. 1900 the defendant company paid the rent of 140*l.* to the plaintiff.

On the 8th Oct. 1902 an order was made by the High Court for the winding-up of the defendant company under the Companies Acts.

On the 27th Nov. 1899 the defendant company had executed a sublease of part of the premises comprised in the underlease of the 24th March 1892 to the defendant Sinclair from the 25th Dec. 1899 for a term of thirteen years and three months less ten days then next ensuing at the rent of 240*l.*

This sublease was made in pursuance of a licence dated the 13th Oct. 1899, by which the executors of Neve, describing themselves as "the persons in whom the reversion expectant on the determination of the term granted by the lease of the 24th March 1892 is now vested," granted a licence to the defendant company to demise to the defendant Sinclair the vaults, &c., for the residue of the term of twenty-one years thereby granted, less the last ten days thereof.

The defendant Sinclair was in possession under this sublease.

The London and Westminster Bank were, as equitable mortgagees of the defendant company, in possession of the remainder of the premises comprised in the underlease of the 24th March 1892.

This action was brought by the plaintiff claiming possession of the vaults and premises comprised in the underlease of the 24th March 1892, on the ground that, by reason of the winding-up order, a right had accrued to him to re-enter on the vaults and premises and to determine the tenancy of the defendant company, and that he had served a notice upon them demanding possession accordingly.

The defendant Sinclair counter-claimed under the provisions of the Conveyancing Act and

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Law of Property Act 1881 relief from the forfeiture, and asked for an order that the vaults, &c., comprised in the sublease of the 27th Nov. 1899 should vest in him for the residue of the term thereby granted and upon the conditions thereof.

The other defendants also took out a summons asking for relief against the forfeiture; and on the 1st April 1903 this summons came on for hearing, with the trial of the action and counterclaim, before Joyce, J., when the following judgment was delivered:—

JOYCE, J.—The first, and practically, I think, the only question that really arises in this case, is as to the effect of what took place between the parties in Oct. and Nov. 1899. Now at that time Neve had foreclosed, and he was dead, and the claim under the foreclosure was vested in his executors, Neve and Buttanshaw. They were receiving from R. Gancia and Co. Limited the same rent as was reserved by the document which has been called the "underlease." Suppose at that time that the executors of Neve and R. Gancia and Co. Limited and Sinclair had entered into a tripartite agreement which recited that the executors of Neve were the reversioners of the underlease to R. Gancia and Co. Limited; that they had been asked to conceal under the terms of that underlease to the granting of the sublease by R. Gancia and Co. Limited; and that R. Gancia and Co. Limited had thereby agreed expressly, with such consent, to grant the sublease to Sinclair. If such a document as that had been made and executed by the three parties, to my mind it is absolutely clear that the executors of Neve could not, after that, have turned round and asserted their paramount title as mortgagees or as representing mortgagees, and have asserted or objected that R. Gancia and Co. Limited had no underlease at all. Nor could they have asserted that either as against R. Gancia and Co. Limited or as against Sinclair, who took under the sublease. Now, upon carefully considering what really did happen, and looking at the correspondence and documents, I am of opinion that what happened is really equivalent to such an agreement in fact. And I hold that the executors of Neve, whose testator had foreclosed, were, as reversioners of the underlease to R. Gancia and Co. Limited, in truth and substance parties to the sublease to Sinclair, and fully concurred in it. Now what took place next was the sale and assignment to Keith in Aug. 1900. Upon that sale it appears perfectly clear to me that all the parties had full knowledge—not merely notice but full knowledge—of everything that occurred, and knew exactly how matters stood. When it was completed the counterpart of the underlease appears to have been handed over to the purchaser, Keith. In my opinion the true construction of that assignment, when you come to examine it, is not, as in the case referred to before Cotton, L.J., that the lease, or, rather, that the underlease was actually excepted from the covenant against incumbrances. There was no express covenant, I think, in this case. Probably it was implied. But, in my opinion, it really amounts to an agreement between the vendors and the executors of Neve, who, in my opinion, had undertaken or incurred a responsibility both to R. Gancia and Co. Limited and to Sinclair. It amounted to an agreement

between them and the purchaser Keith that that sublease and the underlease should continue to subsist. At all events, if I am wrong in this, it is clear to my mind that Keith, the purchaser at that sale, was not and could not be, as against R. Gancia and Co. Limited or Sinclair, in a better position than the executors of Neve themselves were. The result of all this is to my mind that the present plaintiff cannot successfully contend that as against him the sublease is not subsisting, nor can he contend that as against him the underlease is not subsisting, and that that was the view which Keith, the purchaser, and his advisers took of the matter is plain from their notice to inspect the dilapidations, and from their notice which purported to forfeit the underlease. That really disposes of the action. Perhaps I may say one word with reference to the general law as to leases granted by a mortgagor after the mortgage. I think the result of the cases is that although the mere payment and receipt of rent as between the lessee and the mortgagee may convert the lessee into a tenant from year to year, it does not to my mind follow from that alone that the lessee holds upon the terms of the lease so far as they are applicable to a tenancy from year to year. I think, as stated in *Smith's Leading Cases*, and in other text-books, in every case it is a matter of evidence or inference (which is the same thing) from what is done. When a new tenancy is thus created I agree that the terms of such new tenancy must be proved by evidence; and the mere fact that the tenant is paying rent to the mortgagee after notice is no evidence that the tenancy is to be on the same terms as those on which the tenant held under the mortgagor. To my mind that is made out distinctly by the judgments of *Wills and Blackburn, J.J.*, in the case of *Oakley v. Monck* (14 L. T. Rep. 20; L. Rep. 1 Ex. 159). The plaintiff says the result was that there was an agreement, or I think he says that even without an agreement R. Gancia and Co. Limited held upon the terms of the lease as tenant from year to year. Upon those terms, so far as applicable to a tenancy from year to year, I am unable to see anything from which I can infer any such agreement. But I do see my way to infer an agreement, and I think that there was in effect an agreement, that the underlease should continue to subsist and the sublease should continue to subsist. Therefore it appears to me, as I have already said, that the action fails. The order as drawn up declared that the underlease of the 24th March 1892, was binding on the plaintiff, and ordered that the defendants be relieved against the forfeiture of that underlease occasioned by the winding-up of R. Gancia and Co. Limited.

From that decision the plaintiff now appealed.

Levett, K.C. and *E. R. Simpson* for the appellant.—The mortgage to Neve having been executed on the 9th March 1881 before the date of the coming into operation of sect. 18 of the Conveyancing and Law of Property Act 1881—whereby a mortgagor in possession is authorised, as against every incumbrancer, to make from time to time any such lease of the mortgaged property as is described in that section—the underlease of the 24th March 1892, which was granted to R. Gancia and Co.

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Limited by the representative of the mortgagor without the consent of the mortgagee, was invalid and not binding upon the mortgagee. The effect of the payment of rent by R. Gancia and Co. Limited to the mortgagee and his acceptance thereof was only to create a tenancy from year to year upon the terms of the underlease and so far as they were consistent with a yearly tenancy:

Dougal v. McCarthy, 58 L. T. Rep. 699; (1893) 1 Q. B. 736;

Doe d. Hughes v. Bucknill, 12 C. & P. 566.

It is a matter of evidence, and the court has to decide upon the evidence, whether there was an intention that the yearly tenancy should continue upon the terms of the former demise. [ROMER, L.J.—There are some observations of Tindal, C.J. in *Brown v. Storey* (1 Man. & Gr. 117, at p. 126) that may assist you, as they appear to be distinctly in your favour.] The plaintiff was therefore enabled to determine the tenancy upon the making of the winding-up order against R. Gancia and Co. Limited. The licence to sublet given to R. Gancia and Co. Limited could not operate as a new lease or an agreement by the mortgagee to grant a lease to R. Gancia and Co. Limited, for both a lease and an agreement to grant a lease must be in writing:

Statute of Frauds, s. 1:

Real Property Act 1845, s. 7:

Shelford's Real Property Statutes, 9th edit, p. 515.

The plaintiff has the legal estate. There being some estate in the defendant Sinclair, the court cannot enlarge that estate by means of estoppel. The doctrine of estoppel by consent does not apply to such a case as the present. The defendant Sinclair had the same means of knowledge as the plaintiff had, and there was not sufficient to create estoppel by conduct. It was never intended that a lease should be allowed to be created by mere estoppel:

Burton's Compendium, p. 850;

Co. Litt., p. 45b;

Pickard v. Sears, 6 Adol. & Ell. 469;

Willmott v. Barker, 43 L. T. Rep. 95, 15 Ch. Div. 96, at p. 105.

Hughes, K.C. and *F. L. Wright* for the respondents, the defendant company and the bank.—We submit that the doctrine of estoppel applies to the present case; and that the executors of the mortgagee by their conduct, and in particular by the terms of the licence to subdemise given by them to R. Gancia and Co. Limited, are estopped from denying the validity of the underlease to R. Gancia and Co. Limited. We rely mainly upon the licence, for we submit that that constitutes an estoppel *in pais*. The authorities which support the proposition that we are now presenting to the court are

Heath v. Pugh, 44 L. T. Rep. 327; 6 Q. B. Div. 345; on appeal, 46 L. T. Rep. 321; 7 App. Cas. 235;

Cairncross v. Lorimer, 3 Macq. 857;

Freeman v. Cooke, 2 Ex. 654;

Pickard v. Sears (ubi sup.).

[VAUGHAN WILLIAMS, L.J.—Is not an estoppel *in pais* limited to the extent upon which it has been acted?] The cases which we have cited show that it is not so limited. A person is estopped from denying representation when that representation has been acted upon. Moreover, by virtue of the order for foreclosure absolute, the mortgagee became bound by the estoppel which

bound the mortgagor. That, we say, has the effect of the foreclosure decree. Where a lease has been granted by a mortgagor there is no difficulty in the mortgagee affirming the lease, with the concurrence of the lessee:

Corbett v. Plowden, 50 L. T. Rep. 740; 25 Ch. Div. 678.

We submit, therefore, that the executors of the mortgagee were able, if they chose, to affirm the underlease granted by the mortgagor's representative to R. Gancia and Co. Limited, and that they have in fact done so in the present case. [VAUGHAN WILLIAMS, L.J. referred to Woodfall's Law of Landlord and Tenant, 11th edit., 1877, p. 204; 13th edit., 1886, p. 233.] These defendants did not set up a new lease or an agreement to grant a new lease. There was only a ratification by the mortgagee of an act done on his behalf by his agent, the mortgagor's representative. They referred also to

Turn v. Turner, 59 L. T. Rep. 742; 39 Ch. Div. 456.

Younger, K.C. (with him *Edward Ford*) for the respondent Sinclair.—The absence of any direct authority upon the present point is strongly in favour of the view that there is no distinction between a lease granted by a mortgagor by way of subdemise and a lease granted by way of assignment. It merely operates by way of estoppel. It is a lease by estoppel. [VAUGHAN WILLIAMS, L.J. referred to Fox on Landlord and Tenant, 3rd edit., ch. 6, citing *Cuthbertson v. Irving*, 4 H. & N. 742.]

Levett, K.C., in reply, referred to

Ashburner's Law of Mortgage, p. 241.

[ROMER, L.J.—If a person conveys simply there is no estoppel. But if he recites that he is seised in fee and purports to convey in fee, he is estopped from denying that he is not so seised.]

Cur. adv. vult.

March 7.—The following written judgments were delivered:—

VAUGHAN WILLIAMS, L.J.—[His Lordship stated the facts of the case substantially as above set forth, and continued:] Now Joyce, J., in dealing with the action, puts it in this way. He says, suppose that in Nov. 1899 (that is to say, before the assignment to the plaintiff) the executors of Neve and R. Gancia and Co. Limited and Sinclair had entered into a tripartite agreement which recited that the executors of Neve were the reversioners of the underlease to R. Gancia and Co. Limited, and that they had been asked to consent under the terms of that underlease to the granting of the sublease by R. Gancia and Co. Limited, and R. Gancia and Co. Limited had thereby agreed expressly to grant the sublease to Sinclair. He goes on to say that if such document as that had been made and executed by the three parties, to his mind it is absolutely clear that the executors of Neve could not after that have turned round and asserted their paramount title as mortgagees, or as representing mortgagees, and have asserted or objected that R. Gancia and Co. Limited had no underlease at all. Nor could they, he adds, have asserted that either as against R. Gancia and Co. Limited or as against Sinclair. The learned judge, having said this, goes on to say that in his opinion what happened is really equiva-

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lent to such an agreement in fact, and he held that the executors of Neve, whose testator had foreclosed, were, as reversioners of that underlease, in truth and in substance parties to the sublease to Sinclair and fully concurred in it. I am not quite sure what this means. In the first place, I assume that in the supposed tripartite agreement the learned judge means that R. Gancia and Co. Limited had agreed to grant a sublease, and that the executors had agreed that R. Gancia and Co. Limited should do so, and that he does not mean by the supposed agreement that the executors agreed themselves to grant a lease to Sinclair. If I am right, the supposed agreement would have been carried out, so far as the grant of the lease by R. Gancia and Co. Limited to Sinclair is concerned; and the only agreement which it could have been said that the executors had broken would have been an implied agreement that they would not, in contravention of the recitals, deny that they were reversioners of the underlease to R. Gancia and Co. Limited, and invalidate the consent which they purported to give, as reversioners of the underlease to R. Gancia and Co. Limited, to their sublease by the assertion of a paramount title inconsistent with the subsistence of the sublease. But this view of the tripartite agreement, even if it can be supported, is hardly consistent with the result indicated by Joyce, J. as following on the assumption that what happened was equivalent to such an agreement in fact, because he says: "I hold that the executors of Neve, whose testator had foreclosed, were, as reversioners of the underlease to R. Gancia and Co. Limited, in truth and in substance parties to the sublease to Sinclair, and fully concurred in it." Such a result would not follow as the consequence of a breach of an implied covenant not to invalidate the sublease to be granted by R. Gancia and Co. Limited to Sinclair. Such an implied covenant would not make the executors parties to the sublease or make them concur in it, in the ordinary sense of that word. I am not quite sure that the learned judge, in the passages which I have quoted, has not somewhat confused the agreement which he suggests with the estoppels arising on it, which I will consider presently. But it is sufficient to say at present that no estoppel preventing the executors from denying that they were the reversioners of the underlease to R. Gancia and Co. Limited could operate as a grant by them of a lease to Sinclair on the terms of the sublease granted by R. Gancia and Co. Limited to Sinclair. There is the difficulty also that the sublease, whoever grants it, requires by the Real Property Act 1845, and that any agreement relating to land has, by the Statute of Frauds, to be in writing; and it is not easy to extract from the documents any implied agreement which would support the learned judge's view. Moreover, I am not satisfied that any agreement can be suggested, as having been entered into without writing, which could be supported by part performance and which would afford a defence in this action. I propose now to deal with the question whether estoppel will enable the defendants to successfully defend this action. If the conduct of the plaintiff enables the defendant to do so, I do not trouble myself about the exact form of the pleadings. It is plain that all parties came into court prepared to try the question of what is the

effect of the plaintiff's assuming the character of reversioner and inducing the defendants to alter their position. That being so, all necessary amendments must be treated as made. That there is an estoppel preventing Neve's executors, Keith's predecessors in title, and therefore Keith, from averring as against R. Gancia and Co. Limited, or Sinclair that he really was not such reversioner I do not doubt, for it seems to me plain that the executors, by their words and conduct, wilfully caused both R. Gancia and Co. Limited and Sinclair to believe in the existence of a state of things, and induced them to act on that belief, so as to alter their own previous position; and it seems to me that Keith, who claims through the executors, is concluded from averring against either R. Gancia and Co. Limited or Sinclair a different state of things as existing at the same time. Now it is true that, where one has an estoppel *in pais* of this sort, the estoppel cannot go further than to prevent the party estopped from putting the party who has acted on his representation in a worse position than he would have been if that representation had been true. Then what would have been the position of Sinclair if Neve's executors had really had vested in them the reversion expectant upon the determination of Mrs. Gooch's lease to R. Gancia and Co. Limited. (And observe this is quite a possible state of things, because there is no reason why they, being the assignees by way of subdemise of Mrs. Gooch's lease of the 11th Dec. 1880 from Bailey, should not have taken an assignment from her of the reversion expectant upon the determination of the underlease granted by her to R. Gancia and Co. Limited.) I take it that Neve's executors, as the assignees of Mrs. Gooch, would no more have been entitled, as between R. Gancia and Co. Limited and themselves, to deny Mrs. Gooch's title than Mrs. Gooch herself would have been. The result of this is that the plaintiff's action fails. He is not entitled to recover possession of the premises, because he is estopped from denying that he is reversioner in respect of the lease granted by Mrs. Gooch to R. Gancia and Co. Limited, and not the less so because at the time he represented himself as such he was as mortgagee entitled to say that the lease by Mrs. Gooch to R. Gancia and Co. Limited, did not bind him. I think that this estoppel against the plaintiff arises equally as between himself and Sinclair and as between himself and R. Gancia and Co. Limited. Both Sinclair and R. Gancia and Co. Limited altered their positions by reason of the assertion by Neve's executors that the reversion attendant upon the determination of the underlease to R. Gancia and Co. Limited was vested in them. By reason of this assertion R. Gancia and Co. Limited granted and Sinclair accepted the sublease. This did not make either R. Gancia and Co. Limited or Sinclair the tenant of Neve's executors. The estoppel simply prevents Neve's executors, or their successor, the plaintiff, from denying that Mrs. Gooch's reversion was vested in them as alleged by them, or from setting up an overriding title inconsistent with the licence by them as reversioners authorising the sublease to Sinclair. Moreover, the conduct both of Neve's executors and of the plaintiff since the granting of the sublease of 1899 is only consistent with a

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continued assertion by them respectively of their position as reversioners and the validity of the sublease. I refer to the assignment to Keith being expressly subject to the sublease of 1892, and to the plaintiff's notice to R. Gancia and Co. Limited to repair. I do not think that it makes the slightest difference that, on the admitted facts, and in particular the payment of the rent reserved under the underlease of 1892 to Neve's executors and to Keith, a tenancy from year to year under Neve's executors or Keith would ordinarily be inferred. This would be only part of the truth which the plaintiff would be estopped from denying. There is no evidence whatever that R. Gancia and Co. Limited was aware of the true position of affairs. For the reasons which I have given I think that the judgment of Joyce, J. ought to be supported, and this appeal dismissed with costs. I should wish to add that I entirely agree with the judgment so far as it relates to the relief against forfeiture. And with regard to the counter-claim by Sinclair for a vesting order, which Joyce, J. had ordered to stand over, I see at present no reason why such order should not be made under sect. 4 of the Act of 1892.

ROMER and STIRLING, L.JJ. concurred.

Appeal dismissed.

Solicitors for the appellant, *Batten, Proffitt, and Scott.*

Solicitors for the respondents, *Charles Mylne Barker; Routh, Stacey, and Castle.*

Wednesday, March 9.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re LECONFIELD; WYNDHAM v. LECONFIELD. (a)

APPEAL FROM THE CHANCERY DIVISION.

Revenue—Estate duty—Succession duty—Will charging residue with duties payable on testator's death on property of which he was tenant for life—Succession duty on proceeds of sale of timber cut by succeeding tenant for life—Heirlooms of national interest—Finance Act 1896 (59 & 60 Vict. c. 28), s. 20—Succession Duty Act 1853 (16 & 17 Vict. c. 51), s. 23.

By his will, dated in 1900, a testator, who died in 1901, directed the trustees to pay out of the residuary proceeds of his estate (1) so much of the estate duty and other death duties which under the Finance Act 1894, or any amending statute, should become payable upon or by reason of his death in respect of all the estates and property of which he should immediately before his death be tenant for life under a certain will or resettlement as the capital moneys and investments subject thereto should be insufficient to pay; and (2) all such succession duty as should become payable upon his death in respect of the same estates and property.

Held, that, as to the duty in respect of the sale of certain timber, the provision of the will was applicable to duty payable in respect of a succession on the death of the testator, which duty was payable out of his residuary estate.

Held, also, that, as to certain heirlooms of national interest, the duty did not become payable upon

the death of the testator, and would not until the happening of the event mentioned in sect. 20 of the Finance Act 1896.

Decision of Joyce, J. (89 L. T. Rep. 434) reversed.

By his will, dated the 10th Sept. 1834, George O'Brien, last Earl of Egremont, devised freehold and copyhold estates of great extent and value in the counties of Cumberland, York, Sussex, and Southampton, to the use of George, afterwards created Baron Leconfield, during his life, with remainder to the use of the son of the latter, Henry, afterwards second Baron Leconfield, during his life, with remainder to the first and other sons of the second baron successively in tail male; and he bequeathed certain leaseholds on trust that the rents and profits should be received by the persons entitled to receive the rents and profits of the estates.

The testator also bequeathed certain chattels of great value, known as the Petworth House heirlooms, upon trust that they should devolve as heirlooms with the estates.

The testator died on the 14th Nov. 1837.

George, first Baron Leconfield, died on the 18th March 1869.

The Hon. George O'Brien Wyndham, eldest son of Henry, second Baron Leconfield, and first tenant in tail under the will, died in the lifetime of his father on the 13th Jan. 1895, a bachelor and intestate, having attained the age of twenty-one years, but not having barred his estate tail.

His father, Henry Baron Leconfield, took out letters of administration to his estate on the 23rd March 1895, and thus became absolutely entitled to the heirlooms.

On the 6th Dec. 1897 Henry Baron Leconfield and his eldest surviving son, the Hon. Charles Henry Wyndham, executed a disentailing assurance of the settled estates, and on the 7th Dec. they executed a resettlement of them, under which (subject to a power of appointing uses and to the payment of a rentcharge to the Hon. C. H. Wyndham) they were limited to the use of Henry Baron Leconfield for life in restoration of his life estate under Lord Egremont's will, with remainder to the use of the Hon. C. H. Wyndham for life without impeachment of waste, with remainder to his first and other sons in tail, with divers remainders over.

The moneys and investments subject to the settlement had been disentailed by another assurance of the 6th Dec. 1887, and by the resettlement were settled on the trusts of capital moneys arising under the Settled Land Acts to be applied primarily in the purchase of lands to be settled.

Certain of the heirlooms were also included in the resettlement, and were settled to devolve as heirlooms with the settled estates, and the remainder of the heirlooms were settled in the same way by another settlement dated the 15th June 1898, with a proviso in both cases that they should not vest absolutely in any tenant in tail unless he should attain the age of twenty-one years.

By his will, dated the 19th April 1900, Henry Baron Leconfield gave certain settled legacies, and declared his intention and will to be that all settlement estate duty payable on his death under or by virtue of the Finance Act 1894, or any Act of Parliament amending, extending, or modifying

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

it, by reason of the settlement thereinbefore made of such settled legacies, as well as all other estate duty payable on his death under or by virtue of any such Act in respect of his estate, should be borne by his general estate in exoneration of any legatee or beneficiary under any of the preceding gifts or dispositions.

The testator devised and bequeathed all his residuary real and personal estate to the general trustees of his will on trust for sale and conversion, and he directed them to pay out of the moneys arising therefrom and the moneys of which he should be possessed at his decease his funeral and testamentary expenses and debts, and to pay and provide for legacies to a daughter and younger sons, and to stand possessed of the residue of the same moneys (thereinafter referred to as "the said residuary proceeds") upon the trusts and for the purposes thereafter declared and expressed concerning the same.

The will (after certain provisions as to the appropriation of funds to meet the legacies) then proceeded as follows:

And I declare that my general trustees or trustee shall stand possessed of the said residuary proceeds upon trust with all convenient speed after my death to apply the same, or an adequate part thereof, in payment and satisfaction of (firstly) so much of the estate duty and other death duties (if any) including any interest which, under or by virtue of the Finance Act 1894, or any statute amending, extending, or modifying the same, shall become payable upon or by reason of my death in respect of all the estates and property (including as well real estate as leaseholds, moneys, funds, stocks, shares, and securities) of which I shall immediately before my death be seized or entitled as tenant for life under or by virtue of or by reference to the will of the late Right Hon. George O'Brien, Earl of Egremont, or the said resettlement [meaning thereby the resettlement of the 7th Dec. 1897] as the capital moneys, stocks, funds, shares, and securities (if any) which at my death may be subject to such will or resettlement, and as such might, under sect. 9, sub-sect. 7, of the Finance Act 1894, or any such other statute as aforesaid, be expended in paying such estate duty or other death duties shall be insufficient to pay; and (secondly) all such succession duty as shall become payable upon my death in respect of the same estates and property.

The ultimate surplus of the residuary proceeds the testator gave in trust for such of his younger sons as attained the age of twenty-one years in equal shares.

The testator died on the 6th Jan. 1901, leaving him surviving his son the Hon. Charles Henry Wyndham, who succeeded as third Baron Leconfield and tenant for life in possession of the settled estates and property, and four younger sons, of whom two had attained the age of twenty-one years.

His will was proved on the 16th April 1901.

The amount of his residuary estate was very large, and the capital moneys, stocks, funds, shares, and securities subject to the resettlement being insufficient to pay the estate duty on the estates and property of which the testator was immediately before his death tenant for life, a large sum had been applied out of the residuary proceeds in payment of estate duty and succession duty, and a large surplus of the residuary proceeds remained after making these payments.

Questions arose, however, in the administration of the estate with regard to the estate duty on the heirlooms, having regard to sect. 20, sub-sect. 1, of the Finance Act 1896 (59 & 60 Vict. c. 28).

Application was made to the Treasury with regard to the heirlooms, and the greater part of them, amounting to the value of 149,600L, were exempted from duty under the provisions of the sub-section, until they should be sold or should be in the possession of some person competent to dispose of them.

Doubts were entertained whether the general trustees of Henry Baron Leconfield's will were bound to provide out of the residuary proceeds of his estate, for the payment of the estate duty on the exempted heirlooms, if it should become payable; and a further question arose with regard to succession duty.

It appeared that the timber on the settled estate was of great value; a considerable quantity was ripe for cutting at the death of Henry Baron Leconfield, and more had matured since, and the present tenant for life, Charles Henry Baron Leconfield, not being impeachable for waste, had cut, and intended from time to time to cut, portions of the timber.

Under the provisions of sect. 23 of the Succession Duty Act 1853 (16 & 17 Vict. c. 51), he, as present tenant for life, was chargeable with succession duty as successor, upon his interest in the net proceeds of sale of the timber, and as he was a stranger in blood to Lord Egremont, from whom his interest was derived, the duty was leviable at the rate of 10 per cent. under sect. 10.

This duty also he claimed that the residuary proceeds ought to bear, and the general trustees of Henry Baron Leconfield's will accordingly took out an originating summons, asking, among other things, for the determination of the question whether, upon the true construction of the will they, as such general trustees, were bound to retain in their hands during the lifetime of Charles Henry Baron Leconfield, or for any and what period, a sufficient part of the testator's residuary estate to meet all or any and what part (a) of the estate duty which would, upon the happening of the first of the events mentioned in sect. 20 of the Finance Act 1896, become, in respect of such of the heirlooms as were exempted from estate duty on the ground of their national or historic interest; and (b) of the succession duty which would, in the event of the timber comprised in the succession being cut, become payable in respect of the successor's interest in the proceeds thereof.

The defendants to the summons were Charles Henry Baron Leconfield, as the present tenant for life; the trustees of the resettlements of 1897 and 1898; and the younger sons of Henry Baron Leconfield, as residuary legatees under his will.

The summons was adjourned into court, and came on to be heard before Joyce, J. on the 6th Nov. 1903, when his Lordship decided (89 L. T. Rep. 434) that the trustees were bound, during the lifetime of Lord Leconfield as the present tenant for life or until further order, to set aside a sufficient sum to pay the estate duty on the heirlooms; but that for the succession duty on the proceeds of sale of the timber they were not bound to make any provision.

From the decision as to the proceeds of sale of the timber Lord Leconfield, and as to the exempted heirlooms the residuary legatees, respectively now appealed.

The appeal by Lord Leconfield was first argued.

Younger, K.C. and MacMullan for the appellant.—This duty is succession duty chargeable on the late Lord Leconfield's death; and the direction contained in the will, as to the payment out of residue of succession duty payable on his death, therefore covers it. The direction in the will ought to be interpreted not as meaning "upon the moment of my death," but "in respect of the succession thereby created." They referred to

Lord Advocate v. Marquis of Ailsa, 9 Sco. Sess. Cas. 4th series 40;

Succession Duty Act 1853, ss. 1, 2, 3, 21, 22, 23;

Customs and Inland Revenue Act 1881, s. 21.

Hughes, K.C. and the Hon. Frank Russell for the respondents the residuary legatees.—This duty does not become payable on the late Lord Leconfield's death, and may never become payable at all. It is a duty which only becomes chargeable on the successor when the successor cuts the timber in respect of his interest in the sale moneys of the timber.

Austen-Cartmell for the respondents the general trustees of the will.

A. L. Ellis for the respondents the trustees of the resettlements of 1897 and 1898.

The appeal by the residuary trustees was then argued.

Hughes, K.C. and the Hon. Frank Russell, for the appellants, contended that the heirlooms came within the Finance Act 1896, s. 20, and that accordingly no duty was payable thereon.

Younger, K.C. and MacMullan, for the respondent, Lord Leconfield, *contra*.

VAUGHAN WILLIAMS, L.J.—I will deal with these two appeals separately, although both appeals really turn on what is one passage, divided into sections, in the will of the late Lord Leconfield. Perhaps I had better read the passage in the will as a whole first. [His Lordship did so, and continued:] Now, the question raised by the first appeal that we have to determine here is this: We have to say whether or not succession duty, payable in respect of succession to land which is covered with timber, is, having regard to the terms of sect. 23 of the Succession Duty Act 1853, a duty which the trustees under this will are directed to pay. Joyce, J., in delivering his judgment, says this: "I am not sure what the testator intended by the words beginning 'secondly' in reference to the particular question that has arisen, or what he would have said if the point had been called to his attention; but upon the whole I think the right way of dealing with this question is to read the words beginning 'secondly' literally; and therefore I think that with respect to timber it is unnecessary to make any provision, and that in my opinion would be a fairer and more convenient result to all parties concerned." Now, in order to understand that judgment one has to turn to the Act which deals with succession duties—that is, the Succession Duty Act 1853. It is best here, I think, first to look at sect. 2 of that Act, and one finds by that section: "Every past or future dis-

position of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution, a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." One gets there a definition really of what a "succession" is. And then when one turns to sect. 10 one finds that section provides: "There shall be levied and paid to Her Majesty in respect of every such succession as aforesaid"—that really is the succession on death—"according to the value thereof, the following duties"; and then the section sets out the various duties. Then we have to arrive at the duty to be levied on succession, and we see by sect. 2 what the succession is—that is, succession on death. That being so, if one turns to sect. 20 one finds that: "The duty imposed by this Act shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof." I do not think I need read more of that section; but I wish to point out that what sect. 20 does is—the duty having been created on the succession—to deal with the time when that duty shall be paid, and with the interest really out of which it is to be paid. Then sect. 21 provides that: "The interest of every successor except as hereinafter provided, in real property, shall be considered to be the value of an annuity equal to the annual value of such property, after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipts of the income or profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto; and every such annuity, for the purposes of this Act, shall be valued according to the tables in the schedule annexed to this Act; and the duty chargeable thereon shall be paid by eight equal half-yearly instalments, the first of such instalments to be paid at the expiration of twelve months." Then the section goes on and makes provision that "if the successor shall die before all such instalments shall have become due, then any instalments not due at his decease shall cease to be payable, except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property." I call attention to sect. 21 in order to show that it really provides for a valuation of the interest, and also provides for the time of payment. One observes that under this section—as indeed I think we may say under all these other sections—that never really is the duty due and payable as a whole immediately on death, but it

is nevertheless a duty which is imposed by this Act on succession, and although not immediately due and payable is a duty payable from the time of the death. Then if one turns to sect. 22 one finds that that deals with the rules for valuing houses and land; and sect. 23, which is the immediately material section in this case, provides that "where timber, trees, or wood, not being coppice or underwood, shall be comprised in any succession, the successor shall be chargeable with duty upon his interest in the net moneys, after deducting all necessary outgoings for the year, which shall from time to time be received from any sales of such timber, trees, or wood, and shall account for and pay the same yearly; provided that no money shall be payable on the net moneys received from the sale of timber, trees, or wood in any one year, unless such net moneys shall exceed the sum of 10l.; provided, that if the successor shall be desirous of commuting the duty, and shall deliver to the commissioners an estimate of the net moneys obtainable by him from the sale of such timber, trees, and wood as may, in a prudent course of management of the property, be felled by such successor during his life, the commissioners, if satisfied with such estimate, shall accept the same and assess the duty accordingly. Here again the section to my mind obviously treats succession duty as being a duty which is imposed on the succession on the death. The whole of sect. 23 is merely a provision for valuation and for the time when the duty shall become due and payable. In my judgment the provision at the end of the section for the commutation of the duty itself points very strongly to the same conclusion. I mean that it points to the conclusion that it is not true to say—as was put to us in argument—that the duty only becomes chargeable in each year upon the event of a sale, but it is really a duty which I think, in the more accurate user of the word "chargeable," is chargeable immediately upon the death at the succession. At all events, whether you use that word or not, to my mind it is perfectly plain that the duty is imposed from the death, and I think that the provision for the commutation goes strongly to negative the suggestion that the duty is really only a duty which becomes imposed upon the happening of the contingency of a sale. I think that the duty here is a duty which arises on the succession on the death, and that it is not true to say that it is a duty which arises on the death plus any contingency—to wit, a sale. Sect. 24, which is the section that deals with advowsons, seems to me to point in the same direction. Under these circumstances, having regard to the provisions in the statute with regard to succession duty, and in particular to sect. 23, which is relied on by the respondents to the first appeal, I now say that I read these words, "all such succession duty as shall become payable upon my death in respect of the same estates and property," not as meaning due and payable, for if one so read them the words would be useless and futile, as there is no succession duty which becomes due really immediately upon death. But I read the words as if they had run: "All such succession duty as shall become payable in respect of any succession upon my death in respect of the same estates and property." And although I have added those words in order to

make my meaning more plain, I must not be supposed to say that I consider that it is necessary to introduce those words to cause this clause in the will to have the meaning which I attribute to it. In my judgment, if you take the words as they stand, "all such succession duty as shall become payable upon my death in respect of the same estates and property," and put upon them their natural interpretation, they mean only what I have just said. In my judgment, therefore, so much of the judgment of of Joyce, J. as decides that the trustees of the will had not the duty and the right to pay the duty in respect of the succession out of the residuary estate ought to be reversed and a declaration made to the contrary. Having now dealt with what I have called the first appeal, I will deal with the second appeal, which is an appeal that depends upon the first half of that clause in the will which I have read already, and which I need not read again. Now, in respect of this part of the case, Joyce's, J. judgment is as follows: "This point is one of some difficulty, but it seems to me to stand in this way, that, *primi facie*, under the provisions of the Finance Act 1894, all the heirlooms subject to that resettlement are liable to duty, and became liable to duty upon the death of the testator, the late Lord Leconfield; but that as to a particular class of heirlooms they are within the specific provisions of the Act of Parliament, which says that for heirlooms and chattels of that particular character the payment of this duty is postponed, or, rather, they are to be exempt during a certain period and under a certain event. Upon the whole, I think that the proper thing to decide is, and I do decide, and I think it was the intention of the testator, that a sufficient sum shall be set aside for the purpose of providing for the payment of this duty, to be retained during the life of Lord Leconfield, or until further order, with liberty to apply. If any event happens on which it is perfectly clear that this is not wanted the parties may come again. I do not say pay the money into court, or anything of the sort. Of course the residuary legatees will have the income on the sum set aside in the meantime." I am sorry to say that in respect of this appeal also I cannot see my way to agreeing with Joyce, J. Really this appeal depends upon the words of the 28th section of the Finance Act 1896. That section says: "Where any property passing on the death of a deceased person consists of such pictures, prints, books, manuscripts, works of art, scientific collections, or other things not yielding income as appear to the Treasury to be of national, scientific, or historic interest, and is settled so as to be enjoyed in kind in succession by different persons, such property shall not, on the death of such deceased person, be aggregated with other property, but shall form an estate by itself, and, while enjoyed in kind by a person not competent to dispose of the same, be exempt from estate duty, but if it is sold or is in the possession of some person who is then competent to dispose of the same, shall become liable to estate duty." Then "(2) The person selling the same, or for whose benefit the same is sold, and also the person being in possession and competent to dispose of the same, shall be accountable for the duty, and shall deliver an account, in accordance

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with sect. 8 of the principal Act, in the case of a sale within one month after the sale, and in the case of a person coming into possession . . . I do not think that I need read anything more from the sub-section. Now, in my opinion the effect of sect. 20 is to exempt heirlooms of this character from this duty. It is quite true that only heirlooms which "appear to the Treasury to be of national, scientific, or historic interest," are so exempt. But there is no question here but that these heirlooms are heirlooms which do so appear to the Treasury. And in my judgment it would not be true to say that the finding—if I may use the expression—by the Treasury would not relate to the time of the death. These heirlooms have all along had this characteristic of being of national or historic interest, although they might not be so certified by the Treasury until a later period. But I have to deal with the words of the will, bearing in mind that what sect. 20 of the Act of 1896 does is to exempt this property until the happening of a particular event. It is not like sect. 15 of the Act of 1894, in which the Treasury have power, in respect of certain subject-matter, to remit the duty. Here the duty is exempt until something has happened. Under these circumstances it seems to me that this is not a duty which comes within the terms used in the first part of the clause in the will. Those words are, "so much of the estate duty and other death duties (if any) as . . . shall become payable upon or by reason of my death in respect of . . ." Then the clause details the estates. It seems to me that this duty does not become payable by reason of the death of the testator; but the truth of that matter is that at the death of the testator these heirlooms are exempted from duty, and it is only when that event happens which is defined by sect. 20 of the Act of 1896 that the duty becomes payable. The event so defined, as we have already seen, is that the heirlooms are sold when they are in possession of some person competent to dispose of the same. When that happens, then the section in terms says that they shall become liable to estate duty. Under those circumstances I think that in respect of these heirlooms there is no duty and no right in the trustees to provide out of the residuary funds money for estate duty.

STIRLING, L.J.—Those two appeals arise out of a direction which is given by the will of the late Lord Leconfield as to the payment of estate duty and succession duty out of certain property of great value to which his eldest son became entitled as tenant for life upon the testator's death. The questions are of some difficulty having regard to the language in which the testator has expressed himself. Now the first appeal relates to a direction given in respect of the payment of succession duty. It runs thus. [His Lordship read the clause, and continued:] Among the estates and properties specified is the very large real estate, of which a part is covered with valuable timber which is said to produce by its cutting, in the ordinary course of management, an income of something like between 3000*l.* and 4000*l.* a year. The question which arises is whether the succession duty payable on that is included in the direction or not. Joyce, J. has held that it is not, but with the greatest respect I have come—though not without considerable hesitation—to a different

conclusion. The duty in question is imposed by sect. 10 of the Succession Duty Act 1853, which says this: "There shall be levied and paid to Her Majesty in respect of every such succession as aforesaid, according to the value thereof, the following duties." Then when the successor shall be the lineal issue or lineal ancestor of the predecessor, "a duty at the rate of 1*l.* per centum upon such value," and so on, there being a number of other provisions raising the amount of duty or the percentage mainly out of regard to the distances of the relationship between the predecessor and the successor. The succession is defined in the early part of the Act, and the main definition is to be found in sect. 2, and from that it is to be gathered that a succession, speaking broadly—but sufficiently for the present purpose—is a beneficial interest in property arising upon the death of some person after the date appointed for the commencement of the Act. Now, the duty being so imposed, there are in certain parts of the Act directions as to the assessment and payment of the duty. Sect. 20 gives a general direction that the duty is to be paid when—speaking broadly again—the successor becomes entitled in possession. Sect. 21 says how the duty is to be assessed and paid as regards real estate and provides as follows: [His Lordship read that section and continued:] Upon that it is to be observed that the first instalment becomes payable, not at the death, but twelve months after the death, and that therefore, if the successor dies before any instalment becomes payable, there is nothing payable. Then we come to sect. 23, which deals with the timber, and, reading it shortly, it has reference to where timber shall be comprised in any succession. Therefore it applies to timber included in the succession, which is the case here; and it provides that: "The successor shall be chargeable with duty upon his interest in the net moneys, after deducting all necessary outgoings for the year, which shall from time to time be received from any sales of such timber, trees, or wood, and shall account for and pay the same yearly." So that the successor pays the duty from time to time as the timber is sold in the course of the management of his estate. Now, it is contended, and that view has been adopted by the learned judge in the court below, that seeing that the duty is not payable until a sale takes place, and then from time to time yearly as sales do take place, that is not succession duty which became payable upon the death of the testator in the present case. Now, the objection to that is this, that if that reasoning be sound, then it would seem equally clear that duty which is payable under sect. 21 in respect of the annual value of the property otherwise than from timber is also open to the same objection, and it does not fall within the direction in the will. Yet it is admitted that the direction does apply to the succession on the ordinary annual value of the estate apart from the timber. As I have said, the words do give rise to difficulty, but the succession takes place on death—takes place upon the death of the testator; and seeing that it is admitted—I think rightly admitted—that the direction in the will extends to the annual value of the real estate, apart from the timber, I do not see my way to draw any distinction between the two. Therefore I think that the direction ought to be held to apply equally to the timber

also. The other question is one of a different kind altogether, and it relates to some very valuable heirlooms which are the subject of family settlement. The direction by the testator with regard to those is as follows: [His Lordship read the clause of the will, and continued:] The estate duty and other death duties which are to be paid under this direction are such as become payable upon or by reason of the death of the testator. Now these heirlooms fall under sect. 20 of the Finance Act 1896, which deals with pictures and other things not yielding income which have appeared to the "Treasury to be of national, scientific, or historic interest," which are settled so as to be enjoyed in kind in succession by different persons. That being so, the Act provides that the property shall not, on the death of the deceased person, be aggregated with other property, but shall form an estate by itself, and, while enjoyed in kind by a person not competent to dispose of the same, shall be exempt from estate duty. That is the position of the property in the present case, and therefore no estate duty is now assessable or payable in respect of these heirlooms. Then the Act goes on to provide that if the property is sold, or is in the possession of some person who is then competent to dispose of the same, it shall become liable to estate duty. It is said that the duty is not payable upon the death of Lord Leconfield, but that it will or may become hereafter payable by reason of his death. I do not think that that is so within the meaning of the language used in the will. It seems to me that it will only become payable by reason of the heirlooms either being sold or coming into the possession of someone who is competent to dispose of the property. That event has not arisen, and therefore I think that no provision ought to be made for the payment of the estate duty.

COZENS-HARDY, L.J.—I am of the same opinion, and I have very little to add. Under the Succession Duty Act 1853, succession duty is levied and made payable in respect of one entire succession. On the succession of the present Lord Leconfield upon his father's death, in respect of different portions of the property comprised in the succession, duty is payable at different times and has to be ascertained by different methods. But it is a succession duty payable in respect of one entire succession, and I think—though perhaps it is unnecessary to express a concluded opinion upon it—that the succession duty payable in respect of any part of the succession is meant by sect. 22 of the Act of 1853 to fall upon the whole interest of the successor. Now, if that be the true view of the Act, it seems to me that it can make no difference at all that in the particular class of property with which we are now dealing—namely, timber—there is a provision that you are to ascertain the amount by reference to the actual sales or by reference to the commutation which the commissioners are bound to allow. That being so, I, for the reason stated by my Lord, and by Stirling, L.J.—though with great respect to the learned judge in the court below—come to the same conclusion as my brethren. I think that this succession duty is payable "upon my death in respect of the same estates and property." With reference to the other point, it seems to me that we must come to the conclusion that, under sect. 20 of the Finance Act 1896, the duty is not a duty which is liable to

be remitted by the Treasury, but that the heirlooms form property which is altogether exempt from duty. It seems to me impossible, that being the true view, in reading the language of the will, that estate duty shall be payable in respect of the heirlooms. It is true, no doubt, that the Treasury authorities did not ascertain and settle which particular heirlooms were exempt; but when they do ascertain that, the exemption would obviously take effect as from the death of Lord Leconfield. For these reasons I think that the appeals ought to be allowed.

Appeals allowed.

Solicitors for all parties: *Miles, Jennings, White, and Foster.*

Monday, March 7.

(Before ROMER and MATHEW, L.JJ.)

GRAY AND OTHERS v. BONSALE. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Landlord and tenant—Forfeiture—Nonpayment of rent—Judgment for possession against assignee of lease—Application by sublessee for relief—Conveyancing Act 1892 (55 & 56 Vict. c. 13), s. 4.

The court has jurisdiction to grant relief to an underlessee under sect. 4 of the Conveyancing Act 1892 in case of forfeiture of the original lease for nonpayment of rent.

APPEAL of the plaintiffs from an order of Bucknill, J. made at chambers.

In Sept. 1858 a lease of a yard in Moorgate-street, in the City of London, was granted by the predecessor of the plaintiffs to Woods for a term of sixty years at the yearly rent of 300*l.*

On the same day the same lessor granted to Woods a lease of an hotel adjoining the yard for a term of sixty years at the yearly rent of 800*l.* This lease contained a proviso that if the rent of 300*l.* reserved by the lease of the yard should at any time be unpaid, the amount in arrear should be added to the rent reserved for the hotel and be subject to the conditions and provisos contained in the lease of the hotel.

The leases contained provisos for re-entry upon nonpayment of the rent reserved.

Shortly after the lease was granted Woods subdemised the yard, at the same rent of 300*l.*, to the Midland Railway Company for the whole of the term, less the last fourteen days thereof.

Subsequently Woods assigned all the premises, both the hotel and the yard, for all the residues of the terms to the defendant Bonsale.

The reversions upon both the leases were vested in the plaintiffs.

The rents due under the leases not having been paid, the plaintiffs brought this action against Bonsale to recover possession of all the premises under the provisos for re-entry on nonpayment of rent, and they obtained judgment for possession in default of appearance.

The Midland Railway Company thereupon applied to Bucknill, J. at chambers for relief, neither Woods nor the defendant Bonsale being made parties to the application. The plaintiffs waived any objection upon the ground that Bonsale was not made a party to the application.

The learned judge made an order granting

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at Law.

relief to the Midland Railway Company upon payment of costs and of all arrears of rent.

The Common Law Procedure Act 1860 (23 & 24 Vict. c. 126) provides:

Sect. 1. In the case of any ejectment for a forfeiture for nonpayment of rent, the court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, up to and within the like time after execution executed, and subject to the same terms and conditions in all respects as to payment of rent, costs, and otherwise, as in the Court of Chancery; and if the lessee, his executors, administrators, or assigns, shall upon such proceeding be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease.

The Conveyancing Act 1881 (44 & 45 Vict. c. 41) provides:

Sect. 14 (2). Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, the lessee may in the lessor's action, if any, or in any action brought by himself, apply to the court for relief, and the court may grant or refuse relief, as the court having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit, and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court in the circumstances of each case thinks fit. (3). This section shall not affect the law relating to re-entry or forfeiture or relief in case of nonpayment of rent.

The Conveyancing Act 1892 (55 & 56 Vict. c. 13) provides:

Sect. 1. This Act may be cited as . . . and the Conveyancing and Law of Property Act 1881 and this Act shall be read together, and may be cited together as . . .

Sect. 4. Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease the court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action, if any, or in any action brought by such person for that purpose, make an order vesting for the whole of the term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as underlessee to any estate or interest in such property upon such conditions as to the execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise, as the court in the circumstances of each case shall think fit, but in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sublease.

The plaintiffs appealed.

Lush, K.C. and *B. A. Cohen* for the appellants.—The learned judge had no power to grant relief to the underlessees upon this application. The application for relief was made under sect. 1 of the Common Law Procedure Act 1860, and under that statute relief cannot be granted to an underlessee unless he brings the original lessee before the court, because the effect of granting relief under that statute is to restore the original lease and the liability of the original lessee:

Hare v. Elms, 68 L. T. Rep. 223; (1893) 1 Q. B. 604.

In this case the two leases granted on the same day must be treated as being one lease by reason

of the provision as to payment of rent of the yard contained in the lease of the hotel. If relief is granted at all, it ought to be upon the terms that all the premises are vested in the underlessee. The provisions of sect. 4 of the Conveyancing Act 1892 do not apply at all in cases of forfeiture for nonpayment of rent. Under sect. 14 of the Conveyancing Act 1881 an underlessee had no right to relief at all in cases which came within that Act. The Act of 1892 was passed to remedy that state of the law so far as concerned underlessees, and to enable them to obtain relief in cases which came within sect. 14 of the Act of 1881. Sect. 1 of the Act of 1892 provides that it is to be read together with the Act of 1881, and then by sect. 4 provides that an underlessee may apply for relief when the lessor is proceeding to enforce a forfeiture. By sub-sect. 8 of sect. 14 of the Act of 1881 it is provided that "this section shall not affect the law relating to re-entry or forfeiture or relief in case of nonpayment of rent." Therefore, as sect. 4 of the Act of 1892 must be read together with sect. 14 of the Act of 1881, relief cannot be given under sect. 4 of the Act of 1892 in cases of nonpayment of rent:

Cholmeley School, Highgate v. Sewall, 71 L. T. Rep. 88; (1894) 2 Q. B. 906.

[*ROMER*, L.J. referred to *Imray v. Oakshettle* (76 L. T. Rep. 632; (1897) 2 Q. B. 218.) That case was decided upon the terms of sub-sect. 6 of sect. 14 of the Act of 1881, which are very different from the terms of sub-sect. 8; and, further, there was no other statute in operation in respect of the matters dealt with by sub-sect. 6 as there is in the case of sub-sect. 8. It would be a strange result if, although the lessee himself cannot apply for relief under the Act of 1881 in case of forfeiture for nonpayment of rent, but only under the Common Law Procedure Act, yet an underlessee can apply under the Act of 1892, or under the Common Law Procedure Act. There are such important differences between the provisions as to relief in the Common Law Procedure Act and those in sect. 4 of the Act of 1892 that it is impossible to suppose that it can have been intended that relief could be given under either Act in cases of nonpayment of rent. The Common Law Procedure Act says that no new lease is to be made, whereas under the Act of 1892 the underlessee may be ordered to execute a new lease. In the case of *London Bridge Buildings Company v. Thomson and others* (89 L. T. Rep. 50), before *Joyce, J.*, this point was not taken.

Neville, K.C. and *C. H. Sargant* for the respondents.—It is true that the application to the learned judge was made under the Common Law Procedure Act 1860, but the order can be supported in this court upon any other ground. The underlessees could obtain relief under the Common Law Procedure Act 1860. It was not necessary in this case to bring the original lessee before the court, and the appellants waived any objection upon the ground that the assignee was not before the court. In *Hare v. Elms* (*ubi sup.*) the original lessee had not assigned his lease at all, and the effect of granting relief would have been to restore the privity of estate between him and the lessor; in this case the original lessee had assigned all his estate to *Bonsale*, and therefore

an order for relief would not reimpose any burden upon him. The person in whose shoes the underlessee ought to be made to stand is the person in whom the term was vested at the time of the forfeiture:

Webber v. Smith, 2 Vernon, 103.

The effect of the order which the learned judge has made is that the underlessees are put in the place of Bonsall, the assignee. The Conveyancing Act 1892 is a perfectly general Act, and the provisions of sect. 4 are not a mere amendment of sect. 14 of the Act of 1881. These provisions are in terms applicable to all cases, whether within sect. 14 of the earlier Act or not, and the former jurisdiction to grant relief under the Common Law Procedure Act is left untouched. The decision of this court in *Imray v. Oakshette* (*ubi sup.*) is a clear authority that the provisions of sect. 4 of the Act of 1892 are not limited by the exceptions contained in sect. 14 of the Act of 1881. These two leases cannot possibly be taken to be all one lease of one property. The respondents are willing to execute any proper lease or deed of covenant in respect of the yard.

Lush, K.C. in reply.—The respondents ought not to be relieved except upon the terms of making good any breaches of covenant—for instance, the repairing covenant; and also of paying an increased rent, as was done in *Ewart v. Fryer* (83 L. T. Rep. 551; (1901) 1 Ch. 499).

ROMER, L.J.—I think that in substance the learned judge was right in holding that relief should be given to the underlessees in this case; but I am not satisfied that he has given relief in quite the right form. On the question which was argued before us, which I think was really the only question of much substance—that is, whether the lease of this yard was to be considered as a separate lease—I think that the contention of the appellants must fail. So far as persons claiming under the lease of the yard are concerned, I think that that lease must not be connected with the lease of the hotel, and not the less because in the lease of the hotel there was a special provision enabling the lessor to re-enter and determine the lease of the hotel if the rent payable under the lease of the yard fell into arrear. That was a provision which might affect all persons claiming under the lease of the hotel, but it was not a provision which could affect any person claiming under the lease of the yard. Therefore I think that it was quite right for the learned judge to hold, as I gather that he did in effect hold, that for the purpose of this application the lease of the yard was the only lease to be considered. Now, it is clear to my mind that relief could have been granted to the underlessees of this yard either under the Common Law Procedure Act 1860 or under the provisions of sect. 4 of the Conveyancing Act 1892. According, however, to the terms which would have to be imposed if the Common Law Procedure Act 1860 were to be applied, difficulties would have arisen which are, I think, wholly got rid of if we simply apply the provisions of sect. 4 of the Conveyancing Act 1892. Those difficulties would arise from considering what would be the position of the original lessee and of the assignee of the lease if a vesting order were not made under sect. 4 of the Act of 1892, or the underlessee made to execute a proper deed so as to create a privity of contract

and of estate as between the underlessee and the lessor. If relief of the ordinary kind were granted under the Common Law Procedure Act 1860—that is, simple relief from forfeiture and no more—the effect, or at any rate the probable effect, would be simply that the original lease would stand, and that the underlessee would simply remain in his position of underlessee, but under no direct liability to the lessor. In that case the old term that existed before and the old liability of the original lessee, and possibly of the assignee, would remain. I think that that would have been an inconvenient course to adopt, especially as the original lessee was not before the court, and the assignee was not before the court, the lessors having waived the necessity of his presence. Still, his absence did, in my opinion, create a difficulty in applying the provisions of the Common Law Procedure Act 1860 in the ordinary way. That being so, I think that the general power conferred upon the court by sect. 4 of the Conveyancing Act 1892 ought to be put in force, and that the provisions of that section are those which can be most usefully applied in a case like this. It was contended that sect. 4 of the Conveyancing Act 1892 does not enable the court to grant any greater relief to an underlessee than could have been granted to an underlessee by the Court of Chancery under its old jurisdiction, or by the courts of common law under the Common Law Procedure Act 1860. That contention was founded upon the provision contained in sub-sect. 8 of sect. 14 of the Conveyancing Act 1881, which enacts that “this section shall not affect the law relating to re-entry or forfeiture or relief in case of nonpayment of rent.” It was argued that we must import that provision into sect. 4 of the Conveyancing Act 1892, and that under sect. 4 the court has no further power in the case of forfeiture for nonpayment of rent on the application of an underlessee than it would have had under the law existing before the Conveyancing Act 1881. In my opinion that contention is not well founded. I think that sect. 4 of the Act of 1892 is not a mere amendment of sect. 14 of the Act of 1881. On the contrary, I think that sect. 4 is what it purports to be—that is, a general enabling clause empowering the court to give relief to underlessees in case of forfeiture of the superior lease under any circumstances and upon such terms as appear to the court to be just, having regard to all the circumstances of the case. I think that this view is in substance supported by the decision of the Court of Appeal in *Imray v. Oakshette* (76 L. T. Rep. 632; (1897) 2 Q. B. 218), in which a similar question arose. In sub-sect. 6 of sect. 14 of the Conveyancing Act 1881 there is a provision that sect. 14 shall not apply to a covenant or condition against assigning, underletting, parting with the possession, or disposing of the land leased; and in *Imray v. Oakshette* (*ubi sup.*) it was contended that, that being so, the court could not grant relief to an underlessee, under sect. 4 of the Conveyancing Act 1892, in cases in which relief could not be granted to the lessee under sect. 14 of the Act of 1881. It was argued, as it has been argued in this case, that sect. 4 of the Act of 1892 is a mere amendment of sect. 14 of the Act of 1881, but that argument failed, and it was decided that the court had jurisdiction under

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sect. 4 of the Act of 1892 to relieve an under-lessee against a forfeiture of the original lease, though such forfeiture was occasioned by breach of a covenant not to assign or underlet without licence, and therefore could not be relieved against in favour of the lessee under the Act of 1881, notwithstanding the provision that the Act of 1881 and the Act of 1892 were to be read together. If the judgments of Lopes and Rigby, L.J.J. in that case are looked at, it will be seen that, after carefully considering the two sections in the two Acts, they came to the conclusion that sect. 4 of the Act of 1892 is, as I have said it is, a substantive section in itself, unlimited in its application, and is not to be regarded as a mere amendment of sect. 14 of the Act of 1881 so far as the underlessee is concerned. Upon these grounds I think that the objection in law to the application of sect. 4 of the Act of 1892 to the present case falls to the ground. That being so, I think that the proper course to be adopted here is to give relief to the underlessee under the provisions of sect. 4 of the Act of 1892, and I think that that ought to be done by vesting in the underlessee the term of the underlease, and making the underlessee covenant with the lessors to pay the rent of the yard during the term, which in this case I think ought clearly to be 300*l.* a year, the rent reserved by the lease, and to observe and perform the covenants contained in the original lease with regard to the demised premises. In that view it appears to me that it will certainly be unnecessary to bring either the lessee or the assignee before the court; in fact, I think that the appellants do not dispute that, if relief is given in that form under sect. 4 of the Act of 1892. It is said on behalf of the appellants that there may have been breaches of the covenants to repair, and that, before the vesting order is made and a proper deed executed by the underlessees, the repairs ought to be done. I agree that, if that be so, the repairs ought to be made good as a term or condition to be imposed by the court upon the underlessees in granting relief against forfeiture. But, as I am not satisfied that there have been any breaches of the covenants to repair, I think that it is best to refer the matter back to the court below to investigate that question. If it turns out that there have been such breaches, it will, as I have said, be a condition that these breaches be made good. If there have not been any such breaches, then relief will be granted upon the terms which I have indicated; but the details of the deed to be executed, and the form of the order as to vesting, ought to be settled by the court below when the final order comes to be made. The order of the learned judge will be discharged and the matter referred back to be dealt with.

MATHEW, L.J.—I am of the same opinion. I must say that I am not at all satisfied that, if the rights of the underlessees depended only on the provisions of the Common Law Procedure Act 1860, it is an imperative rule that a person in the position of the original lessee in this case must be brought before the court. That seems to me to be a question of discretion. The original lessee, Woods, parted with his interest in this property to Bonsall, and it is difficult to conjecture what interest Woods could possibly have. It is said that, because under the Common Law Procedure

Act 1860 no new lease has to be granted, but the old lease is set up, difficulties may arise. All difficulties, however, seem to me to be effectively and finally dealt with by sect. 4 of the Conveyancing Act 1892. Construing that section reasonably and without reference to the supposed effect of the incorporation of the Conveyancing Act 1881, it is an independent enactment directed to get rid of difficulties and grievances, and it must be construed according to its terms. It follows, therefore, that there ought to be a vesting order and the execution of such a deed by the underlessees as is mentioned in sect. 4 as one of the conditions upon which relief may be granted. The suggestion that there ought to be any increase of rent cannot be entertained. As to any other conditions, we do not know what circumstances may be brought before the learned judge to show that particular stipulations may be required.

Order varied.

Solicitors for the appellants, *Druces and Attlee.*
Solicitors for the respondents, *Beale and Co.*

Wednesday, March 23.

(Before COLLINS, M.R., ROMER and
MATHEW, L.J.J.)

*Re AN ARBITRATION BETWEEN C. TRAAE,
FOR THE OWNERS OF THE STEAMSHIP
RIKARD NORDRAAK, AND LENNARD AND SONS
LIMITED. (a)*

APPEAL FROM THE KING'S BENCH DIVISION.

*Ship—Charter-party—Hire—Suspension of hire—
Detention by ice "caused by breakdown of
steamer"—Vessel detained owing to repairs
made necessary by stranding.*

By a charter-party it was provided by one clause that, in the event of loss of time from damage preventing the working of the vessel, the payment of hire should cease until she should again be in an efficient state to resume her service, and by another clause that "detention by ice should be for account of charterers unless caused by breakdown of steamer."

During the voyage the vessel stranded; the necessary repairs were effected and she resumed her voyage; owing, however, to the delay thus caused she was unable to proceed to the destined port before it was closed by ice, and she was consequently detained at an intermediate port.

Held (affirming the judgment of Ridley, J.), that there was a detention by ice "caused by breakdown of steamer," and that payment of hire ceased during that detention.

APPEAL of C. Traae from the judgment of Ridley, J. upon a special case stated by arbitrators.

The arbitrators appointed under a submission contained in a charter-party, dated the 1st Oct. 1902, stated a special case for the opinion of the court which, so far as is material, was as follows:

By the charter-party, dated the 1st Oct. 1902, it was agreed between C. Traae, for the owners of the steamship *Rikard Nordraak*, hereinafter called "the owners," and J. M. Lennard and Sons Limited, hereinafter called "the charterers," that the owners should let and the charterers should

(a) Reported by J. H. WILLIAMS, Esq., Barrister at-Law.

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hire the steamship for the term of about two calendar months from the day on which she was placed with a 'clear hold at the disposal of the charterers at Cardiff, Barry, Penarth, Newport, Swansea, or Port Talbot, as therein mentioned, to be employed on a voyage to Spain and Portugal, thence to the Baltic, and back to United Kingdom or the Continent, as charterers or their agents should direct, upon the following (among other) conditions:

Clause 1. That the owners should maintain the vessel in a thoroughly efficient state in hull and machinery for and during the service.

Clause 3. That the charterers should pay for the use and hire of the vessel at the rate of 370*l.* per calendar month, commencing on and from the day of her delivery to charterers as aforesaid, and at and after the same rate for any part of a month used to complete a voyage, hire to continue from the time specified for terminating the charter until her delivery to owners (unless lost) in the same good order and condition as when accepted (fair wear and tear only excepted) at a port in United Kingdom or on the Continent between Bordeaux and Hamburg.

Clause 14. That in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire should cease until she should be again in an efficient state to resume her service; but should the vessel be driven into port or to anchorage by stress of weather or from any accident to the cargo, such detention or loss of time should be at the charterers' risk and expense.

Clause 16. The act of God, perils of sea, fire, barratry of the master and crew, enemies, pirates, and thieves, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner.

Clause 26. Detention by ice to be for account of charterers unless caused by breakdown of steamer.

The steamship was duly placed at the disposal of the charterers under the charter-party, and proceeded under the charter-party to Pomaron, in Spain, where she loaded a cargo under the charter-party, for which bills of lading were signed for delivery of the said cargo at St. Petersburg.

The steamship sailed from Pomaron for St. Petersburg on the 19th Oct. 1902.

On the 28th Oct. 1902, while in the course of the voyage to St. Petersburg, the steamship grounded at or near Fairmunde, in the Baltic, and thereby received such damage as to render her unfit to continue the said voyage without repair. The captain accordingly put back to Copenhagen for repairs, where the vessel arrived on or about the 1st Nov. 1902, and the necessary repairs were completed on the 1st Dec. 1902. The cargo, or part of it, had been discharged for the purpose of the repairs. It was reloaded after the repairs were completed, and the vessel sailed from Copenhagen on the 1st Jan. 1903, and arrived at Revel, at the entrance of the Gulf of Finland, on the 6th Jan. She put into and stayed at Revel because she was unable to proceed further towards St. Petersburg by reason of

ice. She is still at Revel, not frozen in, but awaiting the breaking up of the ice at St. Petersburg and the approaches thereto.

In these circumstances a dispute arose between the owners and the charterers under the charter-party as to the period for which, according to the true construction of the charter-party, the payment of hire should cease in consequence of the damage received by the steamship by grounding as aforesaid, and whether hire is payable by the charterers under the charter-party during the period of the detention of the ship at Revel.

The arbitrators found and awarded that no hire was payable by the charterers to the owners under the charter-party for the period from the 28th Oct. 1902 until the 20th Dec. 1902 inclusive, but that hire was payable by the charterers to the owners in respect of the period from the 20th Dec. 1902 until the 6th Jan. 1903 inclusive.

They found as a fact that the port of St. Petersburg became closed by ice on the 26th Nov. 1902, and not before, and that by reason of the ice it was practically impossible for the steamship, after completion of her repairs as aforesaid, to get nearer to St. Petersburg than the port of Revel, where she now lies. They further found as a fact that, if the steamship had not grounded on the 28th Oct. 1902 and received damage as aforesaid, she could easily have reached St. Petersburg and have discharged her cargo and have got away from that port before the 26th Nov., and before the port of St. Petersburg was closed by ice.

In these circumstances it was contended before the arbitrators on behalf of the charterers that the detention of the ship at Revel was a detention by ice caused by breakdown of steamer, and that, according to the true construction of the charter-party, the hire ceased during the period of such detention. On the other hand, it was contended on behalf of the owners that the detention at Revel was not a detention by ice at all, or that in any case it was not a detention by ice caused by breakdown of the steamer, and that therefore the hire continued to run during the period of such detention.

If and so far as it was a question of fact, the arbitrators awarded and determined that the detention of the steamship at Revel was a detention caused by breakdown, and, subject to the opinion of the court on the question hereinafter submitted, they awarded and determined that the hire ceased under the charter-party during the period of such detention.

The question for the opinion of the court was:

Whether upon the facts stated and upon the true construction of the charter-party hire was and would be payable by the charterers to the owners under the charter during the detention of the ship at Revel awaiting the opening of the port of St. Petersburg.

If the court should answer this question in the negative, then the award as above stated was to stand.

If the court should answer the question in the affirmative, then the award as above stated was to be set aside, and in that case the arbitrators awarded and directed that the hire continued to run at the rate stipulated by the charter-party, notwithstanding the detention of the steamer at Revel.

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The special case was argued before Ridley, J., and the learned judge held that the decision of the arbitrators was right, and gave judgment in favour of the charterers.

The shipowners appealed.

Sims Williams for the appellants.—The decision of the learned judge, holding that the award of the arbitrators must be upheld, was wrong. Under this charter-party the liability to pay hire would not cease in any case except upon the happening of one of the events specified in clause 14. The detention of the vessel at Revel was not caused by any one of those events. The vessel, as soon as she was repaired, was again in an efficient state, and the liability to pay hire would again arise. It had been decided that hire did not cease to be payable because, owing to accident, the vessel was delayed for repairs:

Harelock v. Geddes, 10 East, 555;

Inman Steamship Company v. Bischoff, 47 L. T. Rep. 581; 7 App. Cas. 670.

In consequence of those decisions this clause was inserted in charter-parties. In *Hogarth v. Miller Brother and Co.* (64 L. T. Rep. 205; (1891) A. C. 48) this clause came up for consideration, and it was held that there was a suspension of hire only during the time that the vessel was actually inefficient for service. Even if this detention can be said to have been caused by the stranding of the vessel, "stranding" is one of the excepted perils specified in clause 16. Clause 26 does not provide that the payment of hire shall cease if there is a detention by ice caused by breakdown of steamer. It is an entirely separate and distinct clause, and a provision for the cesser of hire ought not to be read into it. If the charterers have any remedy under clause 26, it is a remedy in damages only. This detention by ice was not "caused by breakdown of steamer." The vessel after she was repaired was not broken down at all, and was able to proceed on the voyage. She was not detained by ice, for she was not frozen in at all. At Revel her cargo could have been discharged and forwarded by land to St. Petersburg.

Scrutton, K.C. and *H. W. Loehnis*, for the respondents, were not called upon to argue.

COLLINS, M.R.—I think that this appeal must fail. It seems to me that clause 26 of the charter-party means what it plainly says: "Detention by ice to be for account of charterers unless caused by breakdown of steamer." The steamer was broken down, and by reason of that breakdown she was so long delayed that she was unable to proceed on the voyage as far as St. Petersburg by reason of that port being blocked by ice. Therefore there was a "detention by ice," which was not to be "for account of charterers," but was to be for account of the shipowners. Therefore the payment of hire was suspended during that detention. This appeal fails, and must be dismissed.

ROMER, L.J.—I am of the same opinion.

MATHEW, L.J.—I agree. *Appeal dismissed.*

Solicitors for the appellants, *Botterell and Roche*.

Solicitors for the respondents, *Downing, Bolam, and Co.*

Tuesday, March 29.

(Before *COLLINS, M.R.*, *ROMER* and *MATHEW, L.J.J.*)

WALTER V. BEWICKE, MOREING, AND CO. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Costs—Action settled—"Record withdrawn. No costs on either side"—Costs of interlocutory proceedings ordered to be paid by plaintiff—Right of defendant to tax after settlement of action.

During the progress of an action several orders were made, upon interlocutory applications, that the plaintiff should pay the defendants' costs, in some cases "in any event."

The action was subsequently settled upon the terms, indorsed on the briefs of counsel, "Record withdrawn. No costs on either side," the question of the costs of the interlocutory proceedings not being present to their minds.

Held (dismissing the appeal), that after the settlement of the action the defendants were entitled to taxation and payment of their costs of the interlocutory proceedings which the plaintiff had been ordered to pay.

APPEAL of the plaintiff from an order of *Bucknill, J.* made at chambers.

The plaintiff brought this action to recover damages from the defendants for an alleged libel.

During the progress of the action there were several interlocutory applications, in chambers and in the Court of Appeal, in which the plaintiff was ordered to pay the costs of the defendants, in some cases "in any event."

Before the action was tried it was settled by the parties upon the following terms: "Record withdrawn. No costs on either side." The counsel, who came to this agreement and indorsed their briefs with the terms above stated, said that the question of the costs of the interlocutory applications was not present to their minds when they so settled the action.

The defendants applied to the master for an order to tax their costs of those interlocutory applications, but the master refused to make an order.

Upon appeal, *Bucknill, J.* at chambers made an order for the taxation of the defendants' costs of those interlocutory applications.

The plaintiff appealed.

Ernest Pollock for the appellant.—The learned judge had no power to order the taxation of these costs. The terms of settlement mean that there shall be no taxation of any costs at all of any kind; that there shall be a complete truce between the parties, and no further proceedings of any sort or kind between them. When the record is withdrawn there is nothing left in the court at all, and nothing upon which any order of any kind can be made. Therefore there cannot be any order for taxation of any costs, or any taxation of costs:

Stodhart v. Johnson, 3 T. R. 657;

Burdon v. Flower, 7 Dowl. P. C. 786.

The withdrawal of the record ought to be construed as a waiver of all claims to costs to which a party may have been entitled before the settlement. The master refused to make an order, in accordance with the well-settled practice of all the

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

CHAN. DIV.] KNIGHT v. ISLE OF WIGHT ELECTRIC LIGHT AND POWER CO. [CHAN. DIV.]

masters to refuse to tax any costs when the record has been withdrawn. [ROMER, L.J. referred to Order LXV., r. 33.]

Norman Craig, for the respondents, was not called upon to argue.

COLLINS, M.R.—It appears to me that there is no ground whatever for this appeal. During the progress of the action orders were made that the plaintiff should pay costs to the defendants, in some cases "in any event." Those orders cannot be got rid of unless the parties have clearly agreed that those costs shall not be paid. In this case it was agreed that the record should be withdrawn, and it is said that that foregoes all rights to any costs under orders previously made. In my opinion no implication arises in point of law from that agreement that it was agreed to forego such costs. In those circumstances the orders made for payment of the defendants' costs were left as they were, and the defendants have a right to have those costs taxed and paid. This appeal therefore fails, and must be dismissed.

ROMER, L.J.—I agree. Taxation of the costs under these orders follows as a matter of course when the order has been made and the proper time arrives, without any further order to tax, though I think that in the circumstances of this case it was a proper course to take to apply for an order to tax.

MATHEW, L.J.—I am of the same opinion. According to the old practice, when an order was made dismissing an application with costs, the successful party might tax his costs at once, and it could not be said that a subsequent settlement could, apart from express agreement, affect the right to such costs. In the present case the costs were not to be taxed and paid at once, but that cannot make any difference. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Pakeman and Read*.
Solicitors for the respondents, *Bompas, Bischoff, and Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 25, 26, 27, 28, Dec. 1, 5, 15, 1903, and Jan. 20, 1904.

(Before JOYCE, J.)

KNIGHT v. ISLE OF WIGHT ELECTRIC LIGHT AND POWER COMPANY LIMITED. (a)

Nuisance—Noise, vibration, and smell—Electrical works—Generating station—Injunction.

By a provisional order made under the Electric Lighting Acts, and duly confirmed by Act of Parliament, the corporation of R. were authorised to supply electrical energy for public and private purposes within the area of the borough; it being provided by the order that nothing therein should exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused or permitted by them. The corporation entered into arrangements with the defendant company for the erection, maintaining, and work-

ing of a generating station within the borough; and the defendant company, in pursuance of such arrangements, acquired as a site for the proposed works a piece of land adjoining the garden of the plaintiff's house, and proceeded to erect therein the requisite engines, dynamos, and other machinery.

The plaintiff, who occupied her house as a ladies' school, complained of various annoyances to the inmates of her establishment by noise, vibration, and offensive smells or vapours produced by the operation of the defendant company's works, and instituted an action for an injunction and damages in respect of the alleged nuisance.

The court being of opinion that the annoyances complained of were not trivial or a kind to be expected from any ordinary and reasonable use by the defendant company of the land they had acquired, and, further, that, in spite of a diminution in intensity and frequency of the annoyances complained of since the commencement of the action, yet even at the date of the trial such annoyances had repeatedly and recently recurred, an injunction and damages were granted accordingly.

ACTION for an injunction to restrain the defendant company from so working their engines and carrying on their works as to interfere with the enjoyment of certain premises occupied by the plaintiff for the purposes of her business, or so as in any way to cause annoyance, nuisance, or danger to the plaintiff or the persons inhabiting or frequenting the said premises.

The plaintiff was the lessee and occupier of a large house and garden at Ryde, in the Isle of Wight, where she had for some time been carrying on a ladies' school. The defendants had recently acquired a piece of land adjoining the school premises, and had erected thereon extensive works for the supply of electric light and energy.

The plaintiff alleged that the running of the engines and machinery used in the works caused vibration and noise which seriously interfered with the rest and repose of the plaintiff and the inmates of her house, and that the defendants also caused or permitted offensive smells of great intensity and injurious to health to be emitted from their works and to come upon the plaintiff's premises. In respect of these acts she claimed an injunction and damages.

The facts will be found more fully set out in his Lordship's judgment.

Hughes, K.C. and J. W. Manning for the plaintiff.

Younger, K.C. and J. F. Waggett for the defendants.—Even though the acts complained of by the plaintiff would ordinarily constitute a nuisance, such acts are here of a temporary character, and are due to the incompleteness of the works, and accordingly an injunction should not be granted:

Attorney-General v. Sheffield Gas Company, 3 D. G. M. & G. 304, 320, 340;

Harrison v. Southwark and Vauxhall Water Company, 64 L. T. Rep. 864; (1891) 2 Ch. 409;

Attorney-General v. Preston Corporation, 13 Times L. Rep. 14;

Attorney-General v. Cambridge Consumers' Gas Company, 19 L. T. Rep. 508; L. Rep. 4 Ch. 71, 81.

(a) Reported by STONEY DAVEY, Esq., Barrister-at-Law.

Again, there is no proof of injury to the plaintiff's property of a structural character, so that the case does not come within the law as laid down by Lords Westbury and Cranworth in *St. Helen's Smelting Company v. Tipping* (12 L. T. Rep. 776; 11 H. of L. Cas. 642, 650). They also referred to the cases of

Gaunt v. Fynney, 27 L. T. Rep. 569; L. Rep. 8 Ch. 8, 13;

Cooke v. Forbes, 17 L. T. Rep. 371; L. Rep. 5 Eq. 166;

Shelfer v. City of London Electric Lighting Company, 72 L. T. Rep. 34; (1895) 1 Ch. 287, 310, 313.

Hughes, K.C. in reply.—Although, undoubtedly, occupiers of property must all to some degree suffer slight inconveniences caused by their neighbours in the reasonable and ordinary enjoyment of their property, nevertheless an occupier, as here, is entitled to an injunction when the annoyances arise from an unusual use of property:

Fritz v. Hobson, 42 L. T. Rep. 225; 14 Ch. Div. 542, 556;

Bamford v. Turnley, 3 B. & S. 62;

Fleming v. Hislop, 11 App. Cas. 686, 697;

Ball v. Ray, 28 L. T. Rep. 346; L. Rep. 8 Ch. 467.

Even if it could be shown that the annoyances are only occasional, that is not sufficient:

Inchbald v. Robinson, 20 L. T. Rep. 259; L. Rep. 4 Ch. 388;

Lambton v. Mellish, 71 L. T. Rep. 385; (1894) 3 Ch. 163.

Cur. adv. vult.

JOYCE, J.—The plaintiff is the lessee for the residue of a term of twenty-one years from Michaelmas 1900 at a rent of 250*l.* of a house, garden, and grounds in the borough of Ryde, and she carries on there a high-class boarding school for young ladies. In 1899 the corporation of Ryde obtained a provisional order under the Electric Lighting Acts authorising them in the usual way to supply electrical energy for public and private purposes within the area of the borough. By clause 69 of that order it was provided that nothing in the order should exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused or permitted by them. This order was duly confirmed by Act of Parliament. The corporation afterwards entered into arrangements with the defendants for the erection, maintaining, and working of a generating station within the borough. In pursuance of such arrangements the defendants, in the early part of 1903, acquired, as a site for the purpose of the proposed works, a piece of land adjoining the garden of the plaintiff's house, and proceeded to erect thereon the requisite engines, dynamos, and other machinery. The engines were driven by gas produced upon the premises by a system of the character known as the Dawson process, for one of the terms under which the defendants held the site precluded them from erecting any tall chimney shaft thereon. The plaintiff's house was upon a higher level than the defendants' generating station, and there were no intervening buildings. The works were opened on the 1st Oct. 1903, and from that date, if not before, they had been supplying the energy for the production of electric light to customers. It was, of course,

hoped by the defendants and the corporation, and it was to be expected, that the demand for this supply would constantly and greatly increase, and that consequently from time to time considerable additions and extensions would have to be made to the plant and machinery at present installed upon the premises of the defendants. Before the formal opening of the works the manufacture of gas for working the engines and the machinery generally had been in operation, and in particular upon one occasion in September for a period of ninety hours the engines and dynamos were working without any intermission. The plaintiff, complaining of various annoyances to the inmates of her establishment by noise, vibration, and offensive smells or vapours produced by the operation of the defendants' works, instituted this action on the 29th Sept., claiming an injunction and damages in respect of the alleged nuisance. The action was tried upon several days during the Michaelmas Sittings, and a large body of evidence was adduced upon both sides. Having regard to the positive testimony of the plaintiff and the witnesses called by her, whose veracity and substantial accuracy there is no reason to doubt, and to the acts admitted by some of the defendants' witnesses, I consider it to have been sufficiently proved before me that at various times during September, and for not inconsiderable periods, the works of the defendants were so carried on as by noise, offensive smells, and, in some degree, by vibration to occasion a serious interference with the ordinary comfort of the plaintiff and the inmates of her house, and the carrying on of her school. There was some ground for suspecting that these annoyances, or some of them, were injurious to the health of some of the ladies in the plaintiff's house; but I do not consider that to have been established. Generally the annoyances actually experienced were not, in my opinion, trivial or of a kind to be expected from any ordinary and reasonable use by the defendants of the land they had acquired. Nor were they by any means such as would only be complained of by unreasonable or over-fastidious persons. No doubt since the commencement of the action the defendants have, by the adoption of various expedients known to mechanical engineers and men of science, and, perhaps, under pressure of these proceedings, by exercise of special care in the management, greatly diminished the intensity and frequency of the annoyances complained of. The engines and machinery are not now worked later than 11 p.m., as they were at one time. There is room for further improvement in the works, and the most skilful and careful management will always be necessary to prevent the annoyance complained of from constantly recurring. At times there is no annoyance to complain of. Still, at the date of the trial such annoyance had repeatedly and recently recurred. Even then the works were not in such perfect order, if that perfection were attainable, as to remove altogether the plaintiff's just grounds of complaint. In my opinion, subject to a question to be mentioned presently, the plaintiff had ample justification for the institution of the action, and I hold that the repeated and not merely momentary annoyances occasioned to the plaintiff by the defendants' works amounted to an actionable nuisance, unless the defendants can make out that they were in point of law

justified or to be excused. The defendants contended that they were to be so excused, and in support of that contention they relied upon the judgment of Vaughan Williams, L.J. (then Vaughan Williams, J.) in *Harrison v. South-wark and Vauxhall Water Company* (64 L. T. Rep. 864; (1891) 2 Ch. 409), where he said: "In the first place, it seems to me that, if the defendants had without statutory authority sunk this shaft and done this pumping for any lawful and ordinary purpose in the exercise of their powers as private owners of the land, they would not have been responsible as for a nuisance. It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary user of land, a considerable amount of temporary annoyance to their neighbours, but they are not necessarily on that account held to be guilty of causing an unlawful nuisance. The business of life could not be carried on if it were so. For instance, a man who pulls down his house for the purpose of building a new one no doubt causes a considerable inconvenience to his next-door neighbours during the process of demolition; but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by the works of demolition. Nor is he liable to an action, even though the noise and dust and the consequent annoyance be such as would constitute a nuisance, if the same, instead of being created for the purpose of the demolition of the house, had been created in sheer wantonness or in the execution of works for a purpose involving a permanent continuance of the noise and dust. For the law, in judging what constitutes a nuisance, does take into consideration both the object and duration of that which is said to constitute the nuisance." Now, accepting that statement of the law, it must be observed that the nuisance or annoyances complained of in the present case did not arise from acts of the nature referred to in the passage which I have read. The plaintiff had submitted to any inconvenience that arose from the mere construction of the defendants' works. What she complained of was what she had suffered, and was from time to time still suffering, from the working of the generating station, and the operations carried on, and which would continue to be carried on, there. These I hold to be not an ordinary use of the defendants' property, or in any sense reasonable, if serious annoyance is thereby occasioned to the occupiers of the adjoining house and garden. Another excuse set up was that the annoyances were only temporary and occasional. The judgment of Bramwell, B. in the leading case of *Bamford v. Turnley* (3 B. & S. 62) furnishes a sufficient answer to that. The defendants do not allege, nor has it been shown, that their works could not have been established and set permanently in operation without occasioning a nuisance if the necessary and reasonable precautions had been carefully taken in the first instance. Further, what is complained of is not by any means what happened in some cases that have been referred to, where, once in a way, for a public purpose, there was a breaking up of a portion of a road for some two or three days, after which there was an end of the matter. Upon the whole, I hold (1) that the acts complained of have from time to time, and frequently, been such as, having regard to the circumstances and

surroundings of the defendants' property, are in excess of the natural and ordinary course of enjoyment of that property; and (2) that these acts had up to the trial materially interfered with the ordinary comfort of existence of the plaintiff and her household. Consequently there must be an injunction, during the continuance of the plaintiff's lease, to restrain the defendant company, its directors, servants, and agents, from using or working, or causing or permitting to be used or worked, in or upon their generating station and other works adjacent to the plaintiff's garden, any engines, dynamos, or other machinery, or from there carrying on the manufacture of gas or any other process, in such a manner as by the production of noise, noxious or offensive smells, vibration, or otherwise to be or occasion nuisance or injury to the plaintiff as lessee or occupier of the house, garden, and premises comprised in her lease. There will also be an inquiry as to damages.

Solicitors for the plaintiff, *Beale and Payne*, for J. Robinson, Ryde.

Solicitors for the defendants, *Clarkson, Greenwell, and Co.*

March 7 and 19.

(Before JOYCE, J.)

Re GLASDIE COPPER MINES LIMITED; ENGLISH ELECTRO-METALLURGICAL COMPANY LIMITED v. GLASDIE COPPER MINES LIMITED. (a.)

Landlord and tenant—Tenant's fixtures—Removal by mortgagee after forfeiture of lease.

In June 1896 the defendant company issued debentures charging with the payment of the moneys advanced its undertaking and all its property whatsoever, both present and future.

In July 1896 the defendant company took a lease of certain premises, the lease containing a clause that, if the company should become bankrupt or insolvent or go into liquidation, the term should cease and determine and be void to all intents and purposes; and upon that there was power of re-entry.

On the 8th Feb. 1901, in a debenture-holders' action brought on behalf of the debenture-holders to enforce their charge, a receiver and manager was appointed of the undertaking of the defendant company, and of all the present property whatsoever or wheresoever comprised in or subject to the security.

On the 8th July 1903 an application was made in the debenture-holders' action that certain trade fixtures upon the premises, which were the subject of the lease of July 1896, might be sold by the receiver, and that the receiver might be at liberty to remove the same from the premises of the defendant company; and on the 24th Aug. 1903 an order was made accordingly.

On the 16th Oct. 1903 the defendant company passed an extraordinary resolution for a voluntary winding-up.

On the 13th Nov. 1903 the reversioner of the premises, which were the subject of the lease of July 1896, applied to the receiver for delivery and possession of the same.

Upon an application by the reversioner for an

(a) Reported by SYDNEY DAVEY, Esq., Barrister-at-Law.

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inquiry as to her interest in the premises and the buildings and fixtures thereon, and for delivery of possession of the premises by the receiver to the reversioner :

Held, that the interest of the receiver in the premises was not concluded by the resolution of the 16th Oct. 1903, but that the receiver still retained the right to remove the fixtures during a reasonable time.

Pugh v. Arton (20 L. T. Rep. 865; L. Rep. 8 Eq. 626) distinguished.

MOTION wherein the question was raised and determined as to whether tenant's fixtures are removable by a mortgagee of the lessee after the determination of the lease by forfeiture.

The facts will be found set forth at length in his Lordship's judgment.

A. F. Peterson for the applicant.—Tenant's fixtures must be removed during the continuance of the term, or within such time afterwards as the tenant may properly consider himself the tenant of the landlord :

Weeton v. Woodcock, 7 M. & W. 14;

Pugh v. Arton, 20 L. T. Rep. 865; L. Rep. 8 Eq. 626;

Barff v. Probyn, 73 L. T. Rep. 118.

Frank Wright (*Hughes*, K.C. with him) for the debenture-holders.—The proviso in the lease, that the term should cease and determine in the event of the company becoming bankrupt, or insolvent, or going into liquidation, only has the effect of rendering the lease void at the option of the lessor; and accordingly, if in fact a reasonable time ought to be allowed the receiver for the removal of the fixtures, that time should be taken to run from the receipt of the letter dated the 13th Nov. 1903. Now, whatever may be the rule as to the removal of tenant's fixtures generally, where there is an agreement in a lease to the effect that the tenant shall be at liberty to remove his fixtures, he will be allowed a reasonable time in which to remove the same :

Fawcett, Landlord and Tenant, p. 493.

And we submit that it is immaterial whether the agreement is in the lease or elsewhere. In this case the order made by the master was equivalent under the circumstances to an agreement by the applicant that the receiver should be at liberty to remove the fixtures. Moreover, the right of the receiver to remove the fixtures could not be prejudiced by the company's voluntarily going into liquidation. A surrender by a lessee cannot affect the rights of a third party; and accordingly a mortgagee of tenants' fixtures still retains the right to remove the same, notwithstanding a surrender, provided that he does so within a reasonable time :

Saint v. Pilley, 33 L. T. Rep. 93; L. Rep. 10 Ex. 137.

See also

Fawcett, Landlord and Tenant, pp. 460, 461.

And we submit that there is no reason why the same principle should not apply to the present case.

A. Adams, for the receiver, adopted the arguments adduced on behalf of the debenture-holders.

Peterson in reply.—The order of the master simply operates as an admission by the applicant that at the date of the order she had no interest

in the premises; it cannot be construed as an agreement by the applicant.

JOYCE, J.—The question in this case is with reference to certain fixtures—that is to say, certain articles which, though annexed to the soil, do not thereby become the property of the owner of the freehold, but are removable by the tenant. The question I have to decide is whether these articles may be removed by a purchaser or mortgagee from the lessee after the lease has been determined by forfeiture. In the month of June 1896 the defendant company (then bearing a different title) issued debentures and charged with the payment of the moneys advanced its undertaking and all its property whatsoever and wheresoever both present and future, constituting in point of fact a floating charge. Then in the month of July 1896 the defendant company took a lease from the predecessor of the present applicants; and in that lease is a clause which provides that, "if the company, their successors or lawful assigns, shall become bankrupt or insolvent, or go into liquidation, or shall not truly and faithfully and according to the true intent and meaning of these presents observe, perform, and keep all and singular the covenants," and so on, the term "shall cease, determine, and be void to all intents and purposes, but not as regards the right, power, and authority of the lessor, his heirs or assigns, to enforce the due performance of all the covenants"; and then upon that there is a power to re-enter. Subsequently there was a debenture-holders' action brought on behalf of the debenture-holders to enforce their charge, and in that action, on the 8th Feb. 1901, a receiver and manager was appointed of the undertaking of the defendant company and of all the present property whatsoever and wheresoever comprised in or subject to the security. Thereupon it is quite clear that the debenture-holders, as mortgagees, became entitled to the same rights in respect of any fixtures as the lessee had formerly possessed, and could remove the same in the same manner as the lessee had previously been entitled so to do. On the 20th June 1903 a petition to wind-up was presented; so that, if an order had been made upon that petition, there would have been a forfeiture under the terms of the lease, and the commencement of the winding-up would have been on the presentation of the petition. No order to wind-up has been made, and the petition is either still pending or has been struck out by the judge in chambers. Then on the 8th July an application was made by the plaintiffs in the debenture-holders' action that the trade fixtures in question, the boilers and engines and so on, not including any patented machinery which could only be used by the defendant company under the licence granted to them, might be sold by the receiver, and that the receiver might be at liberty to remove the same from the premises of the defendant company. That summons came before the master on several occasions, and ultimately the landlord or the representative of the landlord—I do not know whether the original landlord was dead then or not—was served; and the landlord or his representative (as the case was) appeared by a solicitor. Unfortunately the order made was not drawn up. I am not sure that it would be necessary to draw this order up, because it is an order with reference to an officer of the court; but in the presence of the solicitor of the landlord

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the summons was disposed of, and the note indorsed by the master is in these terms: "Leave to the receiver to sell the plant mentioned in paragraphs 1 (sub-sects. 1 to 6) and 2 of the said affidavit of John Bevan, filed the 20th July 1903. The landlord claims no interest in this plant. Reserves to be fixed by the receiver." That order having been made on the 16th Oct. following—the receiver, of course, being in possession—the company passed an extraordinary resolution for a voluntary winding-up. This did not terminate the lease, because, as I pointed out, or as was pointed out to me in the course of the argument, it is well settled that expressions of the kind such as there are in this lease only mean that the tenancy shall determine at the option of the lessor, that it shall be voidable and not void, and *a fortiori*, when it is added—as it is in this case—that it shall be lawful for the lessor thereupon to re-enter, it follows, where the proviso makes the lease voidable, the landlord must, in order to take advantage of it, do some unequivocal act notified to the lessee indicating his intention to avail himself of his option. After this the receiver, acting under the order of the 24th Aug., issued advertisements for the sale of the fixtures in question on the 26th Nov. In consequence of this advertisement, and knowing it had been issued, and after money had been expended towards carrying out the order, the landlord formally demanded possession on the 13th Nov., or rather the solicitor or agent wrote to the receiver as follows: "I am instructed by my client, Mrs. Vaughan, to apply to you as receiver for delivery and possession of the premises comprised in and demised by the lease, the reversion of the premises being now vested in Mrs. Vaughan under the will of her husband, the late John Vaughan." That was on the 13th Nov. On the 17th Nov. notice was given in the motion which is now before me. That was on behalf of the representative of the landlord, asking that an inquiry be made whether Mrs. Vaughan has any and what interest in the lands and mines—that is, the lands and mines demised—and the buildings and fixtures thereon taken possession of by the receiver and manager, and that directions may be given to the receiver to deliver up possession to the applicant of the said lands and mines, buildings, and fixtures, or that the applicant may be at liberty to commence proceedings against the said receiver to recover possession in the usual way, and for an injunction to restrain the receiver from going on with the sale or removing the fixtures. Now, the applicant's contention is that—the receiver not now holding the premises under a right still to consider himself as tenant (the words used in *Weeton v. Woodcock* (7 M. & W. 14) and *Mackintosh v. Trotter* 3 M. & W. 184)—the landlord was entitled to re-enter, and that the interest of the receiver and debenture-holders is at an end. Upon those two cases and that rule, I observe that Thesiger, L.J. in *Ex parte Brook* (39 L. T. Rep. 458; 10 Ch. Div. 100) says: "It is not easy to define precisely what was meant by the propositions to which we have just referred, and we observe that, as regards the rule laid down in *Weeton v. Woodcock*, the difficulty which we feel in understanding its exact meaning was shared in by the Court of Common Pleas, as stated by Willes, J. in delivering the judgment of that court in *Leader v. Homewood*

(5 C. B. N. S. 546)"; and he goes on to say: "It may be that in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in the case where an interest of uncertain duration comes suddenly to an end and the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures and to remove them with his goods and chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture and the tenant remains on the premises for such reasonable time as last referred to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy." Then he says the case before them is a different case, and that, at all events, the rule does not apply to that case. Now, for the purpose of determining the question here, it appears to me that I have not to decide whether—as is stated in some of the books, or as suggested by North, J. in *Cumberland Union Banking Company v. Maryport Hematite Iron and Steel Company* (66 L. T. Rep. 108; (1892) 1 Ch. 415)—no property at all in the fixtures vests in the landlord until the term comes to an end, or whether the property in the fixtures does *sub modo* vest in the landlord when they are affixed and the tenant retains only a power coupled with an interest. However this may be, it is well settled that where the tenant, the lessee, surrenders his interest to the landlord, that does not deprive the mortgagees or purchasers of the rights they then possessed (the previous purchasers of course) in reference to fixtures situated such as these are, and that they still retain the right to remove them during a reasonable time. The authorities for that are *London and Westminster Loan and Discount Company v. Drake* (6 C. B. N. S. 798) and *Saint v. Pilley* (33 L. T. Rep. 93; L. Rep. 10 Ex. 137); and there are also other cases. Here the passing of the extraordinary resolution was a voluntary act on the part of the lessees in which the mortgagees did not concur, and therefore the passing of such resolution, in my opinion, cannot vest the absolute property in chattels belonging to a mortgagee in the reversioner or take away the purchaser's power to remove any more than such power or such right (whatever it may be) would be taken away in the case of the surrender of a lease by the lessee. I was properly pressed with the case of *Pugh v. Arton* (20 L. T. Rep. 865; L. Rep. 8 Eq. 626), before Malins, V.C., where it was held, according to the marginal note, that "in the absence of special contract, tenants' fixtures cannot be removed after the termination of the lease, and this rule applies whether the lease determines by effluxion of time or by re-entry on forfeiture." In my opinion, that marginal note goes beyond the decision, and is not in accordance with the law. That may be very true so far as concerns a power to remove by the tenant himself, though I trust the Court of Appeal, whenever the case comes to be discussed there, will come to a different conclusion. But, at all events, this only concerns the tenant himself, and has nothing to do with the case of a mortgagee or purchaser from the tenant before the forfeiture accrues; and in this particular case of *Pugh v. Arton* the person who was claiming the fixtures and whose claim was disallowed was a person whose only

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claim was as a volunteer, and it was under and by virtue of the assignment from the lessee, which assignment was in itself the act of forfeiture. In my opinion, the authorities enable me to decide this case in a way which is consonant with reason and justice, and I hold that the mortgagees, the debenture-holders, have a reasonable time within which to remove these fixtures.

Solicitor for the applicant, *W. Wilding Jones*.

Solicitors for the plaintiff company, *Goldberg, Barrett, and Newall*.

Solicitors for the receiver, *Godden, Son, and Holme*.

KING'S BENCH DIVISION.

Monday, Feb. 22.

(Before CHANNELL, J.)

PARKER v. LONDON COUNTY COUNCIL. (a)

Public authority—Limitation of action—Tramway acquired and worked by county council under statutory powers—Public Authorities Protection Act 1893 (56 & 57 Vict. c. 61), s. 1.

The London County Council by two private statutes were empowered to acquire and work a certain tramway.

An accident having happened to a passenger on one of the tramcars owing to the alleged negligence of the council or their servants:

Held, that the action must be commenced within six months, as sect. 1 of the Public Authorities Protection Act 1893 applied.

POINT of law raised on the pleadings.

The action was brought by the plaintiff to recover damages for personal injuries suffered while he was a passenger on a tramcar, owing, it was alleged, to the negligence of the defendants or their servants.

The accident happened on the 16th June 1902, and the writ in the action was issued on the 12th Jan. 1903.

The tramway upon which the accident occurred was acquired from the London Tramways Company by the London Tramways Company Act 1896 (59 & 60 Vict. c. clxxxix.), and power was conferred upon the defendants to work the same by the London County Tramways Act 1896 (59 & 60 Vict. c. li.).

For the purpose of the argument it was admitted that the accident happened in the course of the working of the tramway.

It was contended by the defendants that the action was barred by the Public Authorities Protection Act 1893 (56 & 57 Vict. c. 61), as it was not commenced within six months.

By that statute it is provided by sect. 1:

Where, after the commencement of this Act, any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect: (a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

Moses for the plaintiff.—The question raised here is whether the Public Authorities Protection Act 1893 will avail the defendants when they are acting in the capacity as carriers of passengers and the proprietors of tramways. I submit that *quid* carriers of passengers they are not entitled to set up this statute. In *Carpue v. London and Brighton Railway Company* (5 Q. B. 747; D. & M. 608) the company by their Act, 7 Will. 4 & 1 Vict. c. cxix., were empowered to make the railway, to provide accommodation for the conveyance of passengers, and to make charges for such conveyance. It was further provided "that no action, suit, or information, or any other proceeding of what nature soever, shall be brought, commenced, or prosecuted against any person or corporation for anything done or omitted to be done in pursuance of this Act, or in the execution of the powers or authorities or any of the orders made, given, or directed in, by, or under this Act, unless twenty days' previous notice in writing has been given." An accident having happened owing to a carriage having been thrown off the rails and the plaintiff injured, it was held that no notice of action was necessary, the company being sued in their capacity of carriers and not for anything done or omitted under the special authority of the Act. He also referred to

Palmer v. Grand Junction Railway Company, 4 M. & W. 749.

[CHANNELL, J. — The point seems to be this, whether when a statute empowers a public body such as this to carry on what is really a trading enterprise, the empowering them to do it thereby preventing it being *ultra vires* makes what they do things specified to be done in the execution of the Act.]

Doldy for the defendants.—These tramways were acquired by the county council out of the rates. They were equipped out of the rates and any liability for an accident must be met out of the rates. The defendants are, therefore, under a public duty with regard to the management of these tramways. He referred to

Ambler and Sons v. Bradford Corporation, 87 L. T. Rep. 217; (1902) 2 Ch. 585;

Chamberlain and Hookham Limited v. Bradford Corporation, 83 L. T. Rep. 518.

These cases show that if the work done by the public authority was the execution of a public duty or authority, negligence in carrying out that work would be within the protection afforded by the statute. He referred to

The Tramways Act 1870 (33 & 34 Vict. c. 78), s. 43;

London County Council Tramways Act 1896 (59 & 60 Vict. c. li.);

London Tramways Act 1896 (59 & 60 Vict. c. clxxxix.).

Under those Acts the defendants have power both to purchase and work these tramways. He referred to

Attorney-General v. Margate Pier and Harbour Company, 82 L. T. Rep. 448; (1900) 1 Ch. 749;

The Ydon, 81 L. T. Rep. 10; (1899) P. 236;

Markey v. Tolworth Isolation Hospital, 83 L. T. Rep. 28; (1900) 2 Q. B. 454.

There is a case in which the London County Council in exercising their tramway powers were

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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treated as being within the protection of the Public Authorities Protection Act 1893. It is the case of *North Metropolitan Tramway Company v. London County Council* (78 L. T. Rep. 711; (1898) 2 Ch. 145). It was there held that the London County Council acting under their tramways Acts were entitled to have their costs taxed as between solicitor and client because they came within the statute. He also referred to

Smith v. Northleach Rural District Council, 85 L. T. Rep. 449; (1902) 1 Ch. 197;

Edwards v. St. Mary, Islington, 60 L. T. Rep. 725; 22 Q. B. Div. 338;

Carey v. Bermondsey Borough Council, 67 J. P. 447.

The defendants here in working these tramways, having regard to the private Acts to which I have referred, are under a public duty and are exercising a public authority. This failure—though it be a failure on the part of the driver of the tram—is just as much a neglect or default in the execution of such duty or authority as if the defendants had themselves neglected to provide a competent driver to drive the tram.

Moses in reply.

CHANNELL, J.—For a considerable portion of this argument I was inclined to think that there were grounds upon which I could decide this point in favour of the plaintiff; but I have now come to the conclusion that the matter is really concluded by authority, and that, whatever my opinion upon it may be, I am bound on the point that has been argued before me to give judgment for the defendants. Now, the facts are these: The London County Council have obtained under the combined operations of, I think I may say, several Acts of Parliament the power to acquire, and when acquired to work, certain tramways, and in particular a tramway somewhere in Tooting upon which this accident occurred, and the plaintiff brings his action in respect of an accident happening to him when a passenger upon the tramway. I think the negligence is alleged against the drivers of two tramcars. Now, the question is whether that is an action to which the protection of the Public Authorities Protection Act applies. The case of *Attorney-General v. Margate Pier and Harbour Company* (sup.), before Kekewich, J., shows, if it were necessary, and I think there are many other authorities which will show it also, that a tramway company would have no such protection; they would be a commercial carrying company just as a railway company does a business in which in one sense the public are to a certain extent interested in, because it is a public business. But it does not make them persons acting in the execution of statutory or other public duties when they are carrying on that business, although the public are interested in it. Here it is what I may call a municipal body that is carrying it on and the general principle in reference to matters that have to be paid for out of the rates is that each body of ratepayers for the time being should bear its own burdens, and that they should not be borrowing money without authority and putting the burden unfairly on posterity, nor should they leave their own things unpaid for in their own time in order that they might be paid for in after years. That is the reason why the Legislature may have given this sort of protection to anybody administering

the rate; but I do not find anything of that sort in the words of the Act of Parliament, and although that may be a very good and practical reason why it should have been done, I myself do not go on that. In point of fact I think the Legislature, when they passed this Act of Parliament, was not contemplating the case of a municipal body carrying on a commercial enterprise at all. The question is, What is the effect of the words that they have used? Now, here the complaint is negligence in the course of working the tramway. I should have been inclined myself, but I think now I should have been wrong, no doubt, because I find that the contrary has been laid down by other learned judges, to have said that, although the municipal body might have the protection of this Act of Parliament in reference to matters which they did in the course of the construction of the works of making a tramway, or of laying down pipes, or interfering with the road for the purpose of doing either of those things, they would not have the protection of the Act merely in carrying on the work itself afterwards. It would not have been within these words "neglect or default in the execution of such duty or authority" merely because the act which they were doing was an act which would have been *ultra vires* unless there had been statutory authority for that body to do it. As I have said, I thought there was a great deal in that argument myself, but when I looked into the cases, a good many of which have a more or less indirect bearing upon it, to which I have been referred by Mr. Daldy, there is this particular case of *The Ydon* (81 L. T. Rep. 10; (1899) P. 236). It was an Admiralty case, and the municipal corporation had become a harbour authority, and had acquired the statutory power to take tolls, and their harbour master had been negligent, and his negligence had caused damage to a ship. The exact point that I have been considering was argued there, and the President in giving judgment said: "I cannot doubt that the corporation of Preston in carrying out under statutory authority its enterprise of the Ribble navigation, a water highway to Preston, acts as a public authority exercising a public duty as much as when it makes or maintains the land highways within the ambit of the municipality. I think, further, that the point is covered by authority." Then he refers to *Harrop v. Mayor of Ossett* (78 L. T. Rep. 387; (1898) 1 Ch. 525), *North Metropolitan Tramways Company v. London County Council* (78 L. T. Rep. 711; (1898) 2 Ch. 145), and *Fielding v. Morley Corporation* (79 L. T. Rep. 231; (1899) 1 Ch. 1), which he says "are instances in which this Act was held to apply to municipal corporations carrying out works outside the scope of strictly municipal duties. An endeavour was made before me to distinguish those decisions on the ground that they apply to the construction of works and not to the carrying out of a business by contract with private individuals. But I see no ground for this distinction. Whether a corporation is constructing a work or using it, whether, for example, it is building an aqueduct and laying pipes from it or supplying a consumer from the aqueduct by means of the piping, it appears to me to be equally engaged in executing the duties imposed upon it by Act of Parliament, and, though it may be asked why a corporation so acting should

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receive privileged advantages in litigation, I cannot doubt that the Act in question has conferred them." Now, that is the exact point in this case, and it was so held by the President of the Admiralty Division in that case. The case went to the Court of Appeal, and in that court the same arguments were addressed to the court by Mr. Robson, K.C., Mr. Carver, K.C. and Mr. Stokes, the counsel for the plaintiffs, and their argument was repeated to the effect that there was a distinction between the carrying on of works and the construction of them, but the Court of Appeal decided against them. Their Lordships do not in their judgment go fully into that particular distinction that was taken, but it must have been present to their minds, because it is put forward clearly in the arguments, and they decided that in a proceeding to recover damages for the negligence of the harbour master in admitting the ship into the harbour when there was not sufficient water for her, that that was a matter in which the municipal corporation were entitled to the protection of the statute, and it seems to me that that is a decision on the only point in regard to the matter on which I had any real doubt. The authorities to which Mr. Moyses has referred me are rather old. There are, of course, some points of law with regard to which the older the authority is the better, but in regard to some other points that is not so, and, with regard to these points about notice of action, statute of limitations, and public duties, and so on the law has been considerably altered within the last sixty years, I do not think anyone can doubt that, and, consequently an authority sixty years old is not so reliable as one in 1899. In that case there was an action brought against what was undoubtedly a trading company, and, according to the modern decisions, that would not have brought them within the protection of this Act of Parliament any more than if it came within the protection of the old Act of Parliament which was in existence at that time. I think, therefore, that I cannot regard that as an authority which prevents my acting on, or justifies me in not acting on, the recent authority in the Court of Appeal. On these grounds I think that I must hold that the defendants are entitled to the protection of this statute.

Judgment for the defendants.

Solicitors: Henry L. Sydney; W. A. Blazland.

Thursday, March 3.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

JACKSON (app.) v. WIMBLEDON URBAN DISTRICT COUNCIL (resps.). (a)

Public health—Drain on private ground—Draining several houses—Drain or sewer—"Single private drain"—Public Health Act 1875 (38 & 39 Vict. c. 55) s. 41—Public Health Acts Amendment Act 1890 (53 & 54 Vict. c. 59) s. 19.

J. was the owner of twelve houses, at the rear of which runs a main or common drain with which each of the houses connects.

The sewage is conveyed from the main or common

drain through a branch drain into the public sewer.

The sewage of four other houses, belonging to two other owners, is conveyed by the main or common drain, which also runs at the rear of those four houses, into the said branch drain.

Both the main or common drain and the branch drain are constructed wholly on private property, and it was admitted that the branch drain was a "single private drain" within the meaning of sect. 19 of the Public Health Acts Amendment Act 1890.

Held, that the main or common drain running at the rear of J.'s houses was a sewer and was not a "single private drain" within sect. 19 of the Public Health Acts Amendment Act of 1890.

CASE stated on the hearing of a summons preferred by the respondents against the appellant for that he, the appellant, did on the 29th April 1903, or on some day or days within six months then last past, make default in payment of the sum of 35*l.* 1*s.* due and owing from the appellant to the respondents, being the amount of expenses incurred by the respondents in the execution of certain works in relaying the main drain at the rear of Nos. 51 to 73 (odd numbers), Hartfield-crescent, Wimbledon, and also did make default in payment of 13*l.* 7*s.* 5*d.*, being a proportion of the expenses incurred by the respondents in the execution of certain works in re-laying a single private drain, connecting No. 73, Hartfield-crescent and a certain other house, No. 75, Hartfield-crescent, belonging to a different owner, with a certain public sewer.

On the north side of Hartfield-crescent, in the respondents' district, are sixteen houses, numbered with odd numbers from 51 to 81, both inclusive. The appellant is the owner of twelve of the houses—namely, the houses numbered 51 to 73 inclusive. One Holliday is owner of the house No. 75, and a Mrs. Eysoldt is the owner of the three houses Nos. 77, 79, and 81.

At the rear of the sixteen houses runs a main or common drain, which is connected with the public sewer in Hartfield-crescent by a branch drain, which runs between the house numbered 73 and the house numbered 75 at about right angles to the road, under a narrow piece of land between the two houses, which is unbuilt upon. Each of the sixteen houses connects with the main drain or common drain by means of branch drains, which convey the sewage from each of the houses to the main or common drain, and thence through the branch drain into the public sewer in the Hartfield-crescent.

The plan set out below formed part of the case.

The main or common drain, from D to C, and the branch drain, B to A, are constructed wholly upon private property.

Part 3 of the Public Health Acts Amendment Act 1890, which includes sect. 19 of the Act, has been adopted in the respondents' district.

On the 26th Nov. 1902 a written application was made by certain persons to the respondents acting as the local authority under the Public Health Act 1875, stating that the drains on or belonging to the premises Nos. 77 to 85 (odd numbers) inclusive, Hartfield-crescent, were a nuisance and injurious to health, and requesting the respondents,

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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in pursuance of the provisions of the Act, to empower their surveyor or inspector of nuisances to enter the premises with or without assistants, and cause the ground to be opened and examined after due notice to the occupiers of such premises.

Acting in pursuance of sect. 41 of the Act, the respondents, as such local authority, did, on the 10th Dec. 1902, by writing, empower their inspector of nuisances, after twenty-four hours' written notice to the occupiers of the premises, and such other premises as might be by him found necessary, to enter such premises with or without assistants and cause the ground to be opened and examine such drains.

In pursuance of such authority, the inspector of nuisances did open up the drains—namely, the drains at the rear of Nos. 77 to 85 (odd numbers) inclusive, Hartfield-crescent—after giving twenty-four hours' due notice to the occupiers of such premises, and upon such examination found that it was necessary for the drain at the rear of Nos. 75 and 51 to 73 (odd numbers) inclusive, Hartfield-crescent, to be also opened up and examined. Being empowered by the respondents to open up such other drains, the inspector, after due notice to the occupiers of Nos. 75 and 51 to 73 (odd numbers) inclusive, Hartfield-crescent aforesaid, did enter such premises and open up such drains.

The whole of the main or common drain appeared to be in a bad condition and to require alteration and amendment, and the inspector duly represented such fact to the respondents. The respondents, acting upon such representation, forthwith caused notice in writing to be given to the owners or occupiers of the sixteen houses, requiring them forthwith or within a reasonable time therein specified to do the necessary works.

The owners of the premises Nos. 75, 77, 79, and 81, Hartfield-crescent duly executed the works required by the respondents to their satisfaction so far as such works affected the main or common drain at the rear of their premises, but made default in executing the works required to the branch drain between the points A and B on the plan.

The appellant, as the owner of the houses Nos. 51 to 73 (odd numbers) inclusive, Hartfield-crescent, did not comply with such notice, but made default in executing the works so required to be done to the branch drain A and B, and the main or common drain between the points B and C, and the respondents duly executed such works, and their surveyor duly made an apportionment of the expenses of such works by apportioning the expense of the branch drain A and B amongst the owners of the sixteen houses—namely, upon the appellant in respect of his ownership of the houses Nos. 51 to 73 (odd numbers) inclusive, upon Holliday in respect of the ownership of the house No. 75, and upon Mrs. Eysoldt in respect of her ownership of the houses Nos. 77, 79, and 81, and also apportioned the cost of the works executed to the main or common drain at the rear of 51 to 73 (odd numbers) inclusive upon the appellant.

The appellant did not, within the required statutory period of three months, dispute such apportionment, and the same has now become binding and conclusive.

Formal demand was duly made by the respondents acting as the local authority on the appellant for payment of the sum of 35*l.* 1*s.*, being the amount of the apportionment in respect

of the works executed to the main or common drain at the rear of 51 to 73 (odd numbers) inclusive, Hartfield-crescent, shown as between the point marked B and C on the plan, and the sum of 13*l.* 7*s.* 5*d.* as his proportion of the expenses of the works executed to the branch drain shown as between the points A and B on the plan.

The appellant made default in complying with such demand, and the respondents, on the 8th Aug. 1903, duly laid their complaint.

There was no dispute between the parties as to the amounts claimed by the respondents, and for the purpose of this case they were to be taken as agreed.

By sect. 41 of the Public Health Act 1875 it is provided that:

On the written application of any person to a local authority stating that any drain, water-closet, earth-closet, privy, ash-pit, or cesspool, on or belonging to any premises within the district, is a nuisance or injurious to health (but not otherwise), the local authority may by writing empower their surveyor or inspector of nuisances, after twenty-four hours' written notice to the occupier of such premises, or in case of emergency without notice, to enter such premises with or without assistants, and cause the ground to be opened and examine such drain, water-closet, earth-closet, privy, ash-pit, or cesspool. If the drain, water-closet, earth-closet, privy, ash-pit, or cesspool on examination is found to be in proper condition, he shall cause the ground to be closed and any damage done to be made good as soon as can be, and the expenses of the works shall be defrayed by the local authority. If the drain, water-closet, earth-closet, privy, ash-pit, or cesspool on examination shall appear to be in bad condition or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring to forthwith or within a reasonable time therein specified to do the necessary works, and if such notice is not complied with the person to whom it is given shall be liable to a penalty not exceeding 10*s.* for every day during which he continues to make default, and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses.

By sect. 4 of the Public Health Act 1875:

"Drain" means any drain of and used for drainage of one building only or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed.

"Sewer" includes sewers and drains of every description except drains to which the word "drain" interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act.

By sect. 19, sub-sect. 1 of the Public Health Acts Amendment Act 1890 it is provided that:

Where two or more houses belonging to different owners are connected to a public sewer by a single private drain an application may be made under sect. 41 of the Public Health Act 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or in case of dispute by a court of summary jurisdiction.

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And by sub-sect. 3 it is provided that:

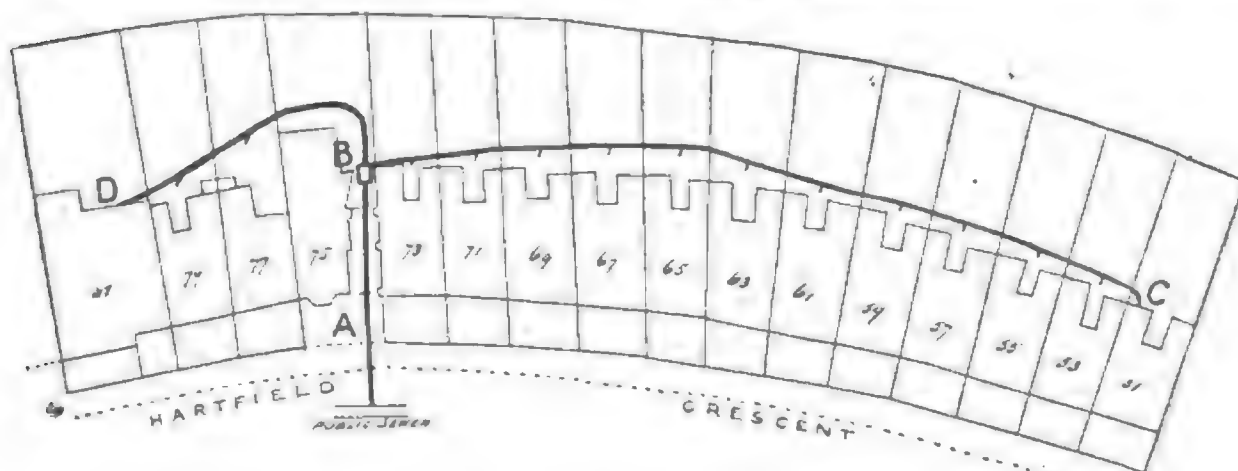
For the purposes of this section the expression "drain" includes a drain used for the drainage of more than one building.

The question for decision was whether, having regard to all the facts, the main or common drain, B to C, used for the drainage of houses Nos. 51 to 73 (odd numbers) inclusive, all of which houses belonged to the appellant, was a single private drain within the meaning of sect. 19 of the Public Health Acts Amendment Act 1890.

At the hearing it was admitted on behalf of the appellant that the branch drain, A to B, was a "single" private drain within the meaning of sect. 19 of the Act of 1890, but it was contended on his behalf that the main or common drain, B to C, was a sewer within the meaning of sect. 4 of the Public Health Act 1875, and not a single private drain connecting two or more houses belonging to different owners with a public sewer within the meaning of sect. 19 of the Act of 1890.

The following cases were cited in support of these contentions:

Travis v. Uttley, 70 L.T. Rep. 242; (1894) 1 Q. B. 233;



A to B.—Branch drain from houses belonging to Mrs. Eysoldt (77 to 81), Mr. Holliday (75), and Mr. Jackson (51 to 73).

B to C.—Drain from Mr. Jackson's houses.

B to D.—Drain from Mrs. Eysoldt's and Mr. Holliday's houses.

Sylvain Mayer for the appellant.—It is contended by the respondents that B to C is a single private drain within sect. 19 of the Public Health Acts Amendment Act 1890. It is really a sewer, for, so far as this portion of the main or common drain is concerned, it does not connect two or more houses belonging to different owners with the public sewer. It is not, therefore, a single private drain within the meaning of that section. Sect. 4 of the Public Health Act 1875 is also in my favour. If the contention of the respondents is correct there would be no sewers left. He referred to

Bradford v. Mayor of Eastbourne, 74 L.T. Rep. 762; (1896) 2 Q. B. 205;

Reg. v. Mayor of Hastings, 75 L.T. Rep. 377; (1897) 1 Q. B. 46.

Macmorran, K.C. (*George Humphreys* with him) for the respondents.—Apart from the Public

Self v. Hove Commissioners, 72 L.T. Rep. 234; (1895) 1 Q. B. 685;

Bradford v. Mayor of Eastbourne, 74 L.T. Rep. 762; (1896) 2 Q. B. 205;

Kershaw v. Taylor, 73 L.T. Rep. 274; (1895) 2 Q. B. 471;

Holland v. Lazarus, 66 L.J. 285, Q. B.

On behalf of the respondents it was contended that it was necessary to have regard to the entire system of drainage discharging into the public sewer at the end of the branch drain nearest the public sewer, marked A, and that such system of drainage comprehends the drainage of the whole of the sixteen houses, Nos. 51 to 81 (odd numbers) inclusive, Hartfield-crescent, which houses belong to different owners, and form, in fact, one entire drain connecting the whole of the sixteen houses with the public sewer, and that, therefore, the main or common drain, D to C, behind all the sixteen houses, and the branch drain, B to A, are capable of being dealt with under sect. 19 of the Public Health Acts Amendment Act 1890 as a single private drain within the meaning of that section. *Seal v. Merthyr Tydfil Urban District Council* (77 L.T. Rep. 303; (1897) 2 Q. B. 543) was cited on behalf of the respondents.

The justices decided in favour of the contention of the respondents.

Health Acts Amendment Act 1890, the entire system is a system of sewers. That statute did not alter what was a drain or a sewer, but merely made the owners liable for the repairs to a "single private drain" which connected two or more houses belonging to different owners with a public sewer. For the purposes of sect. 19 of the Act of 1890 a "drain" includes a drain used for the drainage of more than one building, and so for that purpose a sewer may be a "drain." He referred to

Bradford v. Mayor of Eastbourne (*sup.*), judgment of Wille, J., at p. 215.

The facts of this case would lead to an absurdity unless the contention of the respondents is the right one. There cannot be a sewer leading into a single private drain and then into a sewer. These drains are made by the statute single private drains because they are on private ground,

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and the public authority cannot get at them. The case of *Reg. v. Mayor of Hastings (sup.)* is not in point, and the decision there does not affect this case.

Mayer in reply referred to

Seal v. Merthyr Tydfil Urban District Council, 77 L. T. Rep. 303; (1897) 2 Q. B. 543.

LORD ALVERSTONE, C.J.—I hope that the day will arrive when no question can arise as to what is a sewer and what is a drain. Really, the difficulty of dealing with these questions is such, and the courts have had such difficulty that one does hope that something may be done in the way of a declaratory Act or an amending Act to put these questions beyond the range of discussion. The difficulty probably arises, and the difficulty in legislating probably arose, from the fact that here you are applying modern provisions as to sanitation and repairs of drains to old methods of drainage that have been built up under all kinds of systems. Now, the main proposition for which Mr. Macmorran contends is this: Once get sect. 19 of the Act of 1890 to apply, you are entitled to go back to the end of all the drains and sewers—for this purpose I will call them drains so as not to beg the question—that connect with your private drains, and to bring them all within the purview of sect. 41 of the Act of 1875. I think stated in that way the proposition goes too far. I have had a great deal of trouble in this case by reason of the fact that it is admitted that from A to B is a single private drain within sect. 19, and therefore in respect to that part of it, at any rate, proceedings could be taken under sect. 41. But I think that the main contention of Mr. Macmorran goes too far. It does not follow that you can be entitled to go to the end of every pipe and say that they are all of them private drains because they happen to connect. One can put a number of cases, although I do not know that very much light is thrown by trying to put cases. But it does seem to me, to take one case, that if that were so, a person who was in possession of an undoubted sewer, or through whose land there went a sewer, the obligation of repairing such sewer having fallen upon the local authority, might be deprived of those rights by the action of third persons without his consent at all. Therefore I think the proposition is too wide. Under these circumstances what is the real question we have to decide? From C to B, it is admitted, would be a sewer within the meaning of the Public Health Act 1875 if it had discharged into a sewer at the point B, or if it had been connected by a pipe (which was not a single private drain) which ran from the point B into the sewer. At first I was inclined to think it was difficult to contend that a sewer could communicate with a single private drain, but, after the consideration this case undergone and the argument that has been addressed to us, I think that that view of mine was not well founded and went too far. The scheme, as far as one can see there is a scheme of legislation, originally provided that where there was a drain which drained more than two houses or more than two buildings within the definition (sect. 4 of the Public Health Act 1875) it became a sewer because it was not a drain. I can well imagine that there may be a structure, as in this case, dealing with a long row of houses as to which it could not be denied that

they would be sewers. They do in fact empty on both sides in this case into that which, for this purpose, must be taken as being a single private drain. I do not think that the admission of a single private drain ought to be construed as being an admission that the whole of it is a single private drain, because whatever may have been the reasons for the admission, or however it came to be made, the point was distinctly raised that from C to B was a sewer. Does sect. 19 of the Act of 1890, which enables the local authority to apply sect. 41 of the Act of 1875, involve the proposition and enable one to say that, because that you find that there is a single private drain, the connections with that must be part of the single private drain, and are to be so regarded? As I have already pointed out, that might involve the loss of rights and the change of obligations which undoubtedly existed prior to the Act of 1890, and it would require clear and distinct words in order to bring about that result. The words of sect. 19 are: "Where two or more houses, belonging to different owners, are connected with a public sewer by a single private drain." I am fully conscious of the difficulty of understanding what was meant by a single private drain, having regard to the fact that if a drain does drain two houses it would become a sewer by virtue of the Public Health Act 1875. But at the same time the Legislature, I think, certainly did not mean to sweep away the distinction between a drain and a sewer for all purposes in that particular case, nor does Mr. Macmorran contend that. He says that for some purposes the distinction will remain. If it deals with nuisance and repair, I do not know what there is substantial left beyond ventilation, which Mr. Macmorran referred to. At any rate, it seems to me that the purview of the section is to confine the operation of sect. 41 to that which is a single private drain, and I point out that in the case which has been of great assistance to us and which certainly discussed the matter more carefully than any other case that I know—I mean the case of *Bradford v. Mayor of Eastbourne* (74 L. T. Rep. 762; (1896) 2 Q. B. 295)—it was not contended in the case, nor was it any part of the decision, that the obligations and rights extended to more than that it was a single private drain in fact. It was not any part of that decision to decide that that which was connected with a single private drain must of necessity have been a single private drain itself, or part of it. I cannot help thinking that the language of the most careful judgment (if he will permit me to say so) of my brother Wills rather excludes the idea that the matter was in any way considered by the court beyond the particular question as to what was the meaning of "a single private drain" under sect. 19 of the Act of 1890. Therefore I think that we are entitled, notwithstanding the admission, to say that that which was a sewer may still remain to be a sewer, and that the fact that it connects with a single private drain does not make a difference. It would have been a sewer had it connected with the main sewer by means of that which was itself a sewer, or by a continuation of its own pipe. I do not think the fact that it does happen to pour out into a single private drain between the points A B, and thereby gets to the sewer, makes any difference for the purpose of deciding what is the character

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of the pipe which runs from C to B. Of course, in this case Mr. Macmorran says you find a private drain; you find the different owners, and therefore a case under sect. 19 arises. I think that is perfectly true so far as the portion of the pipe or conduit is concerned which is found to be a single private drain into which the other drains or sewers may connect; but I can see no reason why a sewer should not connect with the single private drain and then with another sewer. For these reasons, which I admit are difficult to express clearly, having regard to the difficulty of the subject, I have come to the conclusion that the magistrates were wrong in coming to the conclusion that the portion of the drain or conduit between C and B was a drain within the meaning of the Public Health Act and not a sewer; and that this appeal ought to be allowed.

WILLS, J.—I have come to the same conclusion, though with considerable difficulty, because it seems to me that to reconcile sect. 19 of the Act of 1890 with the general legislation on this subject is a work of extreme difficulty. The court of which I was a member attempted to do it in the *Eastbourne* case, and I think, so far as the *Eastbourne* case was concerned, the attempt was not altogether unsuccessful. But now it comes to be applied to a different set of circumstances, and that brings one to a fresh difficulty and one as to which the considerations of policy appear to me to be pretty evenly balanced; so there is a very great difficulty in saying that there is any particular reason why one should incline to one class of construction rather than another for reasons of public convenience or general policy. What appears to me to be the determining factor really is that when you come to look at sect. 19 and suppose that it does apply to what has happened in this case, the facts which are disclosed in this case would seem to, *prima facie*, bring us to say that this was a case in which—under certain circumstances, at all events—sect. 19 might apply, because there are two or more houses which belong to different owners—namely, those on the right-hand side and those on the left-hand side of the passage-way through which A to B is carried. They are connected with the public sewer by that single private drain A B, and then one has got to see when that is granted what the consequences are those being the facts. The consequences are that application may be made under sect. 41 of the principal Act, and, when you return to sect. 41, I think it is very clear that the drain in respect of which complaint is to be made and the drain in respect of which the local authority has the power of calling upon the owner to do the work, and may do it themselves if the owner does not do it, is the same in each case. If that is the case, then, inasmuch as the obstruction did not lie between A and B, sect. 41 would not apply. There seems to be a certain sort of intelligent groundwork for such a view in this consideration, that if the obstruction does arise between A and B, generally speaking, it is almost impossible to say which of the various effluents which meet in A and B is the one that does the mischief, and therefore it is reasonable enough that the expense of putting things right should be shared amongst all the people who use A and B. That, of course, does not apply when

you are dealing with B to C, because from B to C the other houses which are necessary to bring in the operation of sect. 19 of the Act of 1890 do not come in at all, and because, excepting for the purposes of sect. 19, from B to C is undoubtedly a sewer. I do not say that these reasons are satisfactory. I very much doubt whether completely satisfactory reasons could be given for any decision any way upon any question almost of those which have come under my notice under this sect. 19; but I think, upon the whole, for the reasons which I have mentioned, that the decision which my Lord has announced is the correct one.

KENNEDY, J.—I think so too. I quite agree that it is very difficult to come to any satisfactory solution of the difficulties which are presented on one side or the other in connection with this case; but it seems to me that the least difficult is the one which my Lord has presented. I will only add just this: The section which is invoked by the respondents here is sect. 19 of the Public Health Acts Amendment Act 1890. To what does that relate? To put it shortly, it relates to the rights or duties of repairing and of bearing expense connected with a single private drain which connects two or more houses belonging to different owners with a sewer. Does any portion of B to C—that is what we have got to deal with—fulfil that condition? Clearly not. B to C is a complete length, which would be a sewer and repairable by the public authority for the whole distance, because it is a length of conveyance of sewage—to avoid the words “drain” and “sewer”—not from different owners but from the same owner. Does A to B satisfy it? I think myself it does, and no question arises as to A to B. There from B to A you have got the different owners; you have got them connected by what certainly may be described as a single private drain. Does the fact then that A to B may be a single private drain and does collect from houses owned by different persons, carry with it, so to speak, the right to treat as a single private drain within the section a tract, I will call it, or a range of drainage which clearly does satisfy it, and the connection of which at B is one of the elements, but one which by itself would be insufficient to make A B a single private drain. A B only becomes a single private drain because of the connection with different houses which is involved in the connection of B not only with B C, but with B D. It seems to me that that is the most simple because the most natural explanation of the words, and also the one which on the whole least conflicts with the consideration that arises from the fact that this is an amending Act, and has to be read with the provisions of the earlier legislation, which undoubtedly did protect the private owner in respect of these things.

Appeal allowed.

Solicitors: W. W. Young, Son, and Ward;
R. H. S. Butterworth.

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REID v. MACBETH AND GRAY.

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House of Lords.

March 3 and 4.

(Before the LORD CHANCELLOR (Halsbury),
Lords MACNAGHTEN, DAVEY, ROBERTSON,
and LINDLEY.)

REID v. MACBETH AND GRAY. (a)

ON APPEAL FROM THE FIRST DIVISION OF
THE COURT OF SESSION IN SCOTLAND.

*Sale of goods—Materials for ship in course of
construction—Bankruptcy of shipbuilder—
Property in goods.*

A firm of shipbuilders contracted to build a ship for the respondents, to be classed 100 A 1 at Lloyd's, and built under their superintendence. The contract contained a clause to the effect that "The vessel as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building yard, workshop, river, or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase money." The contract further provided that in default of delivery it should be competent for the owners to take possession of the vessel, and of all materials intended for her, and to complete her themselves. Before the vessel was completed the shipbuilders became bankrupt. At the date of the bankruptcy there was in the shipbuilding yard a quantity of plates intended for use in the construction of the ship. They had been passed by Lloyd's surveyor at the makers' works, and had been marked with the number of the ship for which they were intended, and with the position which they were to occupy in her. They had been seen in the shipbuilding yard by the shipowners so marked, but had not been specially inspected or approved by them.

Held, that the case was governed by the decision in *Seath v. Moore* (54 L. T. Rep. 690; 11 App. Cas. 350), and was not affected by the *Sale of Goods Act 1893* (56 & 57 Vict. c. 71), and that the trustees in the bankruptcy was entitled to the plates as against the shipowners.

Judgment of the First Division of the Court of Session in Scotland reversed.

APPEAL from a judgment of the First Division of the Court of Session in Scotland (the Lord President (Balfour) and Lords Adam, McLaren, and Kinnear), reported 41 Sc. L. Rep. 369, who had reversed a judgment of the Lord Ordinary (Lord Low), considering themselves bound by a decision of the Second Division of the court in an action between the same parties, reported 4 F. 345; 39 Sc. L. Rep. 188.

The question was whether Robert Reid, trustee of the sequestrated estate of Carmichael, Maclean, and Co., shipbuilders, Greenock, or Macbeth and Gray, shipowners, Glasgow, were entitled to a sum of 1957*l.* 19*s.* 1*d.* being the value of certain materials purchased by Carmichael, Maclean, and Co., from Young and Alexander, iron merchants, Glasgow, to be used in the construction of a steamship, which

Carmichael, Maclean, and Co. had contracted to build for Macbeth and Gray.

Young and Alexander also claimed the sum in question on the ground that the materials, of which the price had not been paid, had been stopped by them *in transitu*, but that claim was repelled by the Lord Ordinary, and was not now insisted on.

The sole question, therefore, was whether the trustee of the sequestrated estate of the builders, or the shipowners for whom the ship was being built, had right to the sum in question.

By art. 4 of the agreement for the building of the ship, entered into between Carmichael, Maclean, and Co. and Macbeth and Gray, dated the 27th Oct. 1898, it was provided that:

The vessel, as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building yard, workshop, river, or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase money.

And by art. 5 it was declared that:

In the event of the builders making default in the prosecution of the construction of the vessel, engines, boilers, and machinery, or making default in her delivery by the date stipulated, it shall be competent for (but not incumbent upon) the purchasers to take possession of the vessel in her then state, and of all her engines, boilers, and machinery, and all materials intended for her or them as before mentioned, and to complete the vessel.

To enable them to build the steamship in question, Carmichael, Maclean, and Co. entered into a contract with Young and Alexander for the requisite quantities of iron or steel materials. By this contract the place of delivery was stated to be "free on trucks, Greenock," and the materials were sent to Greenock by railway, intimation of their arrival being made to Carmichael, Maclean, and Co., whose storekeeper went to the station and selected the portions which were immediately required. These were sent on to the shipbuilding yard, and the remainder were allowed to remain in the station yard until they were needed.

The superintendent engineer in the employment of Macbeth and Gray visited Carmichael, Maclean, and Co.'s yard and saw the materials there. It was his custom to go round the yard from time to time for this purpose.

He stated that when he was shown the materials he saw that No. 29 (the number of the steamship) was painted or otherwise marked upon them, and that the places which they were to occupy in the ship were also so marked, and that he also saw the materials which were lying at the station.

It further appeared that the materials were examined and passed by Lloyd's surveyor before they came to the shipbuilders' yard or the station, having been tested by him at the mills at which they were made before being sent out.

In his judgment the Lord Ordinary said that it was admitted that the question raised in the present appeal would be ruled by the ultimate decision in another case then pending, in which the question was whether the property in the materials which had been taken into the shipbuilding yard had passed to Macbeth and Gray

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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under the same contract as that under which the present question was raised, and this question was decided in the affirmative by the Second Division of the court.

Ure, K.C. (of the Scotch Bar) and *Loehnis* appeared for the appellant, and contended that, though the court below had considered themselves bound to follow the judgment of the Second Division, the case was really indistinguishable from that of *Seath v. Moore* (54 L. T. Rep. 690; 11 App. Cas. 350). The contract was for the sale of a completed ship. They also referred to

Woods v. Russell, 5 B. & Ald. 942; 24 R. R. 621;
Goss v. Quinton, 3 M. & G. 825; 60 R. R. 616;

Wood v. Bell, 5 E. & B. 772; on appeal, 6 E. & B. 355;

Clarke v. Spence, 4 A. & E. 448; 43 R. R. 395;

Tripp v. Armitage, 4 M. & W. 637; 51 R. R. 762;

Laidler v. Burlington, 2 M. & W. 602; 44 R. R. 717.

The Sale of Goods Act 1893 (56 & 57 Vict. c. 71) does not affect the case.

The Lord Advocate (Scott Dickson, K.C. of the Scotch Bar) and *Muir Mackenzie*, for the respondents, argued that *Seath v. Moore* and the other cases cited were distinguishable. Here the course of business implies that the property passed to the respondents when the materials were passed by Lloyd's surveyor, which brings the case within the Sale of Goods Act 1893. See Benjamin on Sales, book 2, chap. 3, p. 293, 4th edit. 1888, and chap. 5, pp. 318, 330, 332, and the cases there cited. See also

McBain v. Wallace, 45 L. T. Rep. 261; 6 App. Cas. 523;

Jones and Co.'s Trustees v. Allan, 4 F. 374; 39 Sc. L. Rep. 263.

Ure, K.C. was heard in reply.

At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case I think that I might say that the question is covered by authority for a reason which I will give in a moment, but, looking at it as if it were *res integra*, I think that the difficulty in the way of the Lord Advocate is that in my view there is no sale at all in this contract except the sale of a complete ship. I think that the observations made by the learned counsel for the appellant are very cogent, that those articles upon which reliance has been placed—namely, arts. 4 and 5—lack every element of sale of these things. What they do I will say a word upon in a moment, but there is no sale of these things. It is an abuse of language to speak of these sections as a sale of things to which they refer. My own view of those sections is that they were intended by the parties to form a security. I daresay it was an ineffectual attempt by the parties to form a security, but that which is sold is a complete ship. The whole foundation of the judgment at which I invite your Lordships to arrive is that there is no sale of these things at all; the only thing sold is the ship. It seems to me rather an extraordinary, and I think I may say an incomprehensible, view that the inspection by Lloyd's of the materials is an acceptance by the buyer of the ship of those particular things which are to form portions of the ship

when sold. There is no such provision in the contract; there is nothing in the relation of the parties which to my mind suggests the agency of Lloyd's as taking the place of the person who is to act on behalf of the purchaser. It is said that, simply because Lloyd's in the management of their business think it right to say that they will not give a certificate that a ship is A 1 at Lloyd's without themselves having an opportunity of inspecting and passing materials of which the ship is to consist, therefore the person who contracts that he will supply a ship A 1 at Lloyd's thereby places Lloyd's in the position of a person who is entitled to act on the purchaser's behalf as inspector and ascertainer, if I may so describe him, of those goods which are to form the ship in the ultimate result. It appears to me to be a most monstrous proposition, and, if there were nothing more, I should say that it was a proposition for which no authority is to be found. But further than that, in the very contract in which the ship, being A 1 at Lloyd's, is the thing sold by one party and accepted by the other, other persons representing the purchaser are to have rights inconsistent with the idea that Lloyd's certificate of these different plates would be a conclusive acceptance on the part of the purchaser of the ship of the goodness of the quality of the material. I think that of itself would be sufficient to dispose of the case, but, as I said just now, I think that the matter is really concluded by authority, because your Lordships' House has had before it in the case of *Seath v. Moore* (54 L. T. Rep. 690; 11 App. Cas. 350) a contract which it would be vain to attempt to distinguish from that in the present case. The only distinction, as I understand it, which is insisted upon is this, that what was there in five contracts is here in one. It is said that a different view would have been taken by the noble and learned Lords who decided that case if, instead of being in five different contracts, it had all been on the same piece of paper. I cannot find the least foundation for that in any part of the judgments delivered by their Lordships in that case; and what seems to me to be absolutely conclusive, and to cover the case now before your Lordships, is what Lord Watson said in *Seath v. Moore*: "There is another principle which appears to me to be deducible from these authorities, and to be in itself sound, and that is that materials provided by the builder, and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract, or as 'sold,' unless they have been affixed to, or in a reasonable sense made part of, the corpus." It seems to me, considering that Lord Watson was dealing with a contract substantially the same as that which we are considering, that it would be an extraordinary thing if your Lordships were to depart from the principles there laid down. Accordingly, as I am of opinion that there was no sale here at all of these materials as distinguished from a contract of sale of the ship, and that there was no acceptance of these materials in any sense which can be relied upon, except in a sense which, as I have said, is inapplicable to the purpose—namely, the certificate of Lloyd's as to the goodness of the materials—it seems to me, with all respect to the learned judges who have decided the case in the court below,

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that their decision was wrong, and ought to be reversed, and I move your Lordships accordingly.

LORD MACNAGHTEN.—My Lords: I am of the same opinion. I think that the case is governed by the decision in *Seath v. Moore*, and, so far as it may not be governed by that case, I entirely agree with the reasons which have been given by the Lord Chancellor.

LORD DAVEY.—My Lords: I put the same construction upon the contract which is before your Lordships as the Lord Chancellor has put upon it, and I need not repeat what he has said upon that head. I will only add this to what he has said with regard to art. 4, as to the expression about which we heard so much in the course of the argument, "as the same proceeds." I think that "the same" must mean either "as the ship proceeds," or "as the construction of the ship proceeds"; but, whether you put the one or the other of these meanings upon the words, it is clear that, whatever else may be obscure in this 4th article, the goods in question are not to become the property of the purchaser except as the construction of the ship proceeds. From that I should certainly understand, as I think was the view of the Lord Ordinary, that, according to the true construction of the article, it was only when the chattels in question were applied for the use of the ship, and became part of the structure of the ship, that it was intended that those words vesting the property should operate. But, quite independently of that question, supposing that the construction contended for by the Lord Advocate were correct, I still think that it would be impossible to uphold the judgment. I entirely agree with what has been said as to the decision in *Seath v. Moore*, and upon that I would merely add that the only suggestion which I heard by which an attempt was made in any way to get rid of the authority of that case was that at that time the Sale of Goods Act 1893 had not been passed. I am unable to see in that any solid ground for distinguishing the case. At the time, as was pointed out in the judgments, although a contract of sale created, according to the law of Scotland, only a *jus ad rem* against the goods until delivery, still, having regard to the provisions of the Mercantile Law Amendment Act, which was then in force, the distinction was only a question of words, and not of substance. But I turn to the Sale of Goods Act, and I find that the material sections are those referred to by the learned judges of the Second Division—namely, sects. 16, 17, and 18. I will read only sect. 16, which seems to me to be the material one: "Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained"; and then in rule 5 of sect. 18 it says, "Where there is a contract for the sale of unascertained or future goods by description," and so forth, the property in the goods passes to the buyer on ascertainment by the buyer and the seller. It appears to me that those sections have no application whatever to the case before your Lordships, for the simple reason which was mentioned by the Lord Chancellor, that here there was no contract for the purchase of these materials. The learned counsel, and also the learned judges in the court below, seem to me

to have proceeded on the supposition or hypothesis that this contract contained not only a contract for the purchase of the ship, but a separate contract for the purchase of the materials also; and that seems to me to be a complete fallacy. There is only one contract, a contract for the purchase of the ship. There is no contract for the sale or purchase of these materials, and, unless you can find a contract for the sale of these chattels within the meaning of the Sale of Goods Act, it appears to me that the sections of that Act have no application whatever to the case. I think, therefore, that the case is exactly covered by the decision given by your Lordships' House in the case of *Seath v. Moore*, and I will only express my entire concurrence in the judgments given in that case by those very learned Lords, Lord Blackburn and Lord Watson.

LORD ROBERTSON.—My Lords: I have only to add that I cannot find in this contract any contract to buy materials, or to buy anything except a completed ship. Art. 4 seems to me to fall exactly within sect. 61, sub-sect. 4, of the Sale of Goods Act 1893—that is to say, it "is intended to operate by way of mortgage, pledge, charge, or other security." The circumstance that it is inserted in what is a sale of a completed ship will not avail to make it a sale in the sense of the Sale of Goods Act 1893. In fact art. 4 does not even purport to express a sale. It merely asserts that to be the property of the purchaser of the ship which has no more relation to it than that it was intended by the builder for the ship. That as it stands is impossibly wide, and I agree with your Lordships that the respondents' attempt to make those materials "specific" in the sense of the Sale of Goods Act, by saying that they had been passed by Lloyd's surveyor, is not warranted by the terms of the contract. The reference to Lloyd's in the first article cannot be strained to this extent. The truth is that art. 4 is simply a bold attempt to sweep into the net the whole of the materials required for the ship. The judgments of this House in *Seath v. Moore* negative the possibility of that being legally done.

LORD LINDLEY.—My Lords: I am of the same opinion, and cannot usefully add anything.

*Interlocutors appealed against reversed.
Respondents to pay to the appellant his costs both here and below.*

Solicitors for the appellant, *McKenna and Co.*, for *Drummond and Reid*, Edinburgh, and *Donaldson and Alexander*, Glasgow.

Solicitors for the respondents, *Thomas Cooper and Co.*, for *J. and J. Ross*, Edinburgh, and *Maclay, Murray, and Spens*, Glasgow.

Judicial Committee of the Privy Council.

March 16 and 17.

(Present: The Right Hons. the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, JAMES OF HEREFORD, DAVEY, LINDLEY, and ROBERTSON. Ecclesiastical Assessors: The ARCHBISHOP OF CANTERBURY (Davidson) and the BISHOPS OF SOUTHWELL (Ridding) and RIPON (Boyd-Carpenter).

MOORE v. BISHOP OF OXFORD. (a)

ON APPEAL FROM THE CONSISTORY COURT OF THE DIOCESE OF OXFORD.

Ecclesiastical law—Clergy Discipline Act 1892 (55 & 56 Vict. c. 32)—Immoral habit of swearing and ribaldry.

The occasional use of objectionable language by a clergyman, under circumstances of great provocation, upon rare occasions extending over a period of three years :

Held, not to amount to an immoral habit "of swearing and ribaldry" within the meaning of the Clergy Discipline Act 1892.

Judgment of the court below reversed.

APPEAL by a beneficed clergyman in the Diocese of Oxford from a decision of the Consistory Court of the diocese convicting him under the Clergy Discipline Act 1892 in respect of alleged immoral intercourse with a woman of the name of Johnson, and of an immoral habit of swearing and ribaldry.

Duke, K.C. and Cecil Walsh appeared for the appellant.

Acland, K.C. and Snagge for the respondent.

At the conclusion of the arguments their Lordships' judgment was delivered by

The LORD CHANCELLOR (Halsbury).—Their Lordships are of opinion that the main charge in this case has broken down. The statements of the only witness who is relied upon for the purpose of proving the charge are, in the opinion of their Lordships, uncorroborated by any conduct, act, or proof, and their Lordships are unable to concur with the Consistory Court in thinking that there is any corroboration by the correspondence or otherwise in favour of the accusation which has been made. Apart from any technical rule upon the subject, it would be a most dangerous thing for any court to allow an accusation of this sort to prevail when there is no corroboration; and probably no court would be induced to do so. In those circumstances their Lordships think it impossible to confirm the finding that the evidence of the witness, uncorroborated as it is, and discredited by her own version of the transaction, can be accepted as conclusive against the clergyman whom she accuses. With regard to the other charge, of having been "habitually guilty of swearing and ribaldry," there is a body of evidence relating to three or four occasions, which undoubtedly establishes (as the court below has found) that on those occasions language was used which certainly could not be defended, the use of which would be disgraceful to anybody, whether clergyman or layman. But the question upon this part of the

case is, whether the defendant was, or was not, guilty of the charge made—and properly made—in pursuance of the Clergy Discipline Act 1892, s. 2, which speaks of a clergyman "alleged to have been guilty of any immoral act, immoral conduct, or immoral habit," the words "immoral habit" being the words contained in the charge. Where on occasions of considerable provocation words are used however discreditable and disgraceful to the person who used them—and certainly no words could be too severe in condemnation of language such as that found to have been used by the appellant, even allowing for exaggeration in the views of some of the witnesses who used such words themselves, and attributed them to the appellant—yet the question would still remain whether or not, the clergyman having been proved in circumstances of provocation to have used such words on three or four occasions in the course of three years, it is true to say that he is guilty of the offence contemplated by the statute. The use of language of that sort can hardly be described as an "immoral act" in the sense in which that term is used in the Clergy Discipline Act. Immoral conduct and immoral habit are probably the same thing. What is charged—and in their Lordships' opinion properly charged in accordance with the statute—is that the appellant has "during the past five years been guilty of offences against the laws ecclesiastical (being offences against morality within the meaning of the Clergy Discipline Act 1892) in that he had habitually been guilty of swearing and ribaldry." Their Lordships certainly do not mean to give any countenance to the supposed innocence of the use of such words, even on special occasions of extraordinary provocation. As has been already said, no words are too severe to condemn such language. But the view which their Lordships entertain is that the offence contemplated by the statute—namely, of being habitually guilty of swearing and ribaldry—is not made out. Even although the appellant may have sometimes used such language, it is not established that he has been habitually guilty of such conduct. The evidence is spread over a period of three years, and the suggestion on the appellant's behalf is that objectionable language was only used on rare occasions of great provocation. Under these circumstances their Lordships are of opinion that the appeal ought to be allowed with respect to both charges. It is satisfactory to their Lordships to find that the views which they entertain are shared by the most reverend and right reverend prelates who have been good enough to give them their assistance on this occasion. Their Lordships desire to add that they entirely concur in the observation of the learned counsel for the appellant that, under the circumstances, the Bishop of Oxford could not have taken any other course in this case than that which he has pursued. The result, therefore, is that their Lordships will humbly advise His Majesty to allow the appeal, but under the circumstances their Lordships feel that it is not a case in which costs should be given, and there will, therefore, be no order as to costs on either side, either before this board or in the court below.

Solicitors for the appellant, Bryant and Hall, for A. Walsh, Oxford.

Solicitors for the respondent, Mallam and Co.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

CT. OF APP.]

Re SUSSEX BRICK COMPANY.

[CT. OF APP.]

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Feb. 12.

(Before VAUGHAN WILLIAMS, STIRLING, and
COZENS-HARDY, L.JJ.)

Re SUSSEX BRICK COMPANY. (a)

APPEAL FROM THE CHANCERY DIVISION.

*Company—Registration of transfer of shares—
Unreasonable delay—Reconstruction of company
—Date on which transfer to be treated as regis-
tered—Companies Act 1862 (25 & 26 Vict. c. 89),
ss. 35, 161.*

*The court has power under sect. 35 of the Com-
panies Act 1862 to rectify the register of
members after the liquidation of the company
has commenced; and such power is not limited by
sect. 98 to rectification for the purpose of settling
the list of contributories.*

*Where there had been unnecessary delay in
registering a transfer of shares, and in con-
sequence it had not been registered when the
company went into voluntary liquidation for the
purpose of reconstruction under sect. 161 of the
Companies Act 1862, the court, on the applica-
tion of the transferee, ordered the transfer to be
registered as of a date prior to the winding-up,
which rendered valid a notice of dissent given
by the transferee under sect. 161 after the date
on which the transfer ought to have been, but
was not, registered.*

*Re Joint Stock Discount Company; Nation's
case (15 L. T. Rep. 308; L. Rep. 3 Eq. 77)
followed.*

APPLICATION by the transferor and transferees
of certain shares in the Sussex Brick Company to
have the register of shareholders rectified by
putting the names of the transferees on the
register in place of that of the transferor on the
ground that the change had not been made in
consequence of unnecessary delay on the part of
the company.

The facts appear sufficiently in the judgment of
Buckley, J., delivered the 30th July 1903.

BUCKLEY, J.—This is an application in which
Belcher, the transferor, and Brown and Pollock,
the transferees, of two blocks of shares, all
concur in seeking, to put it shortly, to obtain a
rectification of the register by putting the trans-
ferees' names on in lieu of that of the trans-
feror. The shares are all fully paid. On the
12th March 1903 there was sent by Brown, one of
the transferees, a transfer which is dated the 3rd
March for 17,234 shares. He sent the certificate
and the transfer, and asked for an acknowledg-
ment and a new certificate. On the 14th March
the secretary wrote in reply sending a receipt.
The reply is simply: "Herewith inclosed please
find transfer receipt 17,234 shares in the company
from Belcher's name to Brown and Pollock."
That was marked in the corner, "One inclosure."
Unfortunately that inclosure is not forthcoming,
but it is what is called a transfer receipt. I have
the form of it because I have it as regards the
other transfer. It bears in print at the foot:

"Certificate in exchange for this receipt will be
ready about (blank)." From a subsequent letter
it would seem that that must have been so
filled in as to read thus: "Certificate in ex-
change for this receipt will be ready about the
28th inst"—that is, the 28th March. On the
27th March Brown wrote and sent to the
secretary a letter inclosing the certificate of
5000 other fully-paid shares, and the transfer of
them which had been executed as long ago as
Jan. 1901, and asked for a new certificate of those
shares. On the 1st April the secretary wrote
back saying: "As you are aware the books have
been closed until after the meeting to-morrow."
That would be the 2nd, and I infer that means
they would be open again on the 3rd April. On
the 4th Brown writes again: "As we presume
the books of the company are now open, we shall
be glad to receive reply to our letter of 27th
ult," which was the letter I mentioned before.
On the 4th the secretary writes acknowledging
the receipt of the transfer for the 5000 shares,
and stating that he would place it before the
directors at the next board meeting, "when a
certificate will be made out and signed and for-
warded to you." On the 4th Brown wrote again
acknowledging receipt of that letter, and saying:
"You do not, however, say anything about the
17,234 shares the receipt for which we inclose,
and the certificate for which was to have been
ready 28th ult. May we take it that this certi-
cate will be sent to us with the others?" On the
7th the secretary writes again: "In reply to yours
of the 4th, the transfers of 17,234 shares will be
placed before the directors together with the
transfer of the 5000 at their next board for regis-
tration, and when registered I will forward the
certificate to you. Formal receipt for the 5000
shares herewith inclosed." That is the document
I referred to just now, and that has at the foot
"A certificate in exchange for this receipt will
be ready about the 27th inst." So that the trans-
action throughout was this: Fully-paid shares,
no possible objection to registering the transfer,
and no objection is suggested or raised, but the
reply which is always made is, "At our next
board meeting the matter will be carried
through, and you shall have your certificate
back." In fact on the 2nd April the com-
pany passed a resolution for voluntary liqui-
dation, and on the 20th it was confirmed. I will
take the two transfers separately. The transfer
sent in on the 12th March should have been before
the board which was held on the 21st March,
and it was not brought before that board. Why
it was not, I do not know; there was no
reason why it should not be. The only reason
suggested is that the secretary had resigned,
and there had been a new secretary. The new
secretary ought to have informed himself of what
was going on, and the matter ought to have been
brought before the board. The next transfer,
which was lodged on the 27th March, was after
the date of that board meeting, but according to
the letters which passed it would have been in
the ordinary course of the company's business to
have convened a board which would have passed
the transfer and issued a new certificate. Before
the 27th April—viz., on the 20th—the company
was wound up. I suppose the fact is at that
particular time a voluntary liquidation being in
contemplation the board was not meeting as

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

regularly as it otherwise would have met, and there was a delay occasioned by that. I do not say an improper delay, but a delay in point of fact, and the transfers ought to have been registered, I think, before the winding-up on the 20th April. However, they have not been registered, and the application now is, the company being in liquidation, to register them notwithstanding the winding-up. Under sect. 131 of the Companies Act 1862 no doubt the sanction of the liquidator is required for the registration of a transfer, but I have power under sect. 198, coupled with 138, to rectify the register, notwithstanding the winding-up, if I think there has been improper delay. It seems to me there has been a delay under sect. 35, and these transfers ought to be registered. I therefore make the order for rectification of the register by substituting the names of the transferees for that of the transferor, and the company must pay the costs.

His Lordship, having refused to order the register to be rectified by dating the transfer as of an earlier date than the date of his order, the transferees appealed, asking that the order might be varied by providing that the rectification of the company's register should have effect as regarded the 17,234 shares as at and from the 20th March 1903, and as regarded the 5000 shares as at and from the 4th April 1903.

Muir Mackenzie for the appellants.—The order of Buckley, J. does not go far enough. He orders the register to be rectified as of the date of his order, instead of *nunc pro tunc* as in *Re Joint Stock Discount Company*; *Nation's* case (15 L. T. Rep. 308; L. Rep. 3 Eq. 77). The registration of these transfers ought to date as from the date when they ought to have been registered. The effect on the appellants of the order of Buckley, J. is serious. Under this voluntary winding-up there was a scheme of reconstruction, and the appellants object to that scheme and desire, under sect. 161 of the Companies Act 1862, to give notice dissenting from it, which would give them the right to have their holding in the company valued, and the value paid to them. But not being on the register their notice was ineffectual, and the transferor has given no such notice. Under sect. 161 that notice must be given by a member of the company within seven days after the passing of the resolution. Here, as Buckley, J. held, the appellants ought to have been put on the register on the 21st March and the 4th April 1903 respectively, and, therefore, the registration ought to be ante-dated to those dates, for on the 20th April, when the resolution for a voluntary winding-up was passed, they were the persons in fact entitled to the benefit of the proviso in sect. 161.

Gore-Browne, K.C. and *J. E. Harman* for the liquidator.—The liquidation of the company having commenced, the appellants are not entitled to have their names put on the register of members on a date anterior to the commencement of the winding-up. The court has no jurisdiction to make the order under sect. 35 of the Companies Act 1862. The case of *Re Joint Stock Discount Company*; *Nation's* case (*ubi sup.*) and other similar cases were decided under sect. 98 of the Companies Act 1862, which links together for this purpose the settling of the list of contributories, and the rectification of the register

under sect. 35; and under it, for the purpose of settling the list of contributories, the court has power even after a liquidation to rectify the register of members by taking off the name of a person who ought not to be on, and putting on the name of a person which ought to be on. Before liquidation the court will rectify the register under sect. 35, after liquidation has commenced, it will only do so under sect. 98. [COZENS-HARDY, L.J.—Sect. 131 seems to contemplate a transfer of shares after a voluntary liquidation, and not merely the settlement of a list of contributories.] Only with the consent of the liquidators. After liquidation the list of contributories is the important list. If a call is made it is not made on those on the register of members of the company, but on those on the list of contributories. [VAUGHAN WILLIAMS, L.J.—In Buckley on the Companies Acts (8th edit.), pp. 322, 323, in the note to sect. 98, it is stated affirmatively that after a liquidation the power of rectification under sect. 35 is not limited to merely settling a list of contributories, and reference is made to *Re Scottish Universal Finance Bank*; *Breckenridge's* case (12 L. T. Rep. 796; 2 H. & M. 642), *Reese River Silver Mining Company v. Smith* (L. Rep. 4 E. & I. App. 64), and *Re London, Hamburg, and Continental Exchange Bank*; *Ward and Henry's* case (16 L. T. Rep. 254; L. Rep. 2 Ch. App. 431).] The effect of that passage is that after the liquidation has commenced sect. 35 only applies so far as is provided by sect. 98. If the appellants are to be treated for all purposes as if they had become members before the 2nd April, it involves not only that they are entitled to give notice of dissent under sect. 161, but that they were entitled to have notice of the meetings, and then the special resolutions passed at the meetings would be invalidated as notice was not given to them. [VAUGHAN WILLIAMS, L.J.—I think not. The statute is complied with by the issue of the notice to the shareholders whose names then appear on the register. The validity of the meeting or the validity of any proceedings will not be affected by the order asked for.] Supposing the transferor had given notice of dissent, then he must have been treated as the person entitled to do so.

VAUGHAN WILLIAMS, L.J.—I think this appeal must be allowed. I propose to deal with this case as a case in which there has been an unfortunate accident which resulted in very unnecessary delay in putting the names of these gentlemen, Messrs. Brown and Pollock, upon the register. Sect. 35 of the Companies Act 1862 says: "If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in England or Ireland, by motion in any of His Majesty's superior courts of law or equity, or by application to a judge sitting in chambers, or to the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in Scotland by summary petition to the Court of Session, or in such other manner as the said

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courts may direct, apply for an order of the court that the register may be rectified, and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained." Now, there can be no doubt but that the names of these gentlemen ought to have been on the register at an earlier date; and, so far as this case is concerned, at a date earlier than the time of the holding of the meetings with regard to the reconstruction of this company. Under those circumstances there can be no doubt that the case of *Re Joint Stock Discount Company; Nation's case* (*ubi sup.*) is an authority for the proposition that when it is right that an order for rectification should be made (and Lord Romilly there draws no distinction between an order for rectification by taking the name off, or by putting a name on, the register), the court may make an order not only that the right name shall be put on or taken off the register as the case may be, but that the register shall be treated as if the name had been on or off the register when it ought to have been on or off the register. But it has been argued here that it is quite true that may be done in the exercise of the powers given by sect. 35 of the Act of 1862; but the power which was actually exercised by Lord Romilly in that case was a power exercised in respect of a list of contributories, and after the commencement of this liquidation the only power under which the register can be modified is under the 98th section, and the 35th section no longer applies. The 98th section says: "As soon as may be after making an order for winding-up the company the court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities." It is said that after the liquidation rectification is not ordered under sect. 35, but under sect. 98; and that under these circumstances this rectification ought not to be made *nunc pro tunc*. On that point there is a decision of Wood, V.C. in the case of *Re Scottish Universal Finance Bank; Breckenridge's case* (*ubi sup.*), and it is clear that this particular point was raised there. Counsel is there reported to have said in argument: "The 98th section of the Act is a positive direction as to the course which is to be pursued. The court is to settle a list of contributories with power to rectify the register for that purpose, and is bound to rectify the register so far as may be necessary." When the learned Vice-Chancellor gave judgment he said: "It is said in opposition to the motion that it is irregular after a winding-up order has been made, because the whole matter is then in the hands of the court, and I am referred to the 98th section of the Act to show that the rectification of the register is after such an order a matter merely auxiliary to the settlement of the list of contributories. But there is nothing in that section to prohibit the court from acting in respect of the share register of the company in any manner in which it might have acted had that section not existed,

and I cannot, therefore, hold that the hands of the court are in any manner tied by that section." That decision of Wood, V.C. seems to me to be exactly in point, and to negative the argument which counsel for the liquidator submitted to us. I see that view is taken in Buckley on the Companies Acts, 8th edit., at p. 322, where several other authorities besides *Breckenridge's case* (*ubi sup.*) are referred to; and it is said there: "After a winding-up order has been made the power of rectification given to the court by sect. 35 is not cut down and reduced to a mere power of rectification in the settling of the list of contributories. It is open to a contributory, after the order has been made and before the list of contributories has been settled to move for rectification under this section and the 35th section." I have only to add this, that I do not mean for a moment to suggest that anyone is entitled to such an order *ex debito justitiæ*; it is a matter in the discretion of the judge, and there might be cases in which the learned judge, although he considered it essential to completely putting in order the rights of the applicant, might refuse to do so because he thought it would work injustice in respect of other people. If I thought here that it would work injustice to other people, and especially if I thought it would work injustice to persons who are not in any way bound to bear the mistakes of the company, I should have carefully considered the matter before I made this order. But in the present case there is no evidence that any injustice will be caused at all. It has been suggested that if we make this order we shall invalidate the resolutions because the meetings will not have been properly called; and a variety of other suggestions of that sort were made in the course of the argument. As the matter stands, we can do justice and prevent any wrong accruing to those two gentlemen, Mr. Brown and Mr. Pollock, without doing any injustice to anyone else. Under these circumstances I think that the order for rectification ought to be treated as an order of some date immediately before the holding of the meeting.

STIRLING, L.J.—I am of the same opinion. The first objection raised in this case to the exercise of the jurisdiction which is conferred on the court by sect. 35 of the Companies Act 1862, is an argument that the court is deprived of the power of exercising that jurisdiction, except for the purpose of settling the list of contributories. That objection is based on the wording of of sect. 98. [His Lordship read the section and continued:] It is said that the power of rectification which is derived under sect. 35 is confined to the settlement of the list of contributories. I think that is entirely contrary to previous decisions. There is not only the case to which my Lord has referred—namely, *Breckenridge's case* (*ubi sup.*)—but I observe, on looking at another case which is cited in Buckley on the Companies Acts—namely, *Reese River Silver Mining Company v. Smith* (*ubi sup.*)—there is the high authority of Lord Cairns for the proposition which was laid down by Sir William Page-Wood in the case which has already been cited. Lord Cairns says: "Notwithstanding the winding-up, the court under the 98th section is to rectify the register of members in all cases where such rectification is required in pursuance of the

Act—that is to say, at all events in those cases pointed out by the 35th section.” Now the present case falls within the 35th section, because as the learned judge has found, and the finding of fact is really not disputed, in the language of the Act “unnecessary delay” has taken place in the entering on the register the fact of a person having ceased to be a member of the company, and he has also found that the names of the applicants Brown and Pollock have been omitted without sufficient cause from the register. That being so, the jurisdiction to make such an order as Buckley, J. has made exists, and the order, therefore, must be sustained as far as it goes. But the object of this appeal is to fix the date at which the change on the register is to be operative; and it is contended on behalf of the liquidator that the court under sect. 35 has no power to do that. There again, it seems to me we have the guidance of authority so old as the decision of Lord Romilly in *Re Joint Stock Discount Company*; *Nation's case* (*ubi sup.*) which was decided in 1866. That order was made by the Master of the Rolls, no doubt having regard to sect. 98, in the exercise of the powers conferred by sect. 35. It is therefore an authority that in a proper case the court has power to fix a date at which the change in the register is to be made. But then after that there comes, no doubt, a serious question. The application of the appellant is in substance that the registration be made *nunc pro tunc*. Now, when an application of that sort is made, the court ought to be very careful to see that it does no injustice by making the registration retrospective. I may point out that the power which is conferred by sect. 35 is not inoperative. All that it provides is that the court may, in a proper case, make an order for rectification. Therefore the court has full discretion to deal with every particular case which comes before it in such a way as may produce complete justice; but in the present case I fail to see that any injustice is to be done if the alteration is made as is asked. These gentlemen, the present applicants, pressing to have their transfers registered, and seeking their certificates as early as possible, get answers from the secretary of the company which led them to believe that by the date of the last meeting the register would be altered, and they would appear as members. Supposing this had been done, although they had not received their certificates, they sent in notices of dissent from the special resolution in the way prescribed by sect. 161 of the Companies Act 1862. That gave the liquidator full notice of the position that they took in the matter, and he chose to disregard it. Then this application is made to Buckley, J. with the result that the register is altered in favour of the applicants. There is no evidence before us to satisfy me in any way that any injustice is likely to accrue from the alteration of the register being dated so as to cover the notice which was given by the present appellants in the exercise of the rights which they had as members under sect. 161. I think, therefore, that the order ought to be made.

COZENS-HARDY, L.J.—I am entirely of the same opinion. It seems to me that the argument for the respondent is really based on this hypothesis; that the register of members is a thing which ceases to have any real operation or existence after the winding-up order; that the

only right which can be dealt with after a winding-up order is to be given effect to by making some change in the list of contributories. But, if the scheme and method of the Act is looked at, the register of members is one thing, and the list of contributories is an entirely different thing. The list of contributories, to mention one distinction, what is known as list A and list B is something larger than and different from the register of members, and the Act itself, as it seems to me, indicates in no doubtful manner that, notwithstanding a winding-up, the register of members and the status of members may be altered. Now, sect. 131, the very section under which Buckley, J. has acted, or under which he has partly acted, says this: “Whenever a company is wound-up voluntarily the company shall, from the date of the commencement of such winding-up, cease to carry on its business except in so far as may be required for the beneficial winding-up thereof, and all transfers of shares, except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company, taking place after the commencement of such winding-up, shall be void.” That section asserts that there may be after a winding-up transfers of shares with the sanction of the liquidators. That being so, it seems to me that, quite apart from any list of contributories, there is a register of members to which all the provisions of sect. 35 of the Act of 1862 ought to be applied. The authority to which my Lord has called attention, and also the authority to which Stirling, L.J. has called attention, seem to me conclusively to show that the power given by sect. 35 is independent of that which is found by reference under sect. 98. I, therefore, cannot doubt that the court has the right to exercise every power which is conferred by sect. 35 where there has been an undue delay in registering a transfer. That there has been undue delay here is found as a fact by the learned judge, and the accuracy of that finding is really not disputed. Then we have authority going back to the very early days of the Companies Act 1862 that under sect. 35 in a proper case an order having a retrospective effect may be made—may be made not must be made—and may be made imposing such conditions as the court thinks necessary to protect the rights of any third persons; but in a case like this, where there has been no really serious suggestion of any ill result or any unjust consequence which would follow from dating the transfers as of the date when they ought to have been made, I can see no ground for imposing any condition whatever. I think, therefore, the order proposed by my Lord is quite right.

Muir Mackenzie.—It will be sufficient for the appellants if the registration of each transfer is carried back to the 4th April 1903.

VAUGHAN WILLIAMS, L.J.—Then let that be the date.

Harman.—The notice of the confirmation meeting of the 20th April will not be invalidated in consequence.

VAUGHAN WILLIAMS, L.J.—It will not affect that notice at all. The notice was in accordance with the register as it then stood.

Solicitors: Ingle, Holmes, Sons, and Pott; Morris, Fuller, and Co.

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SKINNER v. HUNT AND OTHERS.

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HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Thursday, Jan. 21.

(Before RIDLEY, J.)

SKINNER v. HUNT AND OTHERS. (a)

Landlord and tenant—Covenant by tenant to pay all charges—Paving expenses—Notice to tenant to pay—Payment by tenant—Deduction of amount paid from rent—Landlord's right to distrain for amount deducted—Metropolis Management (Amendment) Act 1862 (25 & 26 Vict. c. 102), s. 96.

The lease of a house contained a covenant on the part of the tenant to pay the rent free of all deductions except landlord's property tax, and to pay all rates, taxes, and assessments whatsoever, and all charges imposed by any local authority upon the frontagers in respect of the taking over and the making and repair of the roads abutting on the premises. The local authority, having incurred expenses in paving the road and having apportioned the expenses among the frontagers, gave the tenant notice, under sect. 96 of the Metropolis Management (Amendment) Act 1862, not to pay his rent without first deducting the amount of the paving expenses due to the local authority from the landlord as owner of the house. The amount of the expenses so claimed from the tenant exceeded the whole sum which he owed to his landlord as rent, and the tenant paid to the local authority the whole rent then due, in accordance with the notice. The landlord then demanded the rent from the tenant, which the tenant refused to pay, and thereupon the landlord distrained upon the tenant for the rent, the whole amount of which the tenant had paid to the local authority.

Held, that the tenant having paid the whole amount of the rent to the local authority, as he was bound under the section to do, that payment was, under the section, to be taken as a payment of the rent, and that therefore the rent was gone and the landlord had no right to distrain for the same, though by the proviso at the end of the section the landlord's rights under the tenant's covenant to pay all such charges remained.

ACTION tried before Ridley, J. with a common jury.

The action was brought to recover damages for an alleged wrongful distress, and the jury found a verdict for the plaintiff for 50*l.* damages.

Upon the admitted facts the case was argued upon the points of law arising under sect. 96 of the Metropolis Management Act 1862. The facts were as follows:

The plaintiff was tenant and occupier of a shop under a lease from one Jacob Budd, for a term of twenty-one years, at a rent of 40*l.* a year, payable quarterly free of all deductions except landlord's property tax.

The lease contained a covenant on the part of the plaintiff to pay all rates, taxes, and assessments whatsoever, and all charges imposed by any local authority upon the frontagers in respect of the taking over the roads and footpaths

abutting upon the said premises, or the making or repair thereof.

On the 22nd Feb. 1903 the plaintiff had received notice that the defendants had been appointed receivers of the rents of the plaintiff's premises, and they gave notice to the plaintiff to pay his rent to them.

On the 18th Dec. 1902 the plaintiff received a notice from the Wandsworth Borough Council not to pay his rent without first deducting the sum of 34*l.* 19*s.* 2*d.*, due to the council under an apportionment of the estimated cost of paving the road and footpaths.

On the 20th Jan. 1903 the plaintiff paid the borough council 10*l.*, being one quarter's rent, due on the 25th Dec. 1902, and he informed the defendants that he had done so.

On the 22nd Jan. 1903 the defendants demanded payment of the rent due on the 25th Dec. 1902, which was not paid, and on the 12th Feb. 1903 they put in a distress upon the plaintiff's premises for that rent.

The present action was then brought by the plaintiff, alleging that the distress was a wrongful distress.

The defendants counterclaimed for the rent.

Sect. 96 of the Metropolis Management (Amendment) Act 1862 (25 & 26 Vict. c. 102) provides:

The two hundred and seventeenth, two hundred and eighteenth, and two hundred and nineteenth sections of the firstly recited Act—that is, the Metropolis Management Act 1855—are hereby repealed; and in lieu thereof be it enacted, that it shall be lawful for any vestry or district board, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the said recited Act or this Act, either from the owner or from any person who then or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorised by the recited Act and this Act; and the owner shall allow such occupier to deduct the sums of money which he so pays out of the rent from time to time becoming due in respect of the said premises as if the same had been actually paid to such owner as part of such rent: Provided always, that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after such demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses, becomes payable by such occupier, unless he refuse, on application being made to him for that purpose by or on behalf of the vestry or district board, truly to disclose the amount of his rent, and the name and address of the person to whom such rent is payable, but the burden of proof that the sum demanded from any such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall lie upon such occupier: Provided also, that nothing herein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant.

Hawke for the defendants.—The plaintiff is not entitled to maintain the action, as the distress was a lawful distress for the rent due. The lease under which the plaintiff held contained a covenant on the plaintiff's part that he would pay all

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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charges imposed by any local authority in respect of the making up or repair of the roads. The tenant was bound by his covenant to pay these charges, and, that being so, he was not entitled to deduct them from the rent. He was bound to pay the rent to the landlord free of all these charges, and that, when taken in conjunction with the covenant to pay all charges imposed by the local authority for the making up of the roads, amounted to a contract on his part that he would not deduct the amount of the charges from the rent. Having no power to deduct the charges, the rent was due, and the distress was consequently lawful.

Sweet v. Seager, 29 L. T. Rep. O. S. 109; 2 C. B. N. S. 119;

Thompson v. Lapworth, 17 L. T. Rep. 507; L. Rep. 3 C. P. 149.

S. G. Lushington for the plaintiff.—By sect. 105 of the Metropolis Management Act 1855 the liability to the expenses of paving new streets is cast upon the owners of the houses forming such street; and by sect. 77 of the Metropolis Management Amendment Act 1862, that liability is extended to “the owners of the land bounding or abutting on such street.” So that by these two sections the liability to the charges incurred in this case by the local authority in paving the roads is cast upon the defendants as the owners of the land bounding or abutting on the road. It is a charge upon the owner and not a charge upon the occupier. Then sect. 96 of the Act of 1862 enables the local authority to recover this charge, which is the landlord’s charge, from the occupier or tenant, by requiring such tenant to pay the charge out of the rent. The local authority are enabled to go to the tenant and demand payment from him of these expenses out of the rent, and the tenant is liable to pay, but only to the extent of the rent which he then owes to his landlord. There was the same procedure adopted under the Income Tax Act 1842, which provided that if the tenant had to pay a landlord’s tax he was enabled to deduct it from the rent, and the payment operated as a payment *pro tanto* of the rent, and could be pleaded as such. The same principle applies wherever the amount of the rent is claimed from the tenant by a right paramount to that of the landlord. When the tenant paid the amount to the local authority the payment was the same as if he had paid the rent to the landlord. The rent was gone and with it the right of the defendants to distrain. The distress was therefore wrongful, as there was no rent due. [He was stopped.] He referred to

Jones v. Morris, 3 Ex. 742;

Ryan v. Thompson, 17 L. T. Rep. 506; L. Rep. 3 C. P. 144;

Thompson v. Lapworth (*ubi sup.*).

RIDLEY, J.—I have come to the conclusion that the plaintiff is entitled to judgment. I think that the section which has to be applied in this case is one which requires a little consideration. The question raised is whether, where the local authority, under sect. 96 of the Metropolis Management (Amendment) Act 1862, have taken steps to recover from the tenant or occupier the amount of the expenses due in respect of the making and repair of roads, there still remains to the landlord the right to distrain for the rent, in respect of which the local authority have made

their demands. Sect. 96 itself is a replacement of sects. 217, 218, and 219 of the Metropolis Management Act of 1855, under which there had been a decision nearly in point with the present case which was cited by counsel for the defendants. But before I refer to that I ought to say in a few words the way in which I read the effect of this enactment. The Act of 1862 itself contains other provisions in an earlier section—sect. 77—by which there is given to the local authority a right to recover from the owner these expenses, which are matters wholly for the owner. The local authority may recover them in the County Court, or by proceeding in a summary manner before a justice of the peace; but sect. 96 proceeds to give them a further power, and it is a power which gives them a right to go to the owner or to the occupier in enforcement, in point of fact, of their right to get back from not only the owner, whose liability it is, but also from the occupier, who is only interested in the matter as tenant of such owner, the expenses to which they have been put. [His Lordship read sect. 96, including the proviso at the end, and proceeded.] It is upon the words of the section that I have read that the main argument arises. Counsel for the plaintiff says that the rent is gone; that it is enacted that the money which is demanded from the tenant, and which he pays, shall be actually paid as part of such rent; that, therefore, it is gone as rent, and with it the right of distraining for it; and, further, that the proviso at the end of the section only keeps alive such contracts as may exist between the landlord and the tenant, chiefly, according to the words of the statute, in respect of the payment of such rates, and that the words “any contract whatsoever” would have relation to a contract of a similar nature to those already specified—namely, an agreement “that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house.” Counsel for the defendants, on the other hand, contends that that is not so, and that the tenant has no such right as is contended for. It is said that the tenant has a right to deduct the expenses paid by him unless there is an agreement to the contrary, and that here there is an agreement to the contrary, because there is an agreement to this effect that the sum of money due in respect of the roads shall be paid by him. It is said, therefore, that there exists an agreement to the contrary, or an agreement which is in effect to the contrary, because there is an agreement which says that the tenant is to pay all charges imposed by the local authority in respect of the taking over and paving the roads and footpaths abutting upon the premises, and that therefore he loses his right of deducting these charges from the rent; and that he can only deduct these charges from the rent if the burden of paying for those roads falls upon the landlord only, and not upon the tenant himself. Therefore counsel for the defendants has contended that, according to the proper meaning of this section and the authorities which he has cited, there is an agreement here to the contrary under the closing proviso, and that, consequently, the occupier has not the right to deduct what he has paid from the rent. That is the difference between the contentions on either side as to the meaning of this section. When I come to look at

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the section I think the words are too strong with regard to the payment off the amount of rent to admit of the defendants' construction. The section says that the payment by the tenant to the local authority is to be taken "as if the same had been actually paid to such owner as part of such rent." Now, if it had been paid to the owner as part of such rent, and if the whole amount of the rent had been thereby paid, then the rent would be gone, and if the rent is gone the landlord cannot distrain in respect of it. It was not necessary for the purposes of the statute that the words should have been so precise. They might have been enacted in a much less specific way, but when we see that a payment when made shall be taken to have been actually paid on account of that rent, it appears to me that, *prima facie*, the rent is gone. It may not have been within the idea or purview of those who drew the statute that it should be so, but I think the proper effect to be given to those words is what I have stated, that the rent is, *prima facie*, gone. That being so, is there anything in the proviso to show that the contrary was the meaning of the Legislature? I think not. If we look at the section it appears to me that the intention of the Legislature was this: The Legislature gave the local authority a remedy for this purpose against both owner and occupier; the remedy against the occupier was a remedy against him in respect of the rent which he held in his hands and which he owed to the owner; they gave the right to take that rent out of the hands of the occupier and away from the owner, and they took from the owner, therefore, the right to the rent. The right to the rent, therefore—that is, so much of the rent as the tenant had had to pay to the local authority—was gone. But then the Legislature, having done that, thought that they must make some provision as to what might be the state of things between the landlord and the tenant according to the lease or the agreement of tenancy which existed between them. Therefore they put in a proviso at the end of the section which had this effect: If it be the fact that the tenant is bound to his landlord either by lease or by some covenant or agreement to pay these expenses, that right of the landlord is still to survive. Therefore the Legislature put in the proviso that nothing therein contained should "affect any contract whatsoever between landlord and tenant"—any contract, I mean, relating to matters of this kind. It might possibly be argued by an astute tenant that if this sum of money had once been paid by the tenant in respect of the demand made upon him for the rent by the local authority it had been paid already; and if the landlord were to come to the tenant and say: "Pay me that which is due under your covenant for the expenses of these roads," the tenant, if he were astute, might say, "I have paid it. You may call it rent, but I have paid it already as the amount of my rent." Therefore it was necessary to put in some provision to the effect that the tenant should still remain liable to perform, as regards his landlord, that burden which the lease cast upon him. The tenant has relieved himself of the duty of paying the rent to the landlord. He has been ordered to pay it to somebody else, and as rent it is gone, but the landlord has left to him the right to say: "You have paid the rent and no doubt you have got rid of that, but you are still liable to me to pay that

which under your covenant you have got to pay: therefore under the proviso in the section, which is put in for that purpose, I have got a right to say to you, pay me the expenses which have been laid upon my shoulders by the authorities." I think that satisfies the meaning of the section, and is more in accordance with it than to say, as counsel for the defendants argued, that the tenant has not a right, where this proceeding has been put in force, to come and say that the rent has been paid. He contends that any agreement of the kind which I have referred to takes away from the tenant the right to say that he has so far paid the amount of the rent. It seems to me that if we give that construction to the proviso we should be violating the actual and natural meaning of the words in the earlier part of the section; whereas, if we take the other meaning, it is more consonant with the section, and it is completely as just; for I cannot quite see that there is any greater reason for preserving to the landlord a right to distrain for that which is gone than there is for the other view, which, as it seems to me, would be an equally just provision. The landlord has lost his rent because it has had to be paid to somebody else, but the rest of the burden which fell upon the tenant the landlord has still got the right to enforce. I cannot see any objection to that interpretation of the section. There is another part of the section which I have left out for the time. I must, however, refer to it with the view to discussing the decision which was cited for the defendants, the case of *Sweet v. Seager* (*ubi sup.*), which is the nearest in point of any of the cases which have been cited, although decided upon the earlier statute of 1855. It appears to me, in the first instance, that that case was not argued upon this point. That gives rise to a suspicion in my mind that the point did not arise, because, whichever way it is decided, it is certainly a point worth arguing. Yet, if that is so, it is singular that neither of the learned counsel engaged in the case dealt with the matter, nor did the court. When I look at the facts of that case I see that, according to those facts, it was not a proceeding similar to this at all, but it was some other proceeding. The facts there were these: "On the 16th Dec. 1856 the plaintiff was required by the board to pay and did pay to the board the sum of 27*l.* 16*s.* 8*d.*, being the amount of the expenses paid by the board for the works. On the 25th Dec. 1856 the sum of 22*l.* 10*s.* became due from the plaintiff to the defendant for a quarter's rent for the house and premises reserved by the underlease. The plaintiff claimed to retain the said sum of 22*l.* 10*s.* in part satisfaction of the sum of 27*l.* 16*s.* 8*d.* paid to the board of works. On the 22nd Jan. 1857 the defendant distrained the goods of the plaintiff on the demised premises for the said sum of 22*l.* 10*s.*" Therefore I do not understand how that could have been in respect of a similar proceeding to this. As to the amount due, in dealing with the amount which the tenant has got to pay—and this is the part of the section which I left out at first—the section says this: "Provided always, that no such occupier shall be required to pay any further sum than the amount of the rent for the time being due from him." That is the main provision and effect of the section. It would not be right that the occupier should be ordered to pay more than

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is actually due from him to the owner; but there is another consideration which comes in and which made it necessary to add a few words to meet this contingency. The notice is given first of all, but some rent may become due between the time when the notice is given and the time when the payment is made. Then the proviso says that for such rent which may accrue due during those few days, there still shall be the right and the authority to proceed under the section as far as that amount of rent may go. I think the words of the proviso clearly mean that. The proviso says: "Rent which is for the time being due, or which, after such demand . . . and after notice not to pay his landlord . . . becomes payable by such occupier"—that is to say, which may accrue due in that interval. Further on the section says: "But the burden of proof that the sum demanded from any such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall lie upon such occupier." I think, therefore, that that is the meaning of those words. That being so, I cannot see how *Sweet v. Seager* (*ubi sup.*) could really have been decided upon this point, though it may be so. I think it must have been otherwise, and that my reading of those words is according to the natural sense, which, as it appears to me, is the sense I have indicated. There was one other decision cited for the defendants, the case of *Thompson v. Lapworth* (*ubi sup.*). The point of that case, as counsel for the defendants said, is not immediately this point, but incidentally the subject was discussed by Willes, J., who says: "The effect, therefore, of the 96th section is to give a remedy against the tenant, who is to be allowed to recoup himself out of the rent due from him unless there be some agreement between himself and his landlord to the contrary." There seems to me nothing in those words which is contrary to what I have said. The learned judge is there dealing generally with the effect of the section, and it cannot be suggested that he was thinking of the question whether or not the landlord still had a right to distrain. What he says is that there is a remedy against the tenant, that is true; that the tenant has a right to recoup himself out of the rent due from him, and that is also true in a general sense, in accordance with what I have said in this case, unless there be some agreement between himself and his landlord to the contrary. In that case he could not recoup himself because he still would remain liable to the covenant by which he is compellable to pay the expenses. The case is one which is capable of argument, but I have come to the conclusion that in this case the right of distraint is gone. Therefore there will be judgment for the plaintiff for 50*l.*, the amount found by the jury; and also, the defendants will fail to recover the 20*l.* which they claim to be due for rent.

Judgment for the plaintiff.

Solicitor for the plaintiff, *Alexander Pope.*

Solicitors for the defendants, *Todd, Dennes, and Lamb.*

Tuesday, Jan. 26.

(Before WILLS and KENNEDY, JJ.)

BLAKE v. MIDLAND RAILWAY COMPANY. (a)

Employer and workman—Injuries by accident—Compensation—Agreement for payment of weekly sum—Subsequent acceptance of work at reduced wages—Application by workman to have memorandum of agreement registered—"Genuineness" of memorandum—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), sched. 2, clause 8.

A workman received injuries by accident which rendered him for a time totally incapable of work. He agreed to accept compensation under the Workmen's Compensation Act 1897, and an agreement was duly entered into between him and his employers, by which he was to receive half his average weekly earnings at the time of the accident. He partially recovered, and was offered and accepted from his employers lighter work at reduced wages. On his resumption of work at the reduced wages, he admitted that he was no longer entitled to the former weekly sum as compensation, and negotiations took place, but no new agreement was come to as to the weekly amount of compensation he was to receive in addition to his reduced wages. The workman subsequently applied to a County Court to have the memorandum of the agreement registered under sched. 2, clause 8, of the Workmen's Compensation Act 1897, but the County Court judge refused to register the memorandum of the agreement upon the ground that the memorandum was not then applicable to the facts of the case, and that therefore the agreement was not then "genuine" within the meaning of the rules.

Held, that the word "genuineness" in clause 8 refers to the memorandum and not to the agreement, and that, as the memorandum accurately represented the agreement which had been come to, it was a "genuine" memorandum within the meaning of the clause, and ought to have been registered, although the agreement itself was no longer applicable to the altered circumstances of the case.

APPEAL from the decision of the judge Derby County Court, upon an application made by the applicant Blake to have a certain memorandum of agreement registered under the provisions of sched. 2, clause 8, of the Workmen's Compensation Act 1897.

The applicant was a workman employed by the respondents, the Midland Railway Company, and was engaged as a shunter. While in the service of the respondents, on the 24th Jan. 1902 he met with a serious accident to his foot, in consequence of which he was taken to a hospital, and he lost his leg below the right knee. He was about thirty-nine years of age, and had a wife and two children.

The accident was admitted, and at the time of the accident on the 24th Jan. 1902 his average weekly earnings before the accident were admitted to be 25*s.* 1*d.*

In consequence of the accident he was totally incapacitated from work up to the 23rd Feb. 1903, and this total incapacity up to that date was admitted, and during that period he received

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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12s. 7d. a week up to Saturday, the 21st Feb. 1903, being the maximum amount of compensation under the scale of compensation in the 1st schedule to the Workmen's Compensation Act. Partial incapacity was admitted still to continue.

On the 23rd Feb. 1903 the applicant, having partially recovered from the effects of the accident, was given light work, and started to work again with the railway company, at 18s. a week, as signalman at Burton.

On the 7th May 1902 the applicant signed the following:

Kettering Station.—7th May 1902.—I hereby elect to accept from the Midland Railway Company compensation under the Workmen's Compensation Act 1897, for the injuries received by me at Kettering on the 24th Jan. 1902, and abandon any other claim, if any, that I may have against the company in respect of such injuries.

On the same day the appellant and the railway company had come to an agreement whereby the company agreed to pay 12s. 7d. a week as compensation during the total or partial incapacity of the appellant, and the appellant made and signed the memorandum to that effect.

In July 1903 the applicant sent the memorandum to the County Court for the purpose of having it registered, according to the provisions contained in sched. 2, clause 8, of the Workmen's Compensation Act 1897.

On the hearing of this application, it was admitted on behalf of the railway company that there was an agreement to the effect of this memorandum so long as the total incapacity lasted, but objection was taken on their behalf to this agreement being filed, as, since the applicant's resumption of work in Feb. 1903 he was only entitled at the most to 7s. a week, and that therefore the memorandum in its present form was inapplicable, and should not be filed.

The applicant admitted in his evidence that he asked for 6s. 10d. a week when he got wages at 18s. a week, and he said that negotiations had passed between them for the payment of a lump sum.

The learned judge gave judgment as follows:

I find as a fact that on Blake's resumption of work in Feb. 1903 he admitted that he was no longer entitled to 12s. 7d. mentioned in this proposed application, and claimed as compensation 6s. 10d. a week in addition to his wages of 18s., and opened negotiations with the company on that basis; I therefore dismiss the application on the ground that this memorandum at the present time is not applicable to the facts of the case, and that no agreement had been come to between the parties which is applicable to the present circumstances, and that therefore this agreement is not now genuine, within the meaning of these rules. Applicant to pay costs of application on scale B. Stay of execution for twenty-one days, and leave to appeal, if necessary.

The applicant appealed.

Clause 8 of sched. 2 of the Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides:

Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the said committee or arbitrator, or by any party interested, to the registrar of the County Court for the district in which any person

entitled to such compensation resides, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a County Court judgment. Provided that the County Court judge may at any time rectify such register.

S. T. Evans, K.C. (C. Edwards with him) for the applicant.—The County Court judge was wrong in not registering the memorandum. The application to register a memorandum of an agreement settling the amount of compensation under the Workmen's Compensation Act is made under clause 8 of sched. 2 of the Act. Under that clause the County Court registrar or judge is bound to register the memorandum "on being satisfied as to its genuineness." The learned judge placed a wrong meaning on the word "genuineness." He says that he dismissed the application on the ground that the memorandum at the time was not applicable to the facts of the case, and that no agreement had been come to which was applicable to the present circumstances of the case. He seems to have been of opinion that the word "genuineness" referred to the agreement, and not to the memorandum; but in the clause the word "genuineness" refers clearly to the memorandum and not to the agreement. The clause says that the memorandum is to be sent, and that the registrar is to register it, on being satisfied of "its"—that is, the memorandum's—"genuineness." The memorandum in this case was a genuine memorandum within the meaning of the rules; it was the memorandum of the actual agreement that had been made, and it was admitted to be a genuine memorandum, and ought to have been registered. It was wholly immaterial that the circumstances may have changed. The change of circumstances did not in the least affect the memorandum of the former agreement, or the genuineness of such memorandum. No injustice could be done by registering the memorandum as it stood, because there is a power to review the weekly payments on the request of either party. There is no decision in this country directly in point. In *Field v. Longden and Sons* (85 L. T. Rep. 571, at p. 573; (1902) 1 K. B. 47, at p. 53), Collins, M.R., dealing with this very clause—clause 8 of sched. 2—says that that clause is an important provision as showing the scheme of the Act to be that the workman is to get compensation with as little expense as possible. There is no limitation of time within which this memorandum under clause 8 is to be registered:

Cochrane v. Traill and Sons, 3 Fraser, 27:

Cam Mick v. Glasgow Iron and Steam Company, 4 Fraser, 198.

The judgment of the Lord Justice-Clerk, in the latter case, shows that "the placing of a memorandum of an agreement on the register is of the nature of a ministerial and administrative act, and that it in no way prejudices the rights of the parties, for a party can at once apply to have the arrangement made by it modified or put an end to if grounds can be stated for so doing." That is a decision exactly in point here.

J. D. Craeford for the respondents.—The learned County Court judge was right in refusing to register the memorandum of the agreement. The judge has found as a fact that on the work-

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man's resumption of work in Feb. 1903 he admitted that he was no longer entitled to the whole 12s. 7d. a week, and claimed only 6s. 10d. in addition to his wages of 18s. a week, and that he opened negotiations with the company on that basis. So that at the time when the application to register was made the applicant himself admitted that the agreement which he sought to register was no longer applicable to the circumstances of the case. That is a finding of fact which is binding upon the court, and, if there is any evidence on which the County Court judge could come to that conclusion, then this court will not interfere. The County Court judge was right in finding that the original agreement had, by the course which this workman had adopted, come to an end between the parties. Before the memorandum can be registered under clause 8, the judge has to be satisfied as to its "genuineness." Here there was no "genuineness" within the meaning of this clause. The memorandum was the memorandum of an agreement which had entirely ceased to be applicable to the circumstances of the case. What the judge is to register is an agreement which is in existence, not only as to liability, but also as to amount at the time when the application to register is made. That is what is meant by "genuineness" in the clause, and the judge can only register "on being satisfied as to its genuineness," and the clause goes on to say: "And thereupon"—that is, after registration—"the said memorandum shall for all purposes be enforceable as a County Court judgment." If the judge had registered the memorandum in the present case, inasmuch as the agreement showed that the weekly payments were 12s. 7d. a week, then upon registration the original agreement as to the 12s. 7d. would have been enforceable as a County Court judgment, which would have been a great injustice to the railway company, as all the workman himself asked for was 6s. 10d. a week in addition to his new wages. That alone shows that it could not have been intended to register a memorandum of an agreement which has in fact ceased to exist. The agreement to be registered must show two things, an agreement as to liability and as to liability for so much per week (per Collins, M.R. in *Field v. Longden and Sons*, *ubi sup.*), or, as put by Mathew, L.J. in the same case, it must show three things—liability to pay, the amount of compensation, and the duration of the compensation.

WILLS, J.—I do not think that there is any doubt on this point, and the case seems to me to be entirely free from all practical difficulties. Every description of practical difficulty has been suggested by counsel for the railway company, but in point of fact I think there is none. The Act of Parliament is as clear as can be. There is an agreement which has been come to with reference to compensation. The workman is entitled by the compensation rules of the Act to have that agreement registered, and I think it has been held that there is no limit of length of time within which it is to be registered. The workman in this case has applied to have the agreement registered, and the answer to that is that the agreement, which was come to in 1902, is no longer applicable to the present circumstances of the case. So far that is conceded. It is conceded that in its entirety the agreement is not applicable to the present circumstances; but

is that any reason why it should not be recorded as having been the agreement come to at the time between the parties? It is very important that it should be recorded, because it prevents the necessity of beginning proceedings under the Workmen's Compensation Act *de novo*, and applying for either a fresh agreement or an arbitration and taking proceedings which are more or less cumbrous and expensive, when the greater part of them has been rendered unnecessary by the agreement which has been already come to. It is to be observed that all the rules require to be ascertained is not whether the agreement is in force at the time of the application, but whether the record of the memorandum, which is to be registered, is genuine—that is to say, whether it honestly or truthfully represents the agreement which was then come to between the parties. There is no question about it in the present case, that what is sought to be registered did so represent the agreement which was come to between the parties; and therefore, looking merely at the words of the Act, I cannot see what obstacle there is to the agreement being recorded. But counsel for the respondents says that it would work injustice, and if he could have satisfied me that to allow the agreement to be registered would necessarily work injustice, I should have been very much inclined to say that I do not believe that the Act ever meant to do injustice, or to do anything except what is right, and if he could satisfy me that it necessarily would work injustice, then I should try all I could to find some other explanation of the meaning of these sections. But I cannot myself see that there is the least fear of its doing injustice. It is quite true that the Act says in sched. 2, clause 8, that the agreement, when once recorded, shall operate as a County Court judgment—that is to say, that when it is recorded as to 12s. 7d. a week, it gives the workman a *prima facie* right to go to the court to take out execution for 12s. 7d., or for whatever sum may be due on the basis of 12s. 7d. a week. But the proceedings of all courts, and the application of their judgments, are always subject to the control of the court, and if the court sees that its process is sought to be made use of for what would be scarcely less than a dishonest purpose, under the circumstances of this case, the court always has an inherent jurisdiction to prevent anything of that kind from being done, and an application to the County Court judge on the ground that to enforce this equivalent to a judgment for a sum based on 12s. 7d. a week would be inequitable between the parties, and would be contrary to good faith and justice, would succeed. The judge might have some little trouble in saying whether it should be 6s. 10d., or 6s. 9d., or 5s. 6d. a week; but that is a matter which we constantly have to deal with in cases of this kind, and there does not seem to be anything in that objection founded upon such a difficulty as that against allowing this to be recorded. If the respondents in the present case had come to a fresh agreement with the workman, they might have registered that agreement, and there would have been an end of it. But they have not done so, and it would be unjust to leave the workman without remedy, so that he would have nothing upon which he could issue execution without going through a fresh, elaborate and expensive process; and

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inasmuch as the question of quantum, upon proper application to the judge, is always subject to review, I do not see the difficulty or the injustice. Let me point out what was pointed out to me by my brother Kennedy in the course of the argument, an observation exceedingly to the point on this part of the case, that if the agreement had been recorded in the first instance, when there was no doubt about its being operative, it would have had precisely the same effect, and upon the return of the workman to work and his getting his 18s. a week, exactly the same difficulty would have arisen. There being no fresh agreement, the agreement recorded would have been enforceable for 12s. 7d. a week, or a sum based upon that, without interference; but interference would have taken place because justice required it, and inasmuch as nothing except putting an end to the agreement by a fresh agreement could have prevented, or ought to prevent, the workman from having the benefit of the judgment of some sort or other, enforceable for a proper amount, the difficulty which seemed to counsel for the respondents insuperable under the present circumstances, would have been exactly the same if the agreement had been registered in the first instance, when nobody could have doubted about the propriety of its registration. But where the learned County Court judge made a mistake was, in my opinion, in confounding the registration of the memorandum with the registration of the agreement. What the County Court judge has to be satisfied of is, not that the agreement is applicable to the present circumstances, but that it was come to, and that the record of it in the memorandum proposed to be registered is correct. When those two elements are present, it seems to me that the workman is entitled as a matter of right under the Act of Parliament to have the agreement registered.

KENNEDY, J.—As we are reversing the decision of the learned County Court judge, I think out of respect for him I should add a few words, though I say generally that I quite agree with what my learned brother has said. With great respect to the learned judge and the counsel who argued in support of his judgment, I do not think it is really a difficult case. The Workmen's Compensation Act provides for an agreement between the parties which shall save procedure under the other methods which the Act gives the workman in order to obtain compensation. The Act not only sanctions such an agreement, but it provides for an official record of the agreement, and there is in that part of the Act which provides for such a record no stipulation as to the time within which a record of the agreement shall be applied for. Further, it provides for no objection being permissible before the learned County Court judge, except one, that the memorandum which it is proposed to place on record is not genuine. That is provided for in terms in the schedule in this sense that the only objection contemplated is an objection to its genuineness, and the learned County Court judge here is obliged to find, in order to justify his judgment, that the document was not then genuine within the meaning of the clause. With great respect to the learned judge I have never heard the word "genuine" so used. A judgment is not the less genuine as a transaction if it was genuine when made, say, five

years ago, though something else has been substituted for it in the meantime, which may be an answer to any proceedings under the judgment; but the judgment is genuine all the same. The question of genuineness means that the parties who appear to be parties made the agreement which is described in the document. That is all it means; and it seems to me that it would be using the word "genuine" in a sense for which, in my opinion, there is no sort of justification to say—which is the reason given by the learned judge—that he holds that "this agreement is not now genuine within the meaning of these rules," when the reason given is that in fact there has been a change of circumstances which would make the carrying out of these terms now no longer fair. When we come to look at the form of record, which is form 16 in the Workmen's Compensation Rules 1898, we see how carefully any mistake is guarded against by their recording—for that is the form of the record—the memorandum. First of all, it has to give the date of injury; and, secondly, "that on the day of

the following agreement was come to by and between the said A. B. and the said C. D. and Co. Limited, that is to say:" If that is so, then it seems to me that what was sought to be done here is a matter against which time had no effect, and that, it being admitted that the document was genuine, the learned judge had nothing else to inquire into or to do. What the effect of recording the agreement is on the enforceability of it is, as my brother has pointed out, a matter on which proceedings could be taken, and they could be taken as regards the future immediately, if circumstances had changed, by the employer taking steps to review. The change of circumstances can be availed of, if it is sought to enforce the agreement as a County Court judgment, by proceedings before the learned County Court judge to stay the proceedings on the judgment except on terms. Speaking for myself, I would seek to give an interpretation to statutes in order to avoid any possible injustice, but I am also bound to say that I think, having regard to the relations of workmen with employers, if the employers find that the workman is getting better, and if they are able to give him, and he is able to do for them, other work, which shows that the scheme of the agreement is no longer applicable, it is not unreasonable, and not too much for the workman to ask the employers to say, record the agreement now, and at once apply for a review. Times have changed, and why should it not lie on them to do it. In this case it is not pretended that any other agreement was ever come to, or that there was any answer in law to the agreement which was, in fact, come to, had it stood outside the statute, simply as an agreement enforceable in law between the parties. Terms were offered, and the workman who had lost one leg and had got better and was able to do some work, was very properly willing to accept work, and the only question was some difference between 2s. and 3s. as to the amount of the wages, but no new agreement was come to. If it had happened that by reason of the record of this agreement it could be only in the future that the pay could be reviewed, I do not really think that any great injustice, or any injustice, would have fallen on the railway company if they had chosen, on this

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agreement being recorded, not to apply for any review, but to pass months in paying this workman in some employment, not giving him another agreement and disputing with him simply as to whether they were to pay 6s. or 4s. They had it in their own hands in a moment to give him that which, either by agreement or by proceedings for review under the Act, would have been the proper amount, and, therefore, the diminished amount of compensation. For these reasons it appears to me that there was really no answer to this application. I should personally be very sorry in these cases, in which the great object is to do justice and at the same time to save expense, to have to come to the result, which counsel for the railway company asks us to come to—namely, that this man should have to start expensive proceedings to obtain compensation now under the Act, when the only difference between the parties is some 2s. a week, though, of course, if the law obliged us to come to that conclusion we should be bound loyally to do it.

Appeal allowed. Case remitted to the County Court judge with a direction that the memorandum of agreement should be recorded. Leave to appeal refused.

Solicitors for the appellant, *Dubois and Williams*, for *Flint and Son*, Derby.

Solicitors for the respondents, *Beale and Co.*, London and Birmingham.

Wednesday, Feb. 3.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

STILES (app.) v. GALINSKI (resp.); NOKES AND NOKES (app.) v. MAYOR, &C., OF ISLINGTON (resp.). (a)

Public health (London)—By-laws—Lodging-house—Cleansing at stated times—Liability of "landlord"—No provision in by-law for notice to landlord—Validity of by-law—Public Health (London) Act 1891 (54 & 55 Vict. c. 76), s. 94.

Under the provisions of sect. 94 of the Public Health (London) Act 1891, by which sanitary authorities are enjoined to make by-laws for (amongst other things) "the cleansing and lime-washing at stated times of the premises"—that is, "of a house or part of a house which is let in lodgings or occupied by members of more than one family"—a metropolitan borough council made by-laws wherein "lodging-house" was defined as "a house or part of a house which is let in lodgings or occupied by members of more than one family." One of these by-laws provided that "the landlord of a lodging-house shall in the first week of the month of April in every year cause every part of the premises to be cleansed." The by-law contained no provision as to the giving of notice to the "landlord," who was defined as including the person who received or was entitled to receive the rack rent of the lodging-house or the profits arising from the letting.

Held, that the by-law was unreasonable and bad, in that it did not provide for notice of the state of the premises to be given to the landlord, who

was thereby made responsible, before making him liable for a breach of the by-law.

Held, further, by Wills, J., that the by-law was also bad upon the ground that the work was required to be done in the first week in April, which frequently included the Easter holidays, when there would be a great difficulty in getting sufficient labour to do work which might require several days.

Two cases stated by metropolitan police magistrates and heard together.

STILES (app.) v. GALINSKI (resp.).

Case stated by the metropolitan police magistrate sitting at the Thames Police-court

At the Thames Police-court on the 23rd June 1903 an information was preferred by the appellant against the respondent for that the respondent, being the landlord of a lodging-house, No. 166, Stepney-green, did not, in the first week of the month of April last, cause every part of the premises to be cleansed, contrary to the by-laws in such case made and provided. This information was heard on the 30th June, when the magistrate dismissed the summons, subject to this case.

The appellant was a sanitary inspector and inspector of lodging-houses under the council of the borough of Stepney.

The respondent was the landlord, within the meaning of the by-laws hereinafter referred to, of the lodging-house in question, which was within the borough of Stepney, and was registered under the by-laws.

Evidence was given that on the 18th March 1903 the appellant visited the house and found the rooms and staircases dirty. He again visited the house on the 14th April, and he found the same state of dirt, so that it was clear that no cleansing had been done during the first week of April.

On the 11th June 1902 the council of the borough of Stepney, under sect. 94 of the Public Health (London) Act 1891, made by-laws which had been duly allowed by the Local Government Board with respect to houses let in lodgings.

The Public Health (London) Act 1891 (54 & 55 Vict. c. 76) provides:

Sect. 94 (1). Every sanitary authority shall make and enforce such by-laws as are requisite for the following matters; (that is to say), (a) for fixing the number of persons who may occupy a house or part of a house which is let in lodgings or occupied by members of more than one family, and for the separation of the sexes in a house so let or occupied; (b) for the registration of houses so let or occupied; (c) for the inspection of such houses; (d) for enforcing drainage for such houses, and for promoting cleanliness and ventilation in such houses; (e) for the cleansing and lime-washing at stated times of the premises; (f) for the taking of precautions in case of any infectious disease. (2) This section shall not apply to common lodging-houses within the Common Lodging-houses Act 1851, or any Act amending the same.

Sect. 114. All by-laws made by the county council or by any sanitary authority under this Act shall be made subject and according to the provisions with respect to by-laws contained in sections one hundred and eighty-two to one hundred and eighty-six of the Public Health Act 1875, and set forth in the first schedule to this Act; and those sections shall apply in like manner as if the county council or sanitary authority were a local authority. . . .

(a) Reported by W. W. OMA, Esq., Barrister-at-Law.

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Sect. 182 of the Public Health Act 1875 (38 & 39 Vict. c. 55), provides:

All by-laws made by a local authority under and for the purposes of this Act shall be under their common seal; and any such by-law may be altered or repealed by a subsequent by-law made pursuant to the provisions of this Act: Provided that no by-law made under this Act by a local authority shall be of any effect if repugnant to the laws of England or to the provisions of this Act.

Sect. 184. By-laws made by a local authority under this Act shall not take effect unless and until they have been submitted to and confirmed by the Local Government Board, which board is hereby empowered to allow or disallow the same as it may think proper; . . .

The by-laws in question were by-laws "made by the council of the metropolitan borough of Stepney with respect to houses let in lodgings or occupied by members of more than one family, in the metropolitan borough of Stepney," and they purported to be made under the Public Health (London) Act 1891.

The by-laws provided:

By-law 1. In these by-laws, unless the context otherwise requires, the following words and expressions have the meanings hereinafter respectively assigned to them: that is to say: "Lodging-house" means a house or part of a house which is let in lodgings or occupied by members of more than one family. "Landlord," in relation to a house or part of a house which is let in lodgings or occupied by members of more than one family, means the person (whatever may be the nature or extent of his interest in the premises, and whether he resides on the premises or not) who receives or is entitled to receive the rack rent of a lodging-house. "Keeper," in relation to a house or part of a house which is let in lodgings or occupied by members of more than one family, means the person (whatever may be the nature or extent of his interest in the premises) by whom or on whose behalf such house or part of a house is let in lodgings, or for occupation by members of more than one family, or for the time being receives or is entitled to receive the profits arising from such letting, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such house or part of a house were let at a rent. "Lodger," in relation to a house or part of a house which is let in lodgings or occupied by members of more than one family, means a person to whom any room or rooms in such house or part of a house may have been let as a lodging or for his use and occupation, or who, not being a member of the family of such person, may occupy or use any such room or rooms by permission of the person to whom the same may be let.

By-law 10. Every lodger in a lodging-house shall cause all solid or liquid filth or refuse to be removed once at least in every day from every room which has been let to him, and shall once at least in every day cause every vessel, utensil, or other receptacle for such filth or refuse, to be thoroughly cleansed.

By-law 11. In every case where a lodger in a lodging-house is entitled to the exclusive use of any staircase, landing, or passage in such house, such lodger shall cause every part of such staircase, landing, or passage to be thoroughly cleansed from time to time as often as may be requisite.

By-law 14 [the one now in question]. The landlord of a lodging-house shall, in the first week in the month of April in every year, and at such other times as the condition thereof may render it necessary, cause every part of the premises to be cleansed. He shall at the same time, except in such cases as are hereinafter specified, cause every area, the interior surface of every ceil-

ing and wall of every water-closet belonging to the premises, and the interior surface of every ceiling and wall of every room, staircase, and passage in the house to be thoroughly lime-washed. Provided that the foregoing requirement with respect to the lime-washing of the internal surface of the walls of rooms, staircases, and passages shall not apply in any case where the internal surface of any such wall is painted, or where the material of or with which such surface is constructed or covered is such as to render the lime-washing thereof unsuitable or inexpedient, and where such surface is thoroughly cleansed and the paint or other covering is renewed, if the renewal thereof be necessary for the purpose of keeping the premises in a cleanly and wholesome condition.

By-law 19. Every person who shall offend against any of the foregoing by-laws shall be liable for every such offence to a penalty of five pounds, and in the case of a continuing offence to a further penalty of forty shillings for each day after written notice of the offence from the council,

with the proviso that a less penalty may be imposed.

The above by-laws applied equally whether the lodging-houses were registered or not.

The magistrate was of opinion that so much of the first clause of by-law 14 as required the annual cleansing by the landlord was invalid on the following grounds: (a) Being *ultra vires*; (b) being repugnant to the laws of England; (c) being repugnant to the provisions of the Public Health (London) Act 1891; (d) being unreasonable. He therefore dismissed the summons.

He considered: (a) That sect. 94 (d) and (e) of the Public Health (London) Act 1891 did not empower the borough council to cast an obligation upon a "landlord" which did not already exist at common law or by statute, but merely entitled them to regulate the duties of persons already responsible by requiring—for example, periodical performances; (b) that the by-law is repugnant to the laws of England, because in the absence of express covenants there is no obligation upon a reversioner even to repair, much less to cleanse, any premises which have been let to a tenant for any term, at any rate unless the state of the premises, in consequence of dirt or non-repair, is a nuisance of which he has notice, and it was in his power to abate the nuisance by putting an end to the tenancy. None of these conditions are appended to the by-law; (c) that under the Public Health (London) Act 1891, and the Public Health Act 1875, the following state of things must exist before any obligation additional to the common law can be cast upon the owner (the equivalent to the "landlord" under the by-laws): (1) A nuisance injurious to health, and (2) inability to find the person by whose act, default, or sufferance the nuisance exists, or structural defect the cause of the nuisance; (d) that even if the by-law would be otherwise good in making the landlord responsible, it is unreasonable, because it does not cast a primary, or at least a concurrent, liability upon the lodger to cleanse his rooms, and also relieves the keeper, who has more immediate control of the premises than the landlord, from all liability in the matter, either concurrent or prior, so far as the rooms and exclusive staircases, &c., are concerned.

The question for the opinion of the court was whether the determination of the magistrate was right in law, and if not what should be done in the premises.

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George Elliott for the appellant.—The first point is whether the magistrate was right when he said that he considered that sect. 94 of the Act of 1891 did not empower the borough council to cast an obligation on a "landlord" which did not already exist at common law or by statute. It is submitted that on that point the magistrate is inaccurate in supposing that this by-law imposed upon the "landlord" any obligation which is inconsistent with the statute; and his suggestion that it imposes a greater obligation than is imposed at common law is not well founded. The Act of 1891 itself imposed obligations which did not exist at common law—for instance, the requisite that a house shall be habitable or sanitary. Sect. 4 (1) of the Act has the provision that the sanitary authority may serve notice of a nuisance on the person by whose act or default the nuisance arose, or, if such person cannot be found, "on the occupier or owner" of the premises. Those words "occupier or owner" are very wide, and the word "owner" there would be wide enough to include the "landlord" in this case—namely, the respondent. So that this by-law is merely carrying into effect what the Act provides for where a nuisance exists—namely, the throwing the onus of cleaning a lodging-house on the person who can easily be found. [Lord ALVERSTONE, C.J.—The real point here is that in sect. 4 (1) the statute implies that in the absence of the occupier you may go against the owner. This by-law seems to give the right to go against the landlord as being under a primary liability. Does the statute contemplate a primary liability being placed on the owner?] This London Act of 1891 does not, but every landlord could make an express covenant in a case of this kind as a condition of his letting, that the letting should be forfeited if the tenant did not do the requisite things. The contention of the magistrate that this by-law imposes obligations more than are imposed at common law, is clearly answered by the fact that the Act does the same in sect. 94, where the sanitary authority are required to make by-laws to do certain things, as, for instance, in (a) and (d), and in the latter sub-section there is an obligation as to drainage which is wider than that at common law. The Legislature would know that in the condition of things existing in the East-end of London, the person who in the case of these houses would be more easily got at would be the landlord, as the tenant might be a very transitory person. [Lord ALVERSTONE, C.J.—If the landlord can say that this by-law makes every landlord liable, whatever the circumstances are, it is a question whether that does not go too far.] The by-law says that the landlord shall "cause" every part of the premises to be cleansed—that is, shall cause it to be done either by himself or through his lodger or keeper, if there is one. That is a perfectly reasonable provision. Then, as to the limit as to this being done in the first week in April, there is no difficulty in the work being done in the first seven days of April, and it is a perfectly reasonable provision. The section (sub-sect. (e)) says that the cleansing is to be "at stated times," and therefore it would not satisfy the section to say that the work should be done "by" a stated time. The balance of convenience is to have the work done at the particular stated time that is specified in the by-law. The by-law is not invalid upon any of the grounds

set out by the magistrate, but is a valid by-law, going no further than carrying out the objects of the section.

R. Cunningham Glen (*Clavell Salter* with him) for the respondent.—The magistrate was right. The question really is whether the council have in this by-law been carrying out the Act or going beyond it. It is submitted that they have been going beyond the Act and have been attempting to legislate. It is necessary to look at the definition of "lodging-house," and by that definition it includes any house or part of a house which is let in lodgings or occupied by more than one family. It is not confined to houses which are registered, but it includes houses of any rent which happen to be let in lodgings or to be occupied by more than one family; and it applies to part of a house. There is no saving clause or reservation whatever in these by-laws as to existing leases or in any other way. This by-law imposes as to existing leases these penal obligations on landlords of all premises which are out of their control and in respect of which they would be trespassers if they interfered. It applies to all lodging-houses whether there is a keeper or not, and there is no reservation in it confining it to those houses where there is a keeper. In *Nokes v. Islington Borough Council* (90 L. T. Rep. 22; (1904) 1 K. B. 610) it was held that a by-law which required the landlord to do work without first having been given notice of the necessity of doing it was a bad by-law. The by-law is unjust and unreasonable, and comes within what was said by Hawkins, J. in *Wallen v. Lister* (70 L. T. Rep. 348; (1894) 1 Q. B. 312) that it enabled proceedings to be taken against a person who had ceased to have any interest in the property. A by-law which imposes on a person the obligation of doing that which he cannot do is bad (*Ibid.*), and it is invalid as being unreasonable: (*Kruse v. Johnson*, 78 L. T. Rep. 647; (1898) 2 Q. B. 91). [WILLS, J.—There may be some force in that observation with regard to tenancies existing at the time the by-laws were passed, but very little with regard to tenancies created after. Lord ALVERSTONE, C.J.—There is nothing unusual or unreasonable in the landlord reserving the right to go in to inspect the premises, and saying to the tenant, "You must clean the premises and I am to have the right to go in and see that you have done it."] It is unreasonable to place the primary liability on the landlord; it has never yet been done by statute. Statutory provisions place the primary liability on the occupier, and in no case on the owner in the first instance. They only place a secondary obligation on the owner in default of other persons failing to perform their duty: (sect. 4 of the Public Health (London) Act 1891). Under that section the primary liability is placed, first, on the person whose act or default causes the nuisance then on the occupier, and lastly on the owner. Here it was the act or default of the lodger that was in question. Again, the by-law is not confined to a cleaning of the premises in the first week in April, but such cleaning is to be done at such other times as may be necessary. That is most unreasonable, and contrary to the enactment. To provide that if lodging-houses are not cleansed at any time of the year the landlord is liable to a penalty is really legislating, and the council cannot legislate by by-laws. The

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provision of the statute that the cleansing is to be done "at stated times" is not complied with by a by-law which fixes one particular week, and it would be an unreasonable interpretation to place upon the statute to hold that a by-law is good which requires the cleaning to be done in one week and that week generally occurring in the Easter holidays.

Elliott, in reply, referred to the provision in sect. 116 of the Act of 1891 to the effect that the occupier of premises cannot prevent the owner from obeying or carrying into effect any provision of the Act, and to the cases of *Parker v. Inge* (55 L. T. Rep. 300; 17 Q. B. Div. 584, per Pollock, B.) and *Lancaster v. Barnes District Council* (78 L. T. Rep. 355; (1898) 1 Q. B. 855) as showing that an owner upon whom a notice to abate a nuisance has been served may be liable, although he has not the immediate possession of the premises.

NOKES AND NOKES (apps.) v. MAYOR, &C., OF ISLINGTON (resps.).

Case stated by the metropolitan police magistrate sitting at Clerkenwell Police-court.

A complaint was preferred by the sanitary inspector, acting on behalf of the mayor, aldermen, and councillors of the metropolitan borough of Islington, against Walter Nokes and George Nokes (the appellants) for that they being the landlords as defined by the by-laws of the mayor, aldermen, and councillors, made under the Public Health (London) Act 1891, with respect to houses let in lodgings or occupied by members of more than one family, of a lodging-house, as defined by the by-laws, at 9, St. Clement-street, Barnsbury, within the borough, did not in the first week of the month of April 1903 cause every part of the premises to be cleansed, contrary to the by-laws.

After hearing the parties and the evidence adduced by them on the 17th and 24th June 1903 the magistrate thereupon convicted the appellants, and fined them in the sum of 10s., and ordered them to pay a further sum of 2l. 2s. for costs.

At the hearing of the complaint the following facts were admitted or proved:

The appellants were auctioneers and house agents, and were the landlords within the meaning of the by-laws of the premises referred to in the complaint, and did not in the first week of the month of April in the year 1903 cause every part of the premises to be cleansed, as required by the by-laws.

The house in question contained ten rooms, and was not cleansed in the first week of April according to the by-law. Some of the rooms were whitewashed and papered in Dec. 1902, and the rest of the cleansing was not carried out till May 1903.

It would take two men from a week to a fortnight to cleanse such a house in accordance with the by-law.

The builder who was employed by the appellants had orders to cleanse fifteen other registered lodging-houses at the same time as these premises, and five other houses belonging to the appellants, and stated that he was of opinion that he could not have carried out the cleansing of all these houses during the first week of April. He did not, however, receive his orders to cleanse

these premises until some time in April, and did not commence until the beginning of May.

Other evidence was given to the effect that with one or two weeks notice an almost unlimited supply of such labour as was necessary for complying with the by-law could be obtained during the first week of April.

Upon the evidence before him the magistrate came to the conclusion that if it was necessary that the cleansing should be carried out in any one week, the first week in April was the most suitable, having regard to the condition of the labour market and all other matters. There were about 530 registered houses let in lodgings in the borough of Islington and coming under this by-law. The appellants owned a considerable number of such houses. There were in the whole of London 16,000 such houses.

There were 11,446 men in the borough of Islington engaged in the house-building trade, of whom 3936 were painters, and 3452 labourers, which formed a larger proportion to the whole population than the same class formed in the neighbouring boroughs.

The cleansing required by the by-law in these houses could to a very large extent be carried out by unskilled labour.

It was contended on behalf of the appellants that the by-law was unreasonable and *ultra vires*, and therefore invalid, in that it was practically impossible that all such houses could be cleansed in the space of one week.

The magistrate was of opinion that although there might be some difficulty in complying with the by-law, yet as there was no impossibility in so doing, the by-law was not so unreasonable as to be invalid in law, and he so determined accordingly, and fined the appellants as aforesaid.

The question for the opinion of the court was whether the determination of the magistrate was right; and if the court should be of opinion that his determination was right the conviction was to stand; but if the court should be of the contrary opinion, then the conviction was to be set aside.

The by-laws in question were "By-laws made by the vestry of the parish of St. Mary, Islington, in the county of London, being the sanitary authority for the said parish, with respect to houses let in lodgings or occupied by members of more than one family," and they purported to be made under the Public Health (London) Act 1891. The by-laws provided:

By-law 1. In these by-laws, unless the context otherwise requires, the following words and expressions have the meanings hereinafter respectively assigned to them—that is to say: "Sanitary authority" means the vestry of the parish of St. Mary, Islington. "Lodging-house" means a house or part of a house in the parish of St. Mary, Islington, which is let in lodgings or occupied by members of more than one family. "Landlord," in relation to a house or part of a house which is let in lodgings or occupied by members of more than one family, means the person (whatever may be the nature or extent of his interest in the premises) by whom or on whose behalf such house or part of a house is let in lodgings, or for occupation by members of more than one family, or who for the time being receives or is entitled to receive the profits arising from such letting, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such house or part of a house were let at a rent. "Lodger," in relation to a house or part of a house which is let in

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lodgings or occupied by members of more than one family, means a person to whom any room or rooms in such house or part of a house may have been let as a lodging or for his use and occupation.

By-law 14. In every case where a lodger in a lodging-house is entitled to the exclusive use of any staircase, landing, or passage in such house, such lodger shall cause every part of such staircase, landing, or passage to be thoroughly cleansed from time to time as often as may be requisite.

By-law 16. The landlord of a lodging-house shall cause every common passage or staircase in such house to be thoroughly cleansed from time to time as often as may be requisite.

By-law 17 [the by-law now in question]. The landlord of a lodging-house shall, in the first week of the month of April in every year, cause every part of the premises to be cleansed. He shall, at the same time, except in such cases as are hereinafter specified, cause every area, the interior surface of every ceiling and wall of every water-closet belonging to the premises, and the interior surface of every ceiling and wall of every room, staircase, and passage in the house to be thoroughly lime-washed. Provided that the foregoing requirement with respect to the lime-washing of the internal surface of the walls of rooms, staircases, and passages shall not apply in any case where the internal surface of any such wall is painted, or where the material of or with which such surface is constructed or covered is such as to render the lime-whiting thereof unsuitable or inexpedient, and where such surface is thoroughly cleansed and the paint or other covering is renewed, if the renewal thereof be necessary for the purpose of keeping the premises in a cleanly and wholesome condition.

By-law 21. Every person who shall offend against any of the foregoing by-laws shall be liable for every such offence to a penalty of five pounds, and in the case of a continuing offence to a further penalty of forty shillings for each day after written notice of the offence from the sanitary authority.

Clarke-Williams for the appellants. — The magistrate was wrong in holding that the by-law was not unreasonable. The by-law is bad. It is repugnant to the Act of 1891 itself, and goes beyond that Act. In both the Public Health Act of 1875 and in this Act of 1891, it is provided that the person offending against the by-law must have notice. Here there is no provision in the by-law that the landlord who is to be made liable under it should have notice. The by-law is bad upon that ground. Moreover, there is no finding that there was any offence committed against the Act; the only offence alleged is against the by-law. There is another objection to the by-law. It provides for the doing of this work in the first week in April. That week generally occurs in the Easter holidays, when it would be difficult to get persons to clean these places. It is unreasonable to require that all the work should be done in one week, and that, too, Easter week. Upon every possible ground the by-law is unreasonable and bad.

Courthope-Munroe for the respondents. — [Lord ALVERSTONE, C.J. — The question is whether this by-law can be good, having regard to the fact that it does not provide for notice to be given.] No notice in such a case is necessary. The "landlord" in this case is, as we see by the definition of the terms, the same as "keeper" in the previous case. The appellants here are really the "keepers" of this lodging-house; and the by-law cannot be bad merely upon the ground that it does not provide for the giving of a notice. Then, with regard to the time within which this

work has to be done, the Act itself, in sect. 94, says that the cleansing is to be done "at stated times." The by-law in providing that it is to be done during the first week of April, conforms to the Act in that respect. [Lord ALVERSTONE, C.J. — We all think that there may be a stated time for carrying out the work; the only point is as to whether the particular time chosen—namely, the first week in April—is reasonable.] As to that, it must be supposed that the public authorities will carry out their by-law in a reasonable way, and will do what is reasonable. This provision in sect. 94 of the Act of 1891 is not new. There was exactly the same provision in sect. 35 (5) of the Sanitary Act 1866 (29 & 30 Vict. c. 90), which sub-section empowered the public authority to make regulations "for the cleansing and lime-washing at stated times of such premises"—that is, of lodging-houses. Pursuant to that provision by-laws have been made which have not been held to be unreasonable. The case of *Nokes v. Islington Borough Council* (90 L. T. Rep. 22), which has been referred to, does not really touch this case at all.

Clarke-Williams in reply.

Lord ALVERSTONE, C.J. — Nobody can have listened to this argument without being struck with the extreme importance of the point that has been raised, and I am very glad (although we have had two cases) that we have had the advantage of having had it thoroughly argued by two counsel on each side. In consequence of some observations that have been made, holding, as I do hold, that the by-laws in both these cases must be held to be unreasonable, I desire expressly to point out that we are not interfering with the discretion of the local authorities to the extent to which it has been suggested by counsel who supported the by-laws. In the first place, I recognise that on practical questions, where a power is given to a public authority to make by-laws within the *ambitus* of the power that is given to them, as, for instance, in this case, for cleansing and lime-washing at stated times of the premises, their discretion ought not to be lightly interfered with, especially where by-laws have been sanctioned by a public department and particular duties and times and periods have been enforced. It is only where we see that some legal principle is interfered with that we ought to hold that by-laws are unreasonable, and, therefore, I am not quite sure that we are all agreed as to all the grounds upon which we think that these by-laws are unreasonable. I also agree, as Lord Russell, C.J. pointed out in *Kruse v. Johnson* (*ubi sup.*), that by-laws, such as these made by public authorities, are not to be set aside except upon strong grounds; and it is not to be assumed against them that they would be construed or administered unreasonably. On the other hand, as we pointed out in the case of *Nokes v. Islington Borough Council* (*ubi sup.*), if they necessarily involved that which is unreasonable, it is our duty to set them aside. There can, in my opinion, be no difficulty in properly framing by-laws which can really get rid of all the objections which have been taken in these cases, and I think, although possibly it may be a difficult task to perform, the matter has not been quite sufficiently considered by the framers of these by-laws. They may have followed, as has been suggested,

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some model by-laws, and those model by-laws may not have sufficiently considered the points which have been developed in this case. The benefit of the arguments in such a case as this is that it does point to objections that may be raised, and so enables local authorities to meet them in their future by-laws. Taking the Stepney case first, the objection that I take to this by-law 14 and the ground upon which I think it is unreasonable is that it includes, or may include, a class of people who are not legally responsible, and not morally responsible, without properly safeguarding them before they can be made liable for a criminal offence. The words are: "The landlord of a lodging-house shall in the first week of the month of April in every year cause every part of the premises to be cleansed"; and by-law 19 imposes a penalty of 5*l.* upon every person who shall offend against any of the by-laws for every such offence. Now, the word "cause" is the word that gives rise to the difficulty. If "cause" could be construed to mean "take reasonable steps"—such as by making a contract with his tenants, or something of that kind—the same difficulty would not have arisen; but I think very properly in the interest of sanitation and of the good working of Acts of Parliament of this kind, "cause" does not mean merely "take steps," but does mean "shall see that the thing is done." Therefore we have the by-law providing that the person upon whom under the by-law the duty is cast, was to see that the thing is done. Now I turn to "landlord," and I find that "landlord" in these by-laws includes [His Lordship read the definition of "landlord"]. I do not for the moment read the definition of "keeper" from these by-laws, because I quite agree that there would be less objection to the by-law if it were confined to a person who really had what I may call the personal management of the house. I think this view again is confirmed by analogy by the same kind of argument that I pointed out with reference to the by-law in *Nokes v. Islington Borough Council* (*ubi sup.*), where the question was as to the supply of water-closet accommodation. The Act, by sect. 4, sub-sect. 3 (a) and (b) makes provision that where the nuisance arises from any want or defect of a structural character, or where the premises are unoccupied, then the notice shall be served upon the owner, and where the person causing the nuisance cannot be found, and it is clear that the nuisance does not arise from the act or sufferance of the occupier or owner of the premises, the sanitary authority may themselves abate the nuisance, and may themselves do the necessary work. Only by way of analogy, I point out that the Act seems at places to draw a distinction between the occupier who would be responsible, or who ought to look after these matters, and the owner. It seems to me that the objection to this by-law—which is not any objection to the local authority making a proper by-law dealing with the matter—is that a person, who may have taken an agreement from a responsible agent and who is going to let the house in lodgings, would be held to be liable on the ground that he was entitled to receive the rack rent, and he had not caused the cleansing to be done. I ought to say that I attach no importance to the objections taken by some of the counsel in this argument—namely, the suggestion that the

landlord would not have a right of entry on the premises. I think it perfectly obvious that under an ordinary agreement rights of entry would be reserved, or ought to be reserved, in order to justify a landlord in interfering and enable him to see that the law is obeyed. I wish further to say this: I see no objection to a by-law which puts the responsibility upon the landlord, even though he may be the person who is merely entitled to receive the rent. But, in my opinion, any such by-law ought to be made with reference to such a person's position, and ought in fact to provide that in the case in which there is some person who is liable or may be liable to the landlord to fulfil the obligation of the statute, the landlord himself should not be subjected to a criminal charge without notice being given to him. Therefore, I come to the conclusion that the by-law in both these cases is bad, because it does not provide for the person, who is going to be made subject to the charge, receiving notice in cases in which, under many circumstances, he may not, so to speak, have what I may call the ordinary means of knowing whether or not the law has been fulfilled. With regard to the second case, counsel for the respondents—the borough of Islington—raised a point, which, if he could have made it good, would have differentiated his case from the decision which I am now giving. He said that under the by-law in the parish of St. Mary, Islington, the definition of "landlord" is narrower and corresponds with the definition of "keeper" in the Stepney case, and to a certain extent I agree with him; but I still think, even if we take the definition of "landlord" in the Islington case, it is not sufficiently precise to exclude the case to which I have already referred. It seems to me that it does still render it possible that the by-law might be construed without putting an unreasonable construction upon it to include the person who gets the profit—that is to say, receives the ultimate money—though he may not be in fact in touch with the lodging-house in the same way as the ordinary keeper is. I certainly think that it is not possible to hold, as counsel for the Islington council contended in the second case, that there is no liability until the house is registered, because I think that by-law 2 brings this by-law into force as soon as the person is required to give the particulars, and the subsequent particulars about continuance of the liability do not in any way confer an exemption from or removal of that liability. These by-laws which, no doubt, were designed with the very best intention, and which ought to be supported unless they are shown to give rise to a serious objection, require re-modelling from the point of view, not of preventing the landlord from being responsible if he does not see that the work is done, but of giving him reasonable and proper notice before he can be charged with the breach of the by-law, as he was in these cases, simply because the house had not been cleansed, or had not been cleansed by the given day. I now come to that part of the case which has given me more difficulty, and upon which I am not quite sure that we are all agreed. Speaking for myself only, I should not have been disposed to interfere with this finding that the by-law was valid, merely on the ground that the period adopted in the by-law for carrying out the work was the end of the

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first week in April. The statute in sect. 94 says that the sanitary authority are to make by-laws for the cleansing and lime-washing at stated times, of the premises. Undoubtedly, in my opinion, that does mean fixed dates about the time when it should be done, or by which day it should be done. I trust that if these by-laws come to be reconsidered, the objection, which seems to me to be a very strong objection, to the taking of this particular period, which my brother Wills has pointed out during the argument, will be considered. I can well imagine that a week or fortnight at the end of April or at the beginning of May, or any period of that kind, would remove all the objections that may be taken upon that ground. But why I should not have been disposed to interfere on that ground is that that does seem to me exactly one of the things in which the knowledge and experience of the local authority, who have to fix a stated time, ought to prevail, unless some grave objection, so serious as to amount to an objection in law, or some strong unreasonableness in fact prevails. While I have been very much impressed by the suggestion that the end of the first week in April will very often be a difficult time for the work to be done, there may be other considerations in connection with the class of lodging-houses or the class of people who inhabit these lodging-houses, of which I do not know, which may counterbalance the inconvenience arising from those former considerations. Had the matter rested with me, I should not have been disposed to hold, and I do not hold, that the by-law is bad because of that particular week being taken; but, for the reasons which I have stated, which are, in my opinion, more substantial with regard to the question of no notice being given to an absent landlord, who may be under no legal or moral responsibility to see the Act carried out as between himself and the real person who is in occupation as tenant of the premises, I think this by-law must be held to be unreasonable. That being so, the appeal in the first case must be dismissed, and the appeal in the second case must be allowed.

WILLS, J.—I am of the same opinion, and I desire to adopt as part of my judgment everything which my Lord has said, except with regard to the matter about the selection of the first week in the month of April for the doing of the work. There are, however, a few observations which I should like to add. It seems to me that an initial mistake has been made in these by-laws by trying to make the same hard and fast rule apply to two perfectly different classes of tenements. The lodging-house proper, which is something in the character of a common lodging-house, may perfectly well be dealt with by a series of regulations which are really quite inapplicable to the very large class of houses which are brought under the common operation of these by-laws under the words "houses occupied by members of more than one family." Take the West End of London, where we are told the same sort of by-laws apply; it is not too much to say that there are very large areas in some of the best parts of London where two-thirds or three-fourths of the houses are so occupied that they would come under this definition. One cannot pass through a great number of streets without finding half a dozen doctors' names upon the same door; it is

the commonest thing in the world for a medical man, who has an extremely good house very highly rented, to let off one or two rooms as consulting rooms to somebody else. That immediately brings this house within the definition of a lodging-house and makes all these by-laws applicable to it, and when we come to such a case as that, the application of this by-law seems to me to be unreasonable to the last extent. Moreover, the definition of "landlord" embraces the person who receives the rack rent of the house. To test that, take, for example, the very large area which is owned by some large owner of property in London. Probably there are five hundred to a thousand houses on that area of which the owner receives the rack rent, and for every one of these houses, if occupied in the way I have described, the owner would be liable as for a lodging-house within the meaning of these by-laws. To hold that he was liable because every one of these houses was not thoroughly cleansed, or was not lime-washed from top to bottom during the first week in April, would impose upon the landlord in such a case as that an absolutely intolerable burden, and one against which all common sense and all instincts of fair play rebel. I only give that instance because it is quite within the extreme instances which may be given of the operation of these by-laws. If the cases are fairly within the scope of the by-laws, as undoubtedly the case I have given would be, it is only by pointing out the circumstances of the by-laws as applied in such cases that one sees whether or not, taken as a whole and as applicable all round, the by-laws are reasonable. If they were confined to the class of houses of the same sort and occupied in the same sort of way as common lodging-houses, then of course there would be very much more to be said in their favour. But, even in that case, I agree with my Lord that, unless the person who is struck at is a person who, from his position and his relation to the property, ought to know exactly what his tenants are doing and in what state they are keeping the house, and so on, it would be quite unfair to render him liable without his having had notice of what is taking place. Counsel for the Islington Borough Council defends a good deal of this—and it is part of his argument that I do not like, and that I feel bound to protest against on important public principles—by saying: "These by-laws might be harsh and improper and unjust if they were applied all round, but the borough council or the local authority must be trusted only to put the law in motion in such cases as those in which it would be reasonable to do so." To begin with, the borough council are not the only persons who are entitled to put the law in motion; every subject of the Crown is entitled to do so. And, further, I do not like legislation which is felt to be so unfair, applying it all round, that it requires to be justified by saying that in particular cases it will not be enforced. I think that is as bad a ground upon which to defend legislation as one could very well have. I pass from that part of the case to say a few words about this provision as to the first week in April, as to which I feel fully the force of a great deal my Lord has said. One constantly knows the principles to be applied; but it is the application of principles which raises the difficulty. In this particular case I feel that it is hardly right to say that

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No money must be received by any carter or other persons taking or receiving orders (except at the shop or stores) until the goods ordered have been delivered. (3) The full name and postal address of all persons ordering must be entered in the books provided for that purpose and sent in to the office the day before the orders are to be delivered.

The existence of the rules and their purport and effect were not communicated to or known by John Plant hereinafter mentioned, or any other customer; nor was any limitation of Cooper's authority to make sales of or to take orders for beer or stout on behalf of the appellant communicated to or known by John Plant or any other customer, the general course of dealing being that when Cooper accepted orders from customers they expected them to be and they were in fact executed.

The appellant supplied to Cooper certain postcards for the use of customers, containing a price list, a notice that travellers would wait upon them, that orders by post would receive prompt attention, a space for particulars of orders, and a space for the name and address of the persons giving such orders. Cooper occasionally, but not invariably, took out such postcards and gave them to persons on whom he called for orders.

Previously to the 5th Nov. 1902, one John Plant, of No. 4, Walmsley-street, Rishton, had from time to time ordered certain stout from the appellant by letter addressed to the appellant at his licensed premises at Nelson, and on one occasion by an order given to Cooper verbally. On the 5th Nov. 1902 Cooper called on Plant at his house and obtained from him there an order for a two-gallon jar of stout for the price of 2s. 4d. Cooper thereupon entered that order in his order-book, and on the following day he posted to the appellant such order-book, together with a summary which he made out of all the orders obtained by him in the Rishton district, including that of John Plant. He also posted to the appellant a number of gummed labels containing the names of the persons who had given the orders. Those labels were to be affixed to the vessels in which the goods ordered were to be delivered.

At the time when the order was given Cooper handed to Plant a postcard, but did not inform him that it was to be used as hereinbefore mentioned or otherwise, and it was not used, but was destroyed by his wife within a short time afterwards.

On receipt by the appellant at his licensed premises of the order-book, summary, and labels on the 7th Nov. 1902, his servants at his licensed premises selected and appropriated a two-gallon jar belonging to the appellant, filled with stout, in fulfilment of Plant's order, and affixed thereto a label bearing Plant's name.

The two-gallon jar, together with other vessels filled pursuant to other orders, was thereupon placed on a cart of the appellant to be delivered in the Rishton district to John Plant and the appellant's other customers by Cooper and one Boyle, a carter of the appellant, and only liquors in accordance with such order-book and summary were placed on the cart, all being labelled with the names of the respective customers.

Cooper and Boyle did not deliver to Plant the stout as ordered by him, but they delivered to

him a two-gallon jar of strong ale, of which the price was 2s. 8d., and which had affixed to it a label bearing the name Lancaster, a customer of the appellant, who had on the 5th Nov. given to Cooper an order for such a jar of strong ale. Plant's wife accepted the jar of ale and paid Cooper 2s. 4d. for it, but she was not, nor were Cooper or Boyle at the time of such delivery, aware of the mistake which had occurred in regard to it.

Plant kept and consumed the strong ale delivered as above-mentioned, and afterwards, on the 18th Nov., offered to Cooper 4d. in addition to the sum already paid for the same, but that offer was not accepted by Cooper or the appellant on the ground that the mistake was that of Cooper and not that of Plant.

It was contended for the appellant that there was no evidence of any holding out that Cooper had authority to accept orders, and that he had no such authority; in fact that (subject to the Court of Quarter Sessions being bound by the authority hereinafter referred to) an executory contract was not sufficient in law to bring the case within the provisions of the Act, and that an executory contract was not complete till accepted at the licensed premises, and that if an executory contract was sufficient it was made on such licensed premises.

It was further contended that though the jar of stout was delivered in pursuance of the order given by Plant to Cooper on the 5th Nov. 1902, there was no contract until Cooper's order-book was received by post at Nelson and accepted by the appellant; that the jar of stout had been appropriated and set apart by the appellant at Nelson, and that the sale thereupon took place at the licensed premises at Nelson and not at Rishton. It was further contended that if no appropriation took place on the licensed premises, then that the order given by Plant had never been executed by the appellant, because stout had never been delivered to Plant or paid for by him, and that the parties were never *ad idem* as to the ale delivered to Plant, and that there was no evidence of any new contract for the sale of the ale.

It was contended for the respondent that the sale, or the contract for the sale, of the stout was completed at Plant's house at Rishton on the 5th and 7th Nov.; that on the facts proved Cooper was the agent of the appellant to sell to Plant and to make a contract with him for the sale of the stout, and that he had been held out as such agent to Plant by the appellant. It was further and alternatively contended that by reason of Plant's acceptance of the strong ale on the 7th Nov. 1902, and of the appellant's assent thereto, signified by his foregoing the additional price to which he was thereby entitled, a new contract was entered into and executed between Plant and the appellant for the sale of the strong ale by the appellant to Plant on the 7th Nov. 1902.

The Court of Quarter Sessions were of opinion that on the facts proved an executory contract for the sale of the stout was made at Plant's house at Rishton, and that therefore the court were bound by the authority of the judgments in the case of *Stephenson v. Rogers* (80 L. T. Rep. at p. 195) to hold that an offence had been committed within the meaning of the Licensing Act

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1872, s. 3, and the court dismissed the appeal, but reduced the fine of 50*l.* imposed by the petty sessions to 20*l.*

The question for the opinion of the court was whether or not the decision of the Court of Quarter Sessions was right.

If the court should be of opinion that it was right, then the order of quarter sessions dismissing the appeal was to be confirmed.

If the court should be of opinion that it was not right, then the order of quarter sessions was to be quashed.

Sect. 3 of the Licensing Act 1872 (35 & 36 Vict. c. 94) provides :

No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorised by his licence to sell the same. Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorised by his licence to sell the same, shall be subject to the following penalties. . . .

Roskill, K.C. (William Mackenzie with him) for the appellant.—The facts in the present case are absolutely identical with the facts in the recent case of *Walker v. Walker* (67 J. P. 452), in which this court decided that there was no sale off the licensed premises and that no offence under sect. 3 had been committed. The authorities show that to constitute a sale at the licensed premises two things are necessary, the order must be accepted at the licensed premises and the goods must be appropriated on the licensed premises. If both those things concur, then the sale is a sale at the licensed premises and not elsewhere. In the present case both those things concurred at the licensed premises; there was the acceptance of the order there and the goods were set aside and appropriated there, so that there was a binding contract only at the licensed premises. It is immaterial that the delivery was at Plant's house. In *Pletts v. Beattie* (74 L. T. Rep. 148; (1896) 1 Q. B. 519) *Wills, J.* points out the distinction between a sale and a delivery, and he says: "I think that it is clear that although the delivery of the beer was to be at Accrington, the sale was at Burnley. Sale and delivery are two distinct elements in a contract for the sale of goods. . . . Those provisions"—that is, the provisions of the Licensing Act—"are satisfied if the substantial elements of a sale take place on the licensed premises, though the beer is consumed or delivered off them." *Wright, J.* in the same case points out that the fact of the order being taken at the customer's door does not prevent the sale from being a sale at the licensed premises; and in *Pletts v. Campbell* (73 L. T. Rep. 344; (1895) 2 Q. B. 229, at p. 233) he points out that if the jars were addressed or otherwise appropriated to the customer before leaving the licensed premises, it would necessarily make a difference in the licence-holder's liability, in favour of the licence-holder. That is what took place here, as the jar in this case was addressed and appropriated to Plant before it left the licensed premises. [Lord ALVERSTONE, C.J.—In any of these cases was the beer to be paid for on delivery? Yes, in *Walker v. Walker* (*ubi sup.*), where the facts are the same as the present. When the order is accepted—which it

was in this case at the licensed premises—then there is a contract. He also referred to

Hewitt v. Jervis, 38 L. J. 365, July 18, 1903.

E. Bankes, K.C. (W. Whately with him) for the respondent.—The question is entirely one of fact, and the justices here so dealt with it, and convicted the appellant. The substance of the transaction was that already a completed contract for sale was made at the customer's house, although the traveller went through the form of giving the postcard to the customer. If that be so, then the fact that the appellant's servants selected and appropriated the beer at the licensed premises makes no difference, and the justices upon these facts have found—and they were right in so finding—that there was an executory contract for sale at Plant's house. With regard to the cases, *Pletts v. Beattie* (*ubi sup.*) does not apply, as all the court there held was that under the particular circumstances of that case all the essential elements of the contract of sale were made at the licensed premises. It was never decided in terms that in these cases an executory contract of sale was enough until Channell, J. decided it in *Stephenson v. Rogers* (80 L. T. Rep. 193, at p. 196). Channell, J. there clearly decides that an executory contract of sale is enough to bring the case within the statute. He says: "On the whole, therefore, the authorities seem to me to be fairly clear to show that an executory contract is within the section, and that it is not necessary, in order to make the transaction an offence, that property should have passed." *Walker v. Walker* (*ubi sup.*) is distinguishable in this, that the licence-holder did exercise his own judgment as to whether he would execute the order or not. [Lord ALVERSTONE, C.J.—I am not quite satisfied that an executory contract of sale off the licensed premises is sufficient; I think you must argue the main question whether what was said by Channell, J. that an executory contract would do is right.] Sect. 3 says "no person shall 'sell,'" and the word "sell" includes an agreement to sell (sect. 1 of the Sale of Goods Act 1893). In dealing with an executory contract of sale it is sufficient if there be a completed agreement to sell and to buy, and the executory contract of sale, plus delivery, or completed by delivery, makes a complete sale, or a completed contract of sale. The intention was that the sale of intoxicating liquors should only take place at certain places which could be controlled. [KENNEDY, J.—Has it ever been held that a mere agreement for the sale brings the case within the section? Sect. 62 of the Act, where wide words are used as to what is necessary in proving a sale, and the judgment of Channell, J. in *Stephenson v. Rogers* (*ubi sup.*) show that. The distinction is between the case where a person acts as a mere conduit-pipe to convey the order, as in *Pletts v. Beattie* (*ubi sup.*), in which case the sale would not be at the unlicensed place, and the case where the person goes and accepts and has power to accept the order at the customer's house, in which there would be a sale at that house. In *Guild v. Freeman* (36 Sc. L. Rep. 6) it was held under similar circumstances that the sale took place at the unlicensed premises. The whole question really turns on the view as to what took place at the customer's house. There is no suggestion here

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that the purchaser assented to an appropriation of the goods at the vendor's place of business. On the facts the justices were abundantly justified in coming to the conclusion to which they came. It is submitted, first, that there was an executory contract of sale at the customer's house, and next, that an executory contract of sale, even without delivery, but, at any rate, if followed by delivery, is sufficient to bring the case within the section. There is no decision to the contrary, and there is authority, especially the judgment of Channell, J., in support of that view. [He also referred to *Pletts v. Campbell* (*ubi sup.*).]

Roskill, K.C. in reply.—By sect. 2 (2) of the Judicature Act 1894, this court can draw inferences of fact on appeals from quarter sessions. There is no statement in the case that Cooper had authority to accept orders; there is a clear statement that he had no such authority. As to the question of executory contract, there are only two cases which deal with it: *Stallard v. Marks* (38 L. T. Rep. 566, 3 Q. B. Div. 412) and *Guild v. Freeman* (*ubi sup.*); the dictum of Channell, J. on that point is merely *obiter*. There was here no contract at all at Plant's house. It was, both to the knowledge of the purchaser and of the traveller, a mere traveller's order to transmit.

Lord ALVERSTONE, C.J.—In these licensing cases it is extremely important, when principles have been laid down in deciding them, that those principles should be applied in subsequent cases where there is really no substantial difference in the facts. The case of *Walker v. Walker* (*ubi sup.*) has been relied on by counsel for the appellant as an authority in his favour on all the points which have been raised. I do not, however, think he was quite entitled to use it in that way. It is quite true that it is very difficult to find any substantial difference in the facts of the two cases; but, on the other hand, it is quite plain from the report that the argument that has been addressed to us with reference to an executory contract being sufficient to bring a case within the section was not presented to the court in that case, and was not the point on which the decision was based. There having been a contention there that there was no appropriation of the goods on the licensed premises and that the property in the goods did not pass until actual delivery, the facts were that the order was taken to the licensed premises and accepted there by the licensee, and that there was a setting aside of the goods and their subsequent delivery. The court there thought, on the authorities, that those facts did not show a sale off the licensed premises, but that the contract, if any, was made on the licensed premises. That short statement of the effect of the judgment showed that the court there were not applying their minds to the point, which does not seem to have been raised there, as to whether or not an executory contract by the agent of the licensed person would be sufficient to constitute an offence within sect. 3 of the Act. I may also remark that Channell, J. was also a party to that judgment, and in all probability, if any question had been raised on that point, he would have directed attention to the case of *Stephenson v. Rogers* (*ubi sup.*). That being so, it will probably have to be decided some day or other whether an executory contract made

by the traveller with the authority of the licensed person brings the licensed person within the Act. Speaking for myself, after having heard the point argued on both sides, the inclination of my mind at present is that it would do so. I am inclined to the opinion indicated by Channell, J. in *Stephenson v. Rogers* (*ubi sup.*), and probably intimated by Wright, J. in the case of *Pletts v. Campbell* (*ubi sup.*), and to a certain extent supported by the case of *Stallard v. Marks* (*ubi sup.*), and by the Scotch case of *Guild v. Freeman* (*ubi sup.*), which has been referred to. But as I do not think that the point really arises in this case, I must not be supposed to express a definite opinion upon the point. It is a very important question which may some day arise, and it is better to reserve any decision upon it until it does arise. With regard to the particular facts of this case, I have come to the conclusion that in this case as stated there was no evidence on which the magistrates ought to have found that there was an executory contract entered into by Cooper on the occasion of his interview with Plant. There was at the most evidence of the acceptance of an order to be transmitted to his principal, who might himself act upon it. Referring to the earlier transactions between the appellant and Plant, Plant or Mrs. Plant had from time to time ordered stout from the appellant by letter addressed to the appellant, and on one occasion had given a verbal order through Cooper. On this particular occasion Mrs. Plant did not think it necessary to use the postcard which was left with her in order that she might order goods on that or on some future occasion. I do not find anything in what passed between Plant and Cooper to show an acceptance of a contract of sale. What are the other facts in the case? As I have said, I do not think it necessary to draw fine distinctions in these licensing matters. Travellers canvassing for orders are undoubtedly common incidents in the wine and spirit trade as in many other trades, and I think it would be a startling proposition to say that the mere forwarding an order was sufficient evidence of the acceptance of a contract. It seems to me that the course of business here prescribed, that no order was to be accepted in the sense of a contract, nor goods delivered, until the orders were first handed into the office and entered in the order-book, and that any person infringing that rule would be instantly dismissed, did point to the fact that it was not intended that the taking of an order to be afterwards transmitted should be the acceptance of a contract. I think that the magistrates meant to say that Cooper was a person who was to canvas for orders, and they set out the restrictions or rules under which he was to do so, and then they found that Plant had not any notice of those restrictions, or of any limitation on Cooper's authority. Looking at these facts, and comparing them with the facts in *Walker v. Walker* (*ubi sup.*), in my opinion there was no evidence on which the magistrates ought to have come to the conclusion that there was an executory contract made at Plant's house for the sale of the beer. So far as the written rules went, there was no evidence of Cooper's authority, in fact, to accept contracts; and, so far as the previous practice went, there was no evidence that the appellant had authorised him to accept contracts. It seems to me that

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the only inference that the magistrates ought to have drawn was that Cooper was there to take orders and transmit them to headquarters, where they might be accepted or not, as the appellant liked. I do not know that much is to be gained by referring to the authorities beyond saying that in the case of *Pletts v. Campbell* (*ubi sup.*) the court, on the facts there stated, came to the conclusion that the substantial part of the transaction took place at the customer's place of business, or, at any rate, not on the licensed premises. In *Pletts v. Beattie* (*ubi sup.*), where a postcard had been sent, the court came to the conclusion that there had been no sale off the licensed premises. In *Stephenson v. Rogers* (*ubi sup.*), the court came to the same conclusion, and they came to the same result in *Walker v. Walker* (*ubi sup.*). The setting aside and appropriation of the goods at the licensed premises where the order was received was also a matter to be taken into consideration. Looking at all the facts fairly, I can see no evidence of anything more than an acceptance of an order, the forwarding of that order to headquarters, and the dealing with that order by the principal, so as to show that the contract—even the executory contract—was not made until the order had been entered and the authority of Cooper to make it ratified. For these reasons I have come to the conclusion that the principle acted upon in the case of *Walker v. Walker* (*ubi sup.*) applies to this case, and that there was no sufficient evidence of an executory contract for sale by Cooper, so as to raise the point as to the sufficiency of an executory contract, which was discussed by Channell, J. in *Stephenson v. Rogers* (*ubi sup.*). I therefore think that this appeal should be allowed.

WILLS, J. concurred, being of opinion that the facts showed that there was no executory contract made at Plant's house, and added: With regard to the question whether an executory contract made at the purchaser's house does bring a case within the words of the section constituting the offence, I would rather reserve anything in the nature of a judgment. The impression, however, left on my mind by the arguments which have been addressed to us, is rather in favour of the view that an executory contract is sufficient; but I still emphatically desire to keep an open mind on the question, in case it should come up before us on a future occasion, because it is impossible for any mind, however experienced in judicial matters, to approach a question which it was not necessary to decide in the same spirit as as if it had to be decided. On the question whether there was really any evidence of a completed sale at Plant's house at Rishton, my opinion had somewhat fluctuated during the course of the argument, but I have ultimately come to the conclusion that the view expressed by the Lord Chief Justice is correct.

KENNEDY, J. concurred.—As to the point whether an executory contract would be sufficient without more to constitute a violation of the section in question, as I desire entirely to reserve it for careful consideration, I do not wish to say, and in fact it would be quite useless to say, what the inclination of my mind is on that point.

Appeal allowed. Order of quarter sessions quashed.

Solicitors for the appellant, *Busk, Mellor, and Norris*, for *Procter and Son*, Burnley.

Solicitors for the respondent, *Bower, Cotton, and Bower*, for *Ainsworth, Sanderson, and Howson*, Blackburn.

Thursday, Feb. 4.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

KINGSLAND (app.) v. HABEN (resp.). (a)

Metropolis management — Drains — By-laws — Reconstruction of drain of old building — Necessity of intercepting trap — Work "in any building" — Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 202.

By a by-law made under the powers of the Metropolis Management Act 1855 it was provided that every person who should construct or reconstruct any pipe or drain, or other means of communicating with sewers, so far as he should effect any such works "in any building" erected before the confirmation of the by-laws, should provide in such drain a suitable and efficient intercepting trap.

Held, that the word "in"—in the words "in any building"—meant, not "inside the building," but "in connection with the building," and that consequently the by-law applied to the reconstruction of a drain in connection with an old building erected before the confirmation of the by-laws, as the reconstruction of the drain was a work "in" such building, although such drain was outside the building, and that such drain ought to be reconstructed with an efficient intercepting trap, as required by the by-law.

CASE stated by a metropolitan police magistrate.

The appellant was a builder carrying on business at Upper Clapton, in the county of London, and the respondent was a sanitary inspector of the metropolitan borough of Hackney.

The appellant was employed by the owner of the messuage and premises No. 181, High-street, Homerton, within the borough, to carry out certain repairs to the premises, and in the exercise of such employment reconstructed a drain upon the premises. The messuage, premises, and the drain so reconstructed were shown upon a plan annexed to the case.

The drain commenced in a water-closet constituting an outbuilding or back addition to the messuage, passed through the back yard of the messuage into the adjoining premises No. 183, High-street, where, uniting with a drain of the last-mentioned premises, it became a sewer within the meaning of the Metropolis Management Acts, and of the by-laws hereinafter mentioned. The messuage and water-closet were erected before the confirmation of the by-laws.

By by-laws under sect. 202 of the Metropolis Management Act 1855, made by the London County Council on the 13th Oct. 1900, confirmed at a subsequent meeting of that council on the 6th Nov. 1900, and approved by the Local Government Board on the 14th June 1901, it was provided as follows:

By-law 5. Every person who shall erect a new building shall provide in every main drain or other drain of such building which may immediately communicate

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with any sewer, a suitable and efficient intercepting trap at a point as distant as may be practicable from such building, and as near as may be practicable to the point at which such drain may be in connection with the sewer. He shall, except in cases where the means of access to be provided in compliance with the preceding by-law, give adequate means of access to such trap, and provide a separate manhole or other separate means of access to such trap for the purpose of cleansing it.

By-law 21. These by-laws shall, so far as practicable, apply to any person who shall construct or reconstruct any pipe or drain, or other means of communication with sewers, or any trap or apparatus connected therewith, so far as he shall effect any such works in any building erected before the confirmation of these by-laws, as if the same were being constructed in a building newly erected.

The appellant did not provide in the drain a suitable and efficient or any intercepting trap, and an information was accordingly laid by the respondent before the magistrate that he had reconstructed the drain without providing therein an intercepting trap and a separate manhole or other separate means of access to the trap for the purpose of cleansing it in accordance with the by-laws. Apart from the providing of the intercepting trap and manhole or other means of access thereto, the drain was laid by the appellant in a satisfactory manner.

The magistrate was of opinion that the water-closet being a building erected before the confirmation of the by-laws, the reconstruction of the drain was a work "in" such building within the meaning of the foregoing by-law 21, and he convicted the appellant of the offence charged, and adjudged that he should pay a penalty of 20s., and two guineas costs.

The question for the opinion of the court was whether the magistrate was right in holding that the reconstruction of the drain was a work in a building within the meaning of such by-law as aforesaid.

Sect. 202 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), gave power to make by-laws for (amongst other things) "regulating the dimensions, form, and mode of construction, and the keeping, cleansing, and repairing of the pipes, drains, and other means of communicating with sewers, and the traps and apparatus connected therewith."

Courthope-Munroe for the appellant. — The magistrate was wrong in holding that the reconstruction of the drain was a work "in" the building, within the meaning of by-law 21. By-law 5 deals with new buildings and with persons erecting new buildings, and provides that the person erecting any new building shall provide in every drain of such building, which may immediately communicate with any sewer, an efficient intercepting trap, and so forth. Then by-law 21 deals with old buildings—that is, buildings erected before the confirmation of the by-laws—and provides that the previous by-law is to apply to a person who shall construct or reconstruct any pipe, drain, or other means of communicating with sewers, so far as he shall effect any such works "in any building" erected before the confirmation of the by-laws, as if the same were thereby constructed in a newly-erected building. The word "in" in the expression "in any building" means "inside" the building. By-law 21 does not apply at all in a case of this

kind; it applies only to work done "inside" the building. The construction of the two by-laws taken together is this, that if a person is erecting a new building, then (by by-law 5) he is to build it with all modern improvements, and he is to provide all the drains of such building, which may communicate with sewers, with efficient intercepting traps; but if he is merely reconstructing the drains of an old building—as the appellant was in this case—then, if he effects any such works "in" that is, "inside" the building, he is also to provide suitable intercepting traps, but if the works are outside the building, he is under no such obligation. Here the building was an old building, and therefore by-law 5 does not apply; and inasmuch as the reconstruction of the drain was work effected outside the building, by-law 21 does not apply. The magistrate was therefore wrong in his construction of the by-law, and the appellant ought not to have been convicted. He referred to

Metropolitan Industrial Dwellings Company v. Long, 68 J. P. 113.

Arory, K.C. (*Thomas Bevan* with him), for the respondent, was not called upon.

LORD ALVERSTONE, C.J.—I should be sorry to think that in construing the words "in any building" in by-law 21 we ought to be driven to construe the word "in" literally, as meaning "inside within the walls" when we are applying by-law 5 to that state of things. I am not at all sure that in one sense it would not be correct to say that these are not the drains in the building, but to my mind we do not want to put our decision on that narrow ground. It seems to me that we have got here a by-law which says that when you are making a drain of such building which may immediately communicate with any sewer you are to put in a sufficient, suitable, and efficient intercepting trap, which is, of course, a most desirable thing. This, if it is applicable, is intended to be applied under by-law 21, and it is material to observe that by-law 21 relates directly to the reconstructing of pipes or drains. Every person who shall construct or reconstruct any pipe or drain, or other means of communicating with sewers, or any trap or apparatus connected therewith, so far as he shall effect any such works in any building erected before the confirmation of these by-laws, shall do the same as if it were a new building. I cannot think that that means that the pipes or drains there referred to, which, in the majority of cases so far as this work is concerned, must be outside the actual walls are to be limited to works which are inside the building, and that the word "in" there means "inside." In my opinion, the word "in" does mean "in reference to" or "in connection with," and does not mean "inside," and certainly this is a case in which, as we have to apply the by-law, we ought to apply it in, as it appears to me, the only reasonable way in which it can be applied. Therefore I think the magistrate was perfectly right.

WILLS, J.—I entirely agree.

KENNEDY, J.—I am of the same opinion.

Appeal dismissed.

Solicitors: for the appellant, *Bramall, White, and Roberts*; for the respondent, *William A. Williams*.

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NORFOLK COUNTY COUNCIL v. GREEN AND ANOTHER.

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Saturday, March 5.
(Before WALTON, J.)

NORFOLK COUNTY COUNCIL v. GREEN AND
ANOTHER. (a)

Highways — Repair — Extraordinary traffic — Extraordinary expenses for repairs — Haulage of timber over roads — Timber the natural produce of land — Period of limitation for recovery of expenses — "Particular work extending over long period" — Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 23 — Locomotives Act 1898 (61 & 62 Vict. c. 29), s. 12, sub-s. 1 (b).

The defendants for a period extending over two years bought from the owner of an estate a large quantity of timber which was felled on the estate, and the timber was hauled by the defendants to the railway station over two roads for a distance of between two and three miles on each road, the haulage being done partly by horses and partly by a traction engine. The quantity of timber so hauled was about 1500 tons, and the felling and hauling were done under several separate contracts extending over the two years. During this period the traffic of the defendants over the roads was unusual traffic, did unusual damage to the roads, and caused unusual expenses in repairing the roads, which were constructed to bear ordinary country traffic, usually agricultural traffic.

In an action brought by the highway authority to recover the expenses of repairing the roads, as being "extraordinary expenses" incurred by them in consequence of the "extraordinary traffic" within sect. 23 of the Highways and Locomotives Act 1878, the defendants alleged that the timber was the natural produce of the land and that the carting of such produce to the railway station was ordinary traffic and an ordinary user of the road.

Held, that, having regard to the total weight carried, the frequency of the loads and the means by which it was carried, the traffic was "extraordinary traffic" within the meaning of sect. 23, and the fact that the timber was the natural produce of the land did not, under the circumstances, prevent the traffic from being "extraordinary," or the expenses from being "extraordinary expenses," which the highway authority were entitled to recover.

Held, further, that the work was not a "particular work extending over a long period" within the meaning of sect. 12, sub-sect. 1 (b), of the Locomotives Act 1898, and that therefore the sub-section did not give the highway authority the right to bring their action for the recovery of the whole of the expenses within six months after the completion of the work, and consequently that by the sub-section their claim was barred for any expenses incurred more than twelve months before the commencement of the action.

ACTION tried before Walton, J. without a jury.

The plaintiffs, the Norfolk County Council, alleged, in their statement of claim, that they were liable to repair the main roads therein mentioned—namely, the Norwich and Stalham-road and the Barton and Neatishead-road, and a bridge carrying the latter road over a stream, situate in the county of Norfolk—and that they

had incurred extraordinary expenses in repairing the same by reason of the damage arising from the excessive weight passed along such roads and the extraordinary traffic conducted thereon, by or in consequence of the orders of the defendants, during the three years ending the 31st March 1902, and the plaintiffs claimed in respect thereof the sum of 677l. 2s. 7d., the action having been commenced on the 4th Aug. 1902.

The defendant Edward Green, in his defence said (*inter alia*) that on the 20th Oct. 1900 the partnership subsisting between himself and his co-defendant (Edward Harry Green) was duly determined, and that since that date he had no interest in and had taken no part in the management of the business, in respect of which the plaintiffs' claim was alleged to have arisen; and he also relied on the defence of his co-defendant.

The defendant Edward Harry Green, in his defence said (*inter alia*) that he used the main roads in question, if and when he used the same during such period, properly and with due care, for an ordinary trade of the district—namely, the periodical haulage of timber cut by the defendant from woods adjoining or served by such main roads.

As to the whole of the plaintiffs' claim the defendant relied on the provisions of sect. 12, sub-sect. 1 (b), of the Locomotives Act 1898, and submitted that the plaintiffs could not recover any expenses incurred in respect of damage done to those main roads and bridge more than six months, or alternatively more than twelve months before the commencement of this action.

Alternatively, the defendant, while denying all liability, brought into court the sum of 110l., and said that that sum was sufficient to satisfy the whole of the plaintiffs' claim.

Sect. 23 of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), under the heading "Extraordinary Traffic," provides:

Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the court having cognisance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid.

The Locomotives Act 1898 (61 & 62 Vict. c. 29) provides:

Sect. 12 (1). Section twenty-three of the Highways and Locomotives (Amendment) Act 1878 (which relates to the recovery of expenses of extraordinary traffic), shall be amended as follows: (a) Expenses under that section shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the County Court, and if exceeding that sum in the High Court. (b) Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any par-

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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ticular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work. (c) There shall be substituted for the words "by whose order" the words "by or in consequence of whose order."

The facts and arguments are fully set out in the judgment.

Macmorran, K.C. and *Hansell* for the plaintiffs.

Bray, K.C. and *H. Gregory* for the defendants.
Cur. adv. vult.

March 5.—*WALTON*, J. delivered the following judgment: This is an action by the Norfolk County Council against Edward Green and Edward Harry Green, and the plaintiffs say in their statement of claim that they are liable to repair the main roads which are hereinafter mentioned, and that they have incurred extraordinary expenses in repairing the same by reason of the damage arising from the excessive weight passed along such roads, and the extraordinary traffic conducted thereon, by or in consequence of the orders of the defendants during the three years ending the 31st March 1902, and the roads in respect of which the claim is made are stated to be the Norwich and Stalham-road and the Barton and Neatishead-road. The facts are to a large extent admitted. Between the year 1897 and March 1902—the claim extending up to the 31st March 1902—a considerable quantity of timber was felled on the Beeston estate, which is in the north-eastern part of Norfolk, between Norwich and the sea, Beeston Park lying on the road from Norwich and Wroxham to Stalham. About the year 1894, Sir Philip Preston, the life tenant of the Beeston estate, died, and he was succeeded by Sir Henry, who died four years later, in 1897. The trustees of the estate after Sir Henry's death had heavy expenses to meet. It happened that at this time there was upon the estate a good deal of fallen timber which had been blown down in a gale. The trustees found that they could raise a considerable sum by the sale of this and other timber, and accordingly between 1897 and March 1902, they sold a large quantity of timber. The first sales in 1897, in 1898, and 1899 were made to a timber merchant named Woods, but early in 1900 the trustees found that they could make better terms with the defendants, Messrs. Green, and from that date they dealt with them, making sales to them from time to time during 1900 and 1901. These sales were separate transactions, and the trustees might at any time in 1900 or 1901 have ceased to do business with Messrs. Green, and Messrs. Green might at any time have ceased to buy timber from the trustees. The timber thus bought by the defendants was hauled by them for the most part to Wroxham station and over the roads in respect of which the claim arises—that is to say, the Wroxham and Stalham-road and the Barton and Neatishead-road. The principal claim is in respect of the Wroxham and Stalham-road. The length of the road affected in each case was between two and three miles. In the statement of claim the length of the Stalham-road is described as a little over three miles, but the part really affected was, I think, rather less—something under three miles. The quantity of timber hauled by the defendants between the early part

of 1900 and March 1902 was about 1510 tons. The haulage was done partly by horses and partly by traction engines. As I understand, the total quantity of timber sold by the trustees produced a sum of about 5000*l.* The quantity sold to the defendants realised or produced a price of about 4000*l.* These are approximately the figures, although I do not know that they are absolutely accurate. The roads in question were ordinary country roads, constructed to bear ordinary country traffic. The usual traffic over the roads was agricultural traffic, and no doubt the roads were used to some extent by brewers' drays, and occasionally by other traffic of a similar description so far as weight is concerned. I ought to mention here that the defendant Edward Green retired from partnership with his co-defendant Edward Harry Green in Oct. 1900, and is not responsible for what was done after that date. Now, a great deal of evidence was given as to the use of the roads by the defendants, and I have come to the conclusion undoubtedly that during the two years in question—that is, from the early part of 1900 up to the 31st March 1902—the traffic of the defendants over the roads in question was—I use the term advisedly—unusual, and did unusual damage to the roads, so occasioning unusual expense to the plaintiffs. The question which I have to determine is whether the traffic was extraordinary traffic within the meaning of sect. 23 of the Highways and Locomotives Act 1878 (41 & 42 Vict. c. 77). There was evidence that the north-east part of Norfolk is well wooded, and that large quantities of timber are sometimes felled in that district and carried to railway stations, but I am satisfied that the two roads in question have, so far as I have heard, never been used for traffic of the kind which was put upon the roads by the defendants in the years 1900, 1901, and to some extent in the early part of 1902, having regard to the quantity carried, the period within which it was carried, and the means by which it was carried. I do not think that in this district there is anything like a regular system of cultivation of timber for the purpose of sale, such as was proved in the case of *Raglan Highway Board v. Monmouth Steam Company* (46 J. P. 598). It may be and probably is the fact that in former years, and before the felling of the Beeston estate began, loads of timber passed over these roads; traction engines were sometimes used on the roads before 1900, but in my judgment only occasionally, and never to the extent to which the defendants' traction engine was used during the two years in question. Now, it is said that the timber was the natural produce of the land, just like grain, barley, or wheat, or potatoes or turnips, and that the carting of such produce to the railway station must be the ordinary traffic over the roads, heavier at sometimes than at others, heavier upon particular roads than upon others, but still, speaking broadly, the natural and ordinary use of the roads. I find that that contention was put forward in the case of *Williams v. Davies* (44 J. P. 347). In the judgment in the Court of Appeal in *Hill v. Thomas* (69 L. T. Rep. 553; (1893) 2 Q. B. 333), that case was discussed, and I think almost all the other cases of importance, which had been decided before the year 1893, were discussed, and with regard to *Williams v. Davies* (*ubi sup.*), what Lord Bowen, who delivered the judgment of the

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Court of Appeal in that case, said was this: "The first case to be noticed is that of *Williams v. Davies* (*ubi sup.*). The defendant had bought timber near a railway station which was conveyed in waggons in sixty-seven loads between Christmas and March. The timber was purchased in the ordinary course of business, but the sixty-seven loads of timber were a greater number of timber-loads than usually passed over the roads in question in three consecutive months, and the heavier loads were heavier than the loads of ordinary agricultural produce. The magistrates held that the sixty-seven loads of timber were in the aggregate excessive weight and extraordinary traffic. The Court of Queen's Bench (Lush and Bowen, JJ.) held that the justices were right. 'What the traffic was to be compared with,' said Lush, J. 'was the ordinary traffic along the road,' and the fact that the timber was the natural produce of the land did not prevent the traffic being held as extraordinary." Another way of putting the same contention, or practically the same contention, is that the carting of timber, which is no doubt felled sometimes, and sometimes in large quantities, is just one of the things that the roads were made for. That is a proposition which I think cannot be disputed. Nobody suggests that the use made by the defendants of these roads was not a lawful use. In that sense it was not an abuse of the roads. They had a right to use the roads, and they had a right to use the roads in the way in which they did use them. But the question is, who has got to pay, and, if the defendants used them for the purposes of extraordinary traffic within the meaning of the statute, and caused extraordinary expense, although they were perfectly justified in using the roads, and although, in that sense, the roads were made for such use, still they have got to pay the extraordinary cost of repairing the extraordinary damage which their extraordinary traffic did. I may again refer to what Lord Bowen said in the case of *Hill v. Thomas* (*ubi sup.*), at p. 339; (1893) 2 Q. B., at the beginning of his judgment. He there gives that which is, I think, now always recognised to be the true definition, the authoritative definition, of what extraordinary traffic is. He says: "The most important question we have to consider is the true meaning to be placed on the words 'damage caused by extraordinary traffic.' We may begin by observing that the object of the section is not to prohibit extraordinary traffic, but to lay the extra expense of damage done by such traffic to the road on the right shoulders—namely, upon those who caused the damage, and to whose benefit it enured. The section, in the second place, distinguishes between 'excessive weight' and 'extraordinary traffic.' The damage done by 'extraordinary traffic' may, therefore, in the eyes of the Legislature, differ from that done by 'excessive weight.' Traffic, thirdly, is a *nomen collectivum*—a collective term—a noun of multitude. It does not, like 'excessive weight,' apply merely to the cargo carried by a single vehicle; it is large enough to include the continuous or repeated user of the road by various vehicles belonging to one owner. Finally, extraordinary traffic, according to the plain use of language, is traffic which is not of the common order of traffic. And, taking all these considerations together, and especially when we remember that the object of the section is to provide for the

expense of such extraordinary traffic as does damage to a highway, we shall arrive at the following result—namely, that 'extraordinary traffic,' as distinct from 'excessive weight,' will include all such continuous or repeated user of the road by a person's vehicles as is out of the common order of traffic, and as may be calculated to damage the highway and increase the expenditure on its repair." That is the test which I have to apply in this case, and having regard to the weight carried, to the frequency of the loads—that is to say, to the total weight carried during this period, which is a period of two years—and having regard to the means by which it was carried, the vehicles and traction employed, I have come to the conclusion that the defendants' traffic was extraordinary traffic within the definition or description given by the Court of Appeal in the case of *Hill v. Thomas* (*ubi sup.*). But that does not dispose of the present case, because the defendants contend that the plaintiffs' claim is to a large extent barred by a limitation which is imposed by sect. 12, sub-sect. 1 (b), of the Locomotives Act 1898. The total claim is for the damage done during the two years which I have mentioned—that is to say, between the early part of 1900 and the 31st March 1902. In saying that the claim was for two years, I am dealing not with the formal claim made in the action, but with the facts as they came out at the trial, and at the trial it was proved that the traffic in question began early in 1900. It is difficult to say exactly when, but still early in 1900, and the claim, of course, extends only to the 31st March 1902, and as the figures worked out at the trial—again I am not giving them as a finding by myself, but merely as I think they were put forward by counsel for the plaintiffs in his reply—the total claim in respect of both roads amounted to something under 450*l.* But now the defendants say that a large part of that claim is barred by the limitation to which I have referred. Sect. 12, sub-sect. 1 (b), of the Locomotives Act 1898 enacts as follows: "Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work." Now the writ in this action was issued on the 4th Aug. 1902. The defendants contend that the claim, by virtue of sect. 12, sub-sect. 1 (b), must be barred to damage done during the twelve months prior to the 4th Aug. 1902—that is to say, that it must be confined to the expense of repairing damage done after the 4th Aug. 1901—and *prima facie* that is so, unless the plaintiffs can bring themselves within the second part of the sub-section, because the sub-section says that the proceedings must be commenced within twelve months of the time at which the damage has been done, or, and this is the second part of the sub-section, "where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work." The plaintiffs say that this was damage which was the consequence of "particular work extending over a long period," and that they did

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commence their action not later than six months after the completion of such work. That is the contention of the plaintiffs. That depends upon whether the work in question, which I may describe as the felling and haulage of this timber from the Beeston estate was a "particular work" within the meaning of this sub-section. As I have said, the felling and hauling of this 1500 tons of timber was not done under any one single contract to begin with. That may not be a conclusive test; but in fact it was not. It really was the haulage of timber which, as it happened, had been bought from time to time by several separate contracts, contracts made in each of the years in question, and it appears to me clear that when one contract was made and the timber included in that contract was felled and hauled away, it was never certain that there would be another contract or that any more timber would be felled. Nobody could say when this work would be finished, if it was a work within the meaning of the sub-section; so far as I know, I do not know whether it is finished now. It is a mere question for how long it would be convenient and profitable for the defendants to buy timber from the trustees of the Beeston estate, and for how long it might be convenient and profitable for the trustees to sell the timber to the defendants and not to sell to somebody else, or not to sell at all. I think that "particular work" in this sub-section must be construed to some extent with reference to the other words of this part of the sub-section. The words are: "Where the damage is the consequence of any particular building contract or work." I think "particular work" must be particular work, something in the nature of, something similar to, a building contract. I do not think that this was work within the meaning of that sub-section, and, therefore, although this, in my judgment, was extraordinary traffic, I do not think that the plaintiffs can recover for any expense incurred in respect of damage done prior to the 4th Aug. 1901. One of the plaintiffs' witnesses, a man named Bunn, who was in charge of this part of the road up to March 1902, said that he did not remember seeing the traction engine in the latter part of 1901, and, according to the plaintiffs' case, the damage to the roads was mainly due to the use of the traction engine. The expense in respect of which the claim is made for the year 1901-2 was, as appears from the evidence, mainly and substantially incurred before the end of the year 1901. There is other evidence which points to this that after Aug. 1901 there was not a great deal of extraordinary traffic or of expense incurred attributable to the extraordinary traffic. I think there was some. It is extremely difficult for me to say how much, but, as I think there was some, I must give the plaintiffs something, and I must assess it as well as I can, though in making assessments of this kind one is very often obliged to do so by something very like guesswork. Doing the best I can with the materials before me, I believe there was some damage, and some damage after the 4th Aug. 1901, and some expenses incurred in consequence of that, and I think I shall be doing no injustice to the defendants if I assess that at the sum of 75*l*. I have considered, having regard to my judgment, whether I ought to deal with the other question about which there is a very great deal of evidence—namely, as to what

expense the plaintiffs were put to during the years 1900 and 1901, and before the 4th Aug. 1901, or in respect of damage done before the 4th Aug. 1901, in repairing the roads and in repairing the extra damage to the roads caused by the extraordinary traffic. I have come to the conclusion that the plaintiffs can recover this 75*l*. and no more. It is not necessary for me, if I am right, to consider this other question, which is a very troublesome and difficult question. I have thought it better not to deal with it at present, but to leave it over and simply to give judgment upon the points which I was obliged to consider—namely, the question whether there was any extraordinary traffic, or any claim in respect thereof, and, if so, how much. My judgment is that the plaintiffs are entitled to recover 75*l*. and that sum only. If there should be an appeal, and if the Court of Appeal should take a different view of the case from that which I take, and if it should be necessary to assess the amount of expense incurred in 1900 and 1901, I shall be quite prepared, if the parties desire it, to deal with that question upon the evidence which I have got, but for the present I do not deal with it.

Judgment for the defendant Edward Green with costs. Judgment for the defendant Edward Harry Green, with costs after the payment into court.

Solicitors for the plaintiffs, Sharpe, Parker, Pritchards, Barham, and Lawford, for Charles Foster, Norwich.

Solicitors for the defendants, Trinder, Capron, and Co.

Feb. 22 and 23.

(Before CHANNELL, J.)

WALKERS, WINSER, AND CO. v. SHAW, SON, AND CO. (a)

Custom—Sale of goods—Right to reject—Custom limiting right—Validity—Custom incorporated in contracts—Powers of trade arbitrators.

By a custom a buyer of barley was not entitled to reject for difference or variation in quality unless the same was excessive or unreasonable and was so found by arbitration under the contract.

Held, that the custom was good.

Semble, that where a custom applicable to contracts in a certain trade comes to be incorporated as an express term in the contracts of that trade, the proper inference to be drawn is that it destroys that custom as a custom.

Apart from custom or contract, an arbitrator has no jurisdiction to award a money compensation instead of rejection, where such right to reject exists.

AWARD in the form of a special case.

The sellers, Walkers, Winsor, and Co., are grain merchants carrying on business in London, and the buyers, Shaw, Son, and Co., are grain merchants carrying on business in Hull, and having frequent transactions in grain on the London market.

By a contract in writing dated London, the 1st Oct. 1902, entered into after previous negotiation by telegrams and correspondence, the sellers agreed

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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to sell and the buyers to purchase a quantity of about 500 tons of St. Malo barley, at time of shipment "to be about as per sample No. 373," for shipment in Oct. 1902, at the price of 23s. 6d. per 420lb. free on board, including freight and insurance to Hull, Grimsby, or Goole, the destination to be given when the vessel was ready to load. Amongst the further terms of the contract it was provided that any shipment in partial execution of the contract was to be deemed and accepted as if made under a separate contract, and that there should be no implied condition that the goods were free from latent defect. Payment was to be by net cash in London for invoice amount on presentation of and in exchange for bill of lading and policy of insurance, and any dispute arising out of the contract was to be left to arbitration in London in the usual way.

On the 3rd Oct. the sellers chartered the steamship *Formby* for the purpose of the contract, and by letter of the same date informed the buyers that the vessel was chartered for their purchase, and requested destination to be given.

The sellers, for the purposes of the sale and in pursuance and in partial execution of the contract, caused to be shipped from St. Malo a quantity of 414 tons 17cwt. 2qrs. 4lb. of barley by the steamship *Formby* and duly appropriated such shipment to the contract, and on the 7th Oct. the buyers gave directions for the destination of the vessel to be the Albert Dock, Hull, which directions were communicated to the master.

On the afternoon of the 8th Oct., after the vessel was partly loaded, the buyers (having previously requested and received from St. Malo a bulk sample of the barley shipped) by telegram sent from Hull at 4.30 p.m. requested the sellers to stop the shipment, alleging that the bulk sample differed from the selling sample, to which telegram the sellers replied on the same day that they were unable to stop the shipment.

The loading of the *Formby* was completed on the 9th Oct., and she forthwith sailed for Hull. The bill of lading was made out in the name of and to the order of F. Avril Fils, the actual shipper of the barley, and, after indorsement by him, passed into the hands of the Comptoir National d'Escompte de Paris, from which it was obtained by the sellers. The sellers in taking up the bill of lading did so for and on behalf of the buyers for the purpose of enabling the latter to receive the barley at Hull, to which port they had ordered the ship, and not with the intention of reserving to themselves any power of disposing of the barley.

On the 9th Oct. the sellers forwarded to the buyers the invoice, amounting to 2505l. 16s. 1d., at the same time stating that the documents would, no doubt, be presented on the following Saturday, and inquiring at what London bank they (the sellers) were to present the same for payment. On the same day the buyers wrote to the sellers that, as they would not pay until proof of a proper shipment, it would be of no use to present the documents, and the arbitrator found as a fact that formal presentation of the shipping documents under the contract was waived by the buyers.

Further telegrams and correspondence passed between the parties, but no arrangement was come to, and the buyers still declined to pay for the documents.

On the 12th Oct. the sellers again wrote that they had the documents in their possession, and that they were still at the buyers' service against payment of 2000l. on account.

The *Formby* arrived in Hull on the 13th Oct., and, the buyers still refusing to take up and pay for the documents pursuant to the contract, the sellers landed the same for account of whom it might concern with Messrs. Laner and Harrison (whose names had been suggested by the buyers in the course of the correspondence) pending arbitration, and on the same day nominated their arbitrator.

On the barley being landed, it was ascertained that there was a deficiency of 27... quarters of the bill of lading quantity. The freight duty and landing charges were paid by the sellers, and amounted to 250l. 13s. 4d. The barley has since remained in store, with the exception of a small quantity sold by arrangement between the parties without prejudice to their respective rights.

No further tender of barley was made by the sellers to complete the total quantity contracted to be sold.

By the custom and usage of the London corn trade applicable to the sale of barley or other grain on contracts in the form employed in this case, a buyer is not entitled to reject for difference or variation in quality unless the same is excessive or unreasonable and is so found by arbitration under the contract.

This has been the custom in the corn trade in London for a very long period, and it has been adopted as one of the terms of the forms of contracts for sale of barley and other grain issued by the London Corn Trade Association since its incorporation in 1886, which forms are very largely used not only in the United Kingdom, but also throughout the British colonies and possessions, and on the Continent of Europe, and in America and elsewhere. The words inserted in the forms of contract are "difference in quality shall not entitle the buyers to reject except under the award of arbitrators or the committee of appeal, as the case may be." A similar rule has been adopted by the Corn Trade Associations of Liverpool and Hull as a rule in forms of contract issued by these associations.

It was contended before the arbitrator on behalf of the buyers that such a custom would be bad in law.

The barley shipped per the *Formby*, although somewhat inferior to the sale sample in quality, and in this respect not "about as per sample" so as to entitle the sellers to insist on payment of the full contract price without any allowance, was commercially within the contract, and the inferiority was not excessive or unreasonable, nor was it so great as to amount to a difference of description.

At the request of the buyers the arbitrator submitted the following as questions of law for the opinion of the court: (1) whether, by reason of the quantity of barley shipped by and discharged from the *Formby* being below the minimum named in the contract, the tender was a good tender under the contract; and (2) whether the above-mentioned custom or usage is bad in law, and, if so, whether, by reason of the inferiority of quality, the buyers were justified in entirely rejecting the barley per *Formby*, and in

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refusing to accept the same subject to an allowance.

The evidence of the witnesses before the arbitrator formed part of the case.

Scrutton, K.C. and *Loehnis* for the buyers, Shaw, Son, and Co.—This custom is bad. The barley was to be "about as per sample," and the contract was made on that condition. The custom is contrary to that condition and so is void, as it contradicts the written contract. They referred to

The Alhambra, 43 L. T. Rep. 636; 4 Asp. Mar. Law Cas. 410; 6 P. Div. 68;

Barrow v. Dyster, 51 L. T. Rep. 573; 13 Q. B. Div. 635.

If it is good, then the seller could force the buyer to take goods different to what were ordered. It was laid down in *Yates v. Pym* (6 Taunt. 446; 16 R. R. 653) that a usage of trade cannot be set up in contravention of an express contract, and therefore, on a warranty of prime singed bacon, evidence was held not to be admissible to receive bacon to a certain degree tainted as prime singed bacon, nor of a practice to preclude the purchaser from all remedy if he does not discover and point out the defect by an early day. The custom is also unreasonable. They referred to

Leuckhart v. Cooper, 3 Bing. N. C. 99; 43 R. R. 602; *Sea Steamship Company v. Price, Walker, and Co.*, 8 Com. Cas. 292.

Again, the custom is too vague and uncertain to be good, for the margin of difference is entirely left to the arbitrator, and one arbitrator might think one thing and one another, so that the buyers and the sellers would never know how they were situated. The custom does not now exist, for, according to the findings in the special case, the custom is incorporated in the contracts. On all these grounds the custom is bad.

Carver, K.C. and *Leck* for the sellers, Walkers, Winsor, and Co.—The custom is good, for its true meaning is only that a buyer cannot reject merely on account of there being a difference or variation in quality. If the difference or variation in quality is excessive or unreasonable, and whether it is excessive or unreasonable is a question for the arbitrator to decide, the right to reject still remains. Such a custom cannot be unreasonable. The reasons why the customs were held bad in *Leuckhart v. Cooper* (sup.) and *Sea Steamship Company v. Price, Walker, and Co.* (sup.) were, in the first case, because it would bind the goods of third persons, and, in the second, because it was clearly unreasonable. As to the point raised that the custom is too vague and uncertain to be enforceable, the only uncertainty that exists is in the application of the rule which the custom makes. The rule itself is certain enough, and the same might be said of every rule of law. They referred to

M'Andrew v. Chappell, 14 L. T. Rep. 556; L. Rep. 1 C. P. 643;

Jackson v. Union Marine Insurance Company, 31 L. T. Rep. 789; L. Rep. 10 C. P. 125;

Vigers v. Sanderson, 84 L. T. Rep. 464; (1901) 1 K. B. 608.

It does not contradict the written contract. If it had been imported into the written contract, it would, perhaps, have contradicted some terms of such contract, but no one could have contended that it was void.

CHANNELL, J.—This case certainly raises some points of difficulty. I think that they are mainly the points of difficulty which always arise when one tribunal has got to review the decision of another tribunal and has not the same jurisdiction, and has not jurisdiction to go into the whole matter which the tribunal below has gone into. It is the difficulty which arises in our courts in County Court appeals and in magistrates' appeals, and also in these special cases stated by arbitrators. I, sitting here, have only power to review or even express opinion as far as I know upon the decisions of these arbitrators so far as they deal with the question of law. Questions of fact are still for the arbitrators alone, notwithstanding the alteration, so far as it is an alteration, in the recent Arbitration Act. There is, besides that, a little difficulty arising upon the terms in which the custom has been found by the umpire. The custom that he finds is that in the London corn trade, the custom and usage of the London corn trade applicable to the sale of barley or other grain on contracts in the form employed in this case, is as he states it. The form employed in this case is a contract to purchase barley to be shipped in France at a cost freight and insurance price with a clause providing that all disputes shall be settled by arbitration, without any clause such as is stated to be put into forms of contract settled by the Corn Trade Association. Where there is a clause in the contract, it says that the difference in quality shall not entitle the buyers to reject except under the award of arbitrators or the committee of appeal, as the case may be. The arbitrator says that where there is a contract such as here, there is a custom that the buyer is not entitled to reject for difference or variation in quality unless the same is excessive or unreasonable and is so found by arbitration under the contract. I think, to my mind, that there is just a little difficulty in consequence of the form in which that is stated. It is stated generally that the buyer is not entitled to reject for difference or variation in quality. If the thing had stopped there, I should think that it was unreasonable; but it does not stop there. There is a qualification in it, "unless the same is excessive or unreasonable." On the whole, I have come to the conclusion that that saves it and makes the thing good. I think that the true meaning of what the arbitrator has found is that which I have been putting throughout the latter portion of the argument, that it means that you have not a right to reject merely for difference or variation in quality if it is a matter that can reasonably be met by an allowance in the price—that is to say, if it does not affect other matters than the amount, the price at which, in fact, the corn or grain was bought. If it did affect other matters, then that variation would be an unreasonable variation, and would be such a variation that it would not be reasonable to require a buyer to take the goods simply at an allowance in the price. If that is what the custom as found here does mean, I see no reason why effect cannot be given to it in law. The law now upon contracts of sale is, of course, stereotyped in the Sale of Goods Act, and the two sections that I have been referred to dealing with the matters are the 15th and the 55th. Sect. 15, sub-sect. 2, says that in the case of a contract for sale by sample there is an

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implied condition that the bulk shall correspond with the sample in quality—that is to say, that there is not merely a warranty, but there is a condition—and therefore the buyer may reject if the thing tendered is not in accordance with the sample. But then the 55th section says that, "Where any right, duty, or liability would, arise under a contract of sale by implication of law"—that, I think, clearly includes this—it may be negated, amongst other things, by usage, if the usage be such as to bind both parties to the contract. Consequently there may be a usage which would prevent this implied condition arising and alter it from a condition into being a mere warranty. Upon that, if there was no arbitration clause, damages could be recovered. If there is an arbitration clause, of course the matter would be settled by the arbitrator giving an allowance. Therefore, provided that there is a valid and effective usage in law, this implied condition, as a condition, is gone. The points that are made against this custom are, first, that it contradicts the written contract. If it did, of course effect could not be given to it. I was somewhat struck with Mr. Scrutton's argument in the first instance, but I think that Mr. Carver answered it by pointing out that this custom is imported into a large number of contracts in this trade, and that, when it is there, nobody contends that the contract cannot be given effect to, or that it makes the contract of no effect. Clearly it does not. Therefore I do not think that it can be said that this custom is so inconsistent with the terms of the contract that it cannot be given effect to. If it went the length of saying, "You shall have no remedy for any variation in the quality contracted for," of course that would be unreasonable and would absolutely alter the nature of the contract. But that is not the custom. The custom simply is that you may take it with a variation in the price, and provided there is a limit to the custom in the way that I think there is by the words "unless the same is excessive or unreasonable," I do not see that that is inconsistent with the written contract. The point whether it is unreasonable is very nearly the same as that which I have been dealing with already. The suggestion is—and it is obvious that it is so—that if you have not got something of this sort in writing it is not fair between the two parties, because one party has the option to reject, when it is in his interest to do so by the market price having fallen, and he also has got the option to keep it when the price has gone the other way, notwithstanding the variation. It is said, and I think with a great deal of truth, that it is reasonable to have a custom which will prevent the rejection being claimed merely on the ground of a variation which does not affect the purpose for which the buyer wants to use the goods, but only goes to affect the price which he is to pay for it. If the custom is so limited, it seems to me that it cannot be said to be unreasonable. Then there is another ground on which it is said to be unreasonable which comes in with the third ground of Mr. Scrutton—namely, that it is uncertain. It is said that it is uncertain because it is a custom which depends, as was put, I think, by Mr. Loehnis in his cross-examination of the witnesses before the arbitrator, upon the idiosyncrasies of the arbitrator. But reasonableness, as Mr. Carver has pointed out, is

a thing which has to be considered in very many points arising in law. Reasonable price, reasonable time, reasonable care and skill are all things recognised by the law, and there is no standard of reasonableness except that which a jury, which is the usual tribunal dealing with such matters, may think to be reasonable; and juries certainly have idiosyncrasies, sometimes very remarkable ones, quite as much as arbitrators, and I should think that most likely judges have them also, so that where the reasonableness, as in the case of a custom, is for the judge and not for the jury, there may be great variations of opinion according to what may be called the idiosyncrasies of the judge just as they are called the idiosyncrasies of the arbitrator. I think, therefore, that the fact that this custom in its operation depends upon what the tribunal which has to deal with it thinks to be reasonable does not make it uncertain in law so that it cannot have any effect given to it. That, therefore, disposes of the three points upon which Mr. Scrutton has contended that this custom cannot be given effect to. Then comes the point which he dealt with lastly—in one sense, perhaps, I ought to have dealt with it first—namely, whether I can interfere with the finding of the umpire that the custom exists in fact. As to that, the question has been put as to whether there is any evidence of it. If there is no evidence of it, I am at liberty to treat it as a question of law, just as a judge, if there is no evidence to go to the jury, says so as a matter of law, and withdraws the case from the jury. If there is any evidence—that is the usual expression; I suppose that it means any real and reliable evidence on which he can reasonably find it—then it becomes a question of fact, and I cannot interfere with it. In this case, if the whole matter were for me, I think that I should come to the conclusion that the custom did not exist, and for this reason. There is a considerable amount of evidence of gentlemen who have known this trade for a long time that at one time the custom did exist, in the sense that it was not incorporated in contracts, and was taken to be understood between the parties in the trade, and that they made their contracts upon the footing of the existence of this custom, without incorporating it in their contracts. After a time the Corn Trade Association was formed, and when the association was formed they drew their own form of contract, and in their form of contract they put an express term more or less corresponding with this alleged custom. I should myself have drawn the inference that that meant this, that as men of business they thought it far more convenient that such a thing as this is should be expressed in the contract rather than left to a common understanding, and that therefore they put it into the common form of contract with a view to the parties agreeing to it if they meant to agree to it, and if they did not propose to agree to it leaving it out. If they say so, that destroys the custom as a custom, a custom being something that is so well understood that it is unnecessary to put it into your contract. I myself should have drawn that inference, I think, upon the whole of this evidence. I should have also taken into account, of course, that which has been pointed out—namely, that the witnesses differed a good deal as to some portions of the custom. Many of

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them say that they always put it into their contracts, and many of them also base it upon the arbitration clause. The arbitration clause in my opinion is an insufficient ground to base it upon. That would have been my view upon this evidence, but I do not feel at liberty to say that there is no evidence upon which a reasonable person could not come to the conclusion to the contrary. There are several witnesses who, although they vary in details, speak decidedly to the custom. Then there is the fact that the umpire is himself the chairman of this Corn Trade Association, and I cannot help thinking that when people refer a matter to a gentleman in that position they mean to avail themselves of his knowledge of the trade by selecting him as the umpire, and that it cannot be said that he is not at liberty to take some account, at any rate, of his knowledge. It would make a good deal of difficulty, in my mind, in my holding as a matter of law that there was no evidence of this custom if the gentleman, merely of his own assertion, asserted that it existed; but of course he has done more than that in this case, because he has had in fact the evidence of gentlemen, possibly as skilled as himself in the trade, who have spoken more or less to the custom. Therefore I think that I cannot hold that there is no evidence of the existence of this custom. I said just now, and perhaps I had better just explain what I meant, that I thought that the incorporation of an arbitration clause merely was not sufficient to base the existence of this contract upon. What I mean is this: I do not pretend that I have so much knowledge of these commercial matters now as I think that I had some thirty years or so ago, because the course of business, the forming of a special commercial court, has taken some of us rather out of the way of dealing with or hearing much about these things. But I cannot help thinking that in many trades besides this trade, arbitrators have been in the habit of assuming, contrary to law, where there is no custom, that they had power, when objection was taken to the quality of an article tendered, to say, "That shall be taken with an allowance." Before the Arbitration Act it was practically impossible to review in any way the decision of arbitrators unless they chose to state a special case, and there was no difference in the practical result whether they went wrong upon a point of law or upon a point of fact. I think that where arbitrators were taking it upon themselves to say that a variation did not signify very much, and could quite fairly be met by an allowance, which undoubtedly they did, they were going wrong on a point of law, having been selected as the tribunal to decide both law and fact. Their decision was final and could not be reviewed. But now, if you intervene at the proper time and in sufficient time, you can, by the operation of the order to state a special case, stop an arbitrator going wrong upon points of law. Therefore the fact that they have been in the habit for years past of deciding these questions, in the way in which they have decided them, by awarding an allowance instead of a rejection, does not seem to me to show the existence of a custom in law. It merely shows that arbitrators have been in the habit of dealing with the matter perhaps in a way that was businesslike and probably fair and just between the parties, but they have been in the habit of dealing with it in that way not according

to law. Of course, if you intervene in time, as was done here, apparently you can deal with it. The evidence of some of the gentlemen who gave evidence, I think, really did not go much beyond that. It was to the effect that, when you got an arbitration, the arbitrator has got power to deal with the matter, and that it had always been the practice of arbitrators to say: "It does not matter very much. We will give you a money allowance and not allow rejection." If they did that, following a binding custom binding the parties to the contract, of course it was all right, but if they did that by virtue of a sort of equitable jurisdiction assumed by themselves, it does not go to make a custom. It only shows that the arbitrator was not infrequently going a little bit beyond the law, possibly not knowing any better. I would not blame them for it if they thought that it did justice, but they could have been stopped if the present machinery under the Arbitration Act had existed. That is the reason upon which it seems to me that some of the evidence of some of the gentlemen really with regard to this custom based upon the fact of the arbitration clause was not evidence to the point, but I think that, on the whole, there was such evidence before the umpire that it would be impossible for one to say that there was no evidence, and therefore, although I myself should have found to the contrary on this point as to the custom, I cannot in any way interfere with the finding. I do not think that I have jurisdiction to do so. On those grounds I think that the decision on the questions in this special case must be given in favour of Mr. Carver's clients.

Judgment accordingly.

Solicitors for Walkers, Winsor, and Co., *Lowless and Co.* Solicitors for Shaw, Son, and Co., *Pritchard and Sons.*

Tuesday, Feb. 23.

(Before CHANNELL, J.)

LORD LUDLOW v. PIKE. (a)

Landlord and tenant—Tithe—Agreement to pay tithe as further rent—Validity—Tithe Act 1891 (54 & 55 Vict. c. 8), s. 1.

An agreement by a tenant to pay to his landlord a certain rent for a farm and "also by way of further rent so much as the landlord shall pay by way of tithe rentcharge on the said premises" is void by virtue of sect. 1 of the Tithe Act 1891.

POINT of law raised on the pleadings.

The action was brought to recover a half-year's rent due the 29th Sept. 1903 for the West Ashton Farm. By the lease the defendant agreed to pay 235*l.* rent per annum, and "also by way of further rent so much as the landlord shall pay by way of tithe rentcharge on the said premises."

The defendant paid into court the sum of 117*l.* 10*s.*, but pleaded that, as to the balance, the agreement to pay was void by virtue of sect. 1 of the Tithe Act 1891 (54 & 55 Vict. c. 8), and so the amount so reserved was not recoverable.

It is provided by sect. 1 of the Tithe Act 1891:

(1) Tithe rentcharge as defined by this Act issuing out of any lands shall be payable by the owner of the lands.

(a) Reported by W. DE B. HENKAT, Esq., Barrister-at-Law.

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notwithstanding any contract between him and the occupier of such lands, and any contract made between an occupier and owner of lands after the passing of this Act for the payment of the tithe rentcharge by the occupier shall be void. (2) Where the occupier is liable under any contract made before the passing of this Act to pay the tithe rentcharge then he shall cease to be bound by that part of his contract, but he shall be liable to pay to the owner such sum as the owner has properly paid on account of the tithe rentcharge which such occupier is liable under his said contract to pay exclusive of any costs incurred or paid by the owner in respect of such tithe rentcharge, and every receipt given for such sum shall state expressly that the sum is paid in respect of that tithe rentcharge, provided that where the lands out of which any tithe rentcharge issues are occupied by several occupiers who have contracted to pay the tithe rentcharge any of such occupiers shall be liable only to pay such proportion of the sum paid by the owner of the lands on account of that tithe rentcharge as the rateable value of the lands occupied by him bears to the rateable value of the whole of the lands occupied by such occupiers.

Foote, K.C. (Garland and Foa with him).—The question raised here is whether the 10*l.* 11*s.* 9*d.*, which under the agreement of tenancy is the further rent payable by the tenant, being the amount payable by the landlord as tithe rentcharge, is recoverable or not, having regard to sect. 1 of the Tithe Act 1891. That section says that a contract between an occupier and owner for payment of tithe rentcharge by the occupier is to be void. But I submit that the proper way to read that section is that any contract for the payment of tithe by the occupier to the tithe owner is to be void, and that it does not affect a contract between the landlord and tenant such as this one. The owner of the land must pay the tithe owner, and then he can recover it from his tenant. The object of the Tithe Act was not to avoid an arrangement between the landlord and tenant like this one, but merely to make the owner of the land responsible direct to the owner of the tithe. There is no doubt that if in this case the farm had been let at an inclusive rent, even although that rent was higher, because the tithe rentcharge was taken into consideration, that undoubtedly would have been good, and Lord St. Leonards points out in *Davies v. Fitton* (2 Dr. & War. 225)—when dealing with 2 & 3 Will. 4, c. 119, which is an Irish statute and provides that the tenant shall hold the land free from the payment of tithes, and that all contracts to the contrary are to be null and void—that the landlord could get a rent equivalent to both the old rent and the tithe, and that an agreement by the tenant “to pay 10*l.* a year rent and in consideration of the tithe rentcharge an additional sum of 5*l.* a year” would be good. He also referred to

Colbron v. Travers, 6 L. T. Rep. 287; 13 C. B. N. S. 181; 31 L. J. 257, C. P.

This last case, which was decided with reference to the Income Tax Acts, shows that if the agreement here had been for a rent of a certain sum, to be reduced by a certain sum if tithe rentcharge should be abolished, that undoubtedly would be good, and it can make no difference because the sum is certain. The case is stronger with regard to tithe rentcharge than with regard to income or property taxes, because in the latter statutes repayment to the landlord is absolutely forbidden.

On these considerations this agreement is good, and the plaintiff is entitled to recover the balance in this case.

Moyeses, for the defendant, was not called upon to argue.

CHANNELL, J.—I have here to determine the question whether sect. 1 of the Tithe Act 1891, which says that any contract made between an occupier and owner of lands for the payment of tithe rentcharge by the occupier shall be void, applies to this contract. It is said by the plaintiff that the section was only intended to apply to a contract that the occupier should pay the tithe directly to the tithe owner, and that it does not apply to a contract by the occupier to pay to his landlord the sum which that landlord has had to pay by way of tithe, and so the agreement is good. The agreement is to pay by way of further rent so much as the landlord shall pay by way of tithe rentcharge, and it certainly does not make the tenant liable to repay the tithe rentcharge as such when the landlord has paid it, but it simply says that as rent or in addition to the rent the tenant is to pay an amount equal to the tithe. It, however, puts upon the tenant the burden of the tithe, though he gets the advantage of a reduction or the disadvantage of an increase according to the fall or rise in the price of corn. However that may be, I think this contract clearly comes within sect. 1 of the Tithe Act 1891, although I do not see why a contract of this kind should be forbidden. As to the cases which have been cited, I think when *Davies v. Fitton* (*sup.*) is considered it is in point, though distinctly against the contention put forward by Mr. Footo on behalf of the plaintiff. Lord St. Leonards said: “If a lease be granted subject to a gross rent with a collateral covenant with the tenant to pay the tithe rentcharge, that agreement would be void under the statute. But suppose an agreement of this nature—the tenant offers to pay 10*l.* a year rent, and in consideration of the tithe rentcharge an additional sum of 5*l.* a year, and this offer is accepted by the landlord. If this court were called upon to carry into execution such an agreement, could it refuse to do so? I certainly can see nothing to prevent it doing so. I apprehend that the court would have no difficulty in so modelling the contract as to make the tenant liable to an entire rent of 10*l.* There is nothing illegal in such a contract, and by so executing it the court would act according to the spirit of the contract.” There his Lordship is drawing a distinction between a contract to pay the exact amount of the tithe and a contract to pay a fixed certain sum assessed between the landlord and the tenant as compensation to the landlord because he has to pay the tithe, and he certainly says that the contract to pay the sum so assessed would be good. Earlier in his judgment he said: “No doubt, independently of the provisions of the statute, he was bound to pay the tithe which is part of the produce which he takes from the land and as a natural burthen on the tenant, but the effect of the statute is to place the matter on a different footing. It provided that no tenant, except under the peculiar circumstances mentioned in the Act, should be liable to pay this demand, and transferred the liability to the landlord or the person who is seized of an estate of inheritance as

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defined in the statute. On the other hand, however, the Act does not prevent the landlord saying, 'I must have a greater rent than I formerly received in consequence of this new obligation imposed on me by this statute.' Every man may take the largest rent people will give him; he may, notwithstanding the statute, by contract, get a rent equivalent both to the old rent and the tithe." That is relied on by Mr. Foote, and he contends that it disposes of this case in his favour, but, when one looks further on in the judgment, this is not so. Lord St. Leonards continues: "But this contract must be construed having regard to the enactments of the statute. I was much struck by the drafts of 1833, for they contain clauses which expressly provide for the payment by the tenant of the tithes. I apprehend these provisions would have been void." At p. 226 of the report the clauses in the drafts referred to contain these words: "Yielding and paying the amount of tithe to the said R. Hedges, Esq. [the landlord], his heirs and assigns, or to such proper authorities as may by Act or Acts of Parliament be duly authorised to receive the said tithe property." From that it appears that in Lord St. Leonards' opinion a contract to pay the amount of the tithe to the landlord would be void, just as a contract to pay the amount of the tithe to the person duly authorised to receive the tithe—namely, the tithe owner—would be void. It would seem that both the cases of *Davies v. Fitton* and *Colbron v. Travers* (*sup.*) show that a contract to pay the amount of the tithe by way of rent is void, and I think that the contract in the present case is within sect. 1 of the Tithe Act 1891, and judgment must be entered for the defendant.

Judgment accordingly.

Solicitors: Rowcliffes, Rawle, and Co., for Pinniger, Callaway, and Pinniger, Westbury; J. T. Rossiter.

Friday, March 4.

(Before PHILLIMORE, J.)

R. BARRETT AND SON LIMITED v. DAVIES.

SAME v. WITHERS (a)

Statute of Limitations—Letter to managing director of company—Acknowledgment.

A letter, written by the debtor to the managing director of a company to whom he owes money, stating: "I am willing to sell the 5230 shares that I hold in the P. D. B. B. Company Limited for the sum of 816l. 4s. 6d., and in the event of my doing so I will with the money pay the 10s. call due on 629 of the above shares, amounting to 314l. 10s., and the balance in settlement of my account with R. B. and Son Limited, amounting at December last to 501l. 14s. 6d.," is sufficient acknowledgment to take the debt out of the Statute of Limitations, even although the sale of the shares does not take place.

A general acknowledgment of a debt with a conditional promise to pay, but without any distinct statement that except upon the performance of the condition the debtor will not or cannot pay, is sufficient to take a debt out of the Statute of Limitations.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

ACTIONS tried under Order XIV.

The following were the facts:—

The plaintiff company sued to recover from Davies 557l. 15s. 3d. and from Withers 418l. 3s., money lent and interest, and the defences raised were the Statute of Limitations.

In Davies' case the last loan was made by the plaintiff company on the 11th Feb. 1897, and the writ was not issued until the 27th Jan. 1904.

The only acknowledgment on which reliance was placed to take the case out of the statute was a letter, dated the 13th March 1901, which came into being in the following circumstances:

Just before the 31st Dec. 1900 an account was rendered by the plaintiff company to the defendant showing the total then due from him 501l. 14s. 6d., of which 87l. 4s. 6d. was for interest. This account was accompanied by a letter written on the company's paper signed "C. A. Barrett, managing director," in which Mr. Barrett said that he inclosed the company's account, and that if Mr. Davies could not arrange to pay the whole by the end of the year he must ask him at least to pay the interest.

It was agreed that after this there was a meeting between Mr. Barrett and Mr. Davies, which resulted in Mr. Davies writing the letter of the 13th March 1901.

The letter was as follows:

Dear Sir,—I beg to confirm our conversation of yesterday—viz., that I am willing to sell the 5230 shares that I hold in the Preston Davies Ball Bearings Company Limited for the sum of 816l. 4s. 6d., and in the event of my doing so I will with the money pay the 10s. call due on 629 of the above shares, amounting to 314l. 10s., and the balance in settlement of my account with R. Barrett and Son Limited, amounting at the 31st Dec. last to 501l. 14s. 6d.—Yours faithfully, PRESTON DAVIES.

Compton for the plaintiff.

Lush, K.C. and W. S. Shaw for the defendant.

PHILLIMORE, J.—[His Lordship, after stating the facts set out above, continued as follows:] It was suggested that this letter was not an acknowledgment made to the plaintiff company, and that it might arise out of some private transactions with Mr. Barrett. I do not think there is any force in this. Barrett was managing director; he had written on behalf of the company; the letter is addressed to him at the premises which happen to be the company's office, and I was told that the plaintiff company had an interest in the Preston Davies Ball Bearings Company Limited which would connect them with the proposal to reconstruct this latter company, and with the advantages to be gained by such reconstruction. The transaction fell through. There was no quotation for the Preston Davies Ball Bearings shares on the Stock Exchange. These are apparently all the facts. It has been decided upon the construction of Lord Tenterden's Act (9 Geo. 4, c. 14) that an acknowledgment of a debt is not enough; that there must be a promise to pay. I agree with what Bramwell, L.J. says in *Meyerhoff v. Froehlich* (39 L. T. Rep. 620; 4 C. P. Div., at p. 64), and I think it difficult to see why an acknowledgment in writing has not been held a sufficient compliance with the statute. But it has certainly been decided to be insufficient. The next steps are plain. From a general acknowledgment without more it is

K.B.] LONDON & NORTH-WESTERN RAIL. CO. v. MAYOR, &C, OF WESTMINSTER. [APP.]

proper to infer a promise to pay: (see *Gardner v. Macmahon*, 2 G. & D. 593; 3 Q. B. 561; *Mitchell's claim*, L. Rep. 6 Ch., p. 828; *Skeet v. Lindsey*, 36 L. T. Rep. 98; 2 Ex. Div. 314). From an acknowledgment coupled with a promise to pay upon condition, and declaring inability or unwillingness to pay except upon this condition, no general promise can be inferred, and the acknowledgment does not operate unless the condition is satisfied: (see *Tanner v. Smart*, 6 B. & C. 603; 30 R. R. 461; *Smith v. Thorne*, 18 Q. B. 134; *Mitchell's claim*, L. Rep. 6 Ch., p. 828; *Meyerhoff v. Froehlich* (*sup.*), and many other cases). This, however, still leaves some of the ground uncovered. There are cases in which the reference to a particular source of payment has been held to point to that source as a primary one, but not as the only one; and, the acknowledgment stands as a general promise to pay, with a suggestion only that the payment may be made out of a particular fund. Lastly, there may be a case where there is a general acknowledgment of the debt with a conditional promise to pay, but without any distinct statement that except upon the performance of the condition the debtor will not or cannot pay. That, I think, is this case; and I do not think that it is covered by authority. There are no doubt cases, such as *Re Bethell* (56 L. T. Rep. 92; 34 Ch. Div. 561) and *Meyerhoff v. Froehlich*, already referred to, where the statement that the debtor will not or cannot pay except upon condition is not put forward in precise words, and yet the acknowledgment has been held insufficient. But in these cases the whole tenor of the language is such as distinctly to negative any prospect of payment unless the condition is fulfilled. In the case before me I have a distinct acknowledgment of the debt coupled with a promise to pay it upon a particular condition happening and silence as to what is to occur if this condition does not happen. Arguments can be adduced on either side. For the debtor it will be said *expressum facit cessare tacitum*, where there is an express promise no other promise can be implied—or, to put it in another way, the express promise cannot be enlarged by implication. For the creditor it could be urged that, if an acknowledgment of a debt implies a promise to pay, there is no reason, in the absence of negative words, for cutting down that promise; that the further promise to pay upon the happening of a particular condition is at worst surplusage, and should in this case rather be treated as explanatory. It might be said that the object of the debtor when he wrote the letter of the 13th March 1901 was to secure himself from being pressed for payment during such reasonable time as he would require to realise the shares, and that in order to secure his practical immunity—I do not say his legal immunity—for that period he indicated that he would pay as soon as he realised, while by a separate admission he kept alive the debt, which was not at that time statute barred. Upon the whole I think that the creditor is right, and that there must be judgment for the plaintiff company. I must not forget to notice the further contention put forward on behalf of the plaintiff company that the letter of the 13th March 1901 gave a fresh cause of action upon an account stated, which would run for six years from that date. If this were so, every admission of debt with a conditional promise to pay would be an

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account stated and would take the case out of the statute; and this is certainly not so. The defendant was not intending to agree an account; he was, I think, intending to acknowledge the debt, and therefore I have inferred a promise to pay; but the case for the plaintiff company is not made really stronger by substituting the words "account stated" for "acknowledgment." In the action against Withers the plaintiff company has tried to strengthen the case by two letters written by the defendant on the 31st Dec. 1900 and the 20th Dec. 1902. I do not think that these letters add strength to the plaintiffs' case. Both are promises to pay when things get better, coupled with positive statements of inability to pay until things are better. *Meyerhoff v. Froehlich* shows that such letters do not keep the debt alive. The case, therefore, against Withers is no stronger than the case against Davies, but it is equally strong. I give judgment for the plaintiffs in both actions, with costs.

Judgment accordingly.

Solicitors: Edmonds and Co.; Alfred Davies.

Supreme Court of Judicature.

COURT OF APPEAL.

March 4, 7, and 8.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

LONDON AND NORTH-WESTERN RAILWAY COMPANY v. MAYOR AND CORPORATION OF THE CITY OF WESTMINSTER. (a)

APPEAL FROM THE CHANCERY DIVISION.

Local government—Public health—Sanitary authority—Power to provide "public sanitary conveniences"—Subway—Subsoil of highway—Vesting in sanitary authority—Right of adjoining owner usque ad medium filum viæ—Trespass—Public Health (London) Act 1891 (54 & 55 Vict. c. 76), s. 44.

Where a sanitary authority, purporting to act under the powers conferred upon them by sect. 44 of the Public Health (London) Act 1891, had constructed beneath the middle of a street certain public lavatories and sanitary conveniences, with requisite and proper means of approach thereto and exit therefrom on both sides of the street so that the approaches in fact constituted a subway for crossing the street, the entrances to the subway being by staircases placed at each side of the street at or near the edge of the footway, it was held that the sanitary authority had been exercising the powers conferred by the statute for a purpose not thereby authorised, they having no power to acquire lands for the purpose of constructing a subway; and that therefore the plaintiffs, opposite the doors of whose premises one of the entrances to the subway was placed, were entitled to a mandatory injunction to restrain the trespass.

Decision of Joyce, J. (85 L. T. Rep. 544) reversed.

By an indenture of conveyance dated the 26th July 1886, and made between Alfred Hooper,

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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William Henry Wroot, and Milson Percy Wroot of the first part, Sir Edmund Antrobus and Hugh Lindsay Antrobus of the second part, Emma Elizabeth Matthews and Joseph Ebenezer Newsom of the third part, Emma Viner of the fourth part, the plaintiffs of the fifth part, and Stephen Reay of the sixth part,

All those freehold messuages or tenements situate in Parliament-street, in the parish of St. Margaret's, Westminster, in the county of Middlesex, and numbered 34, 35, and 36, in Parliament-street aforesaid, and also all those two freehold messuages or tenements situate in Bridge-street, in the said parish of St. Margaret's, Westminster, and numbered respectively 11 and 12 in Bridge-street aforesaid, but which were formerly numbered 46 and 47 in the same street, all of which said premises are more particularly delineated on the plan drawn in the margin of these presents and therein coloured red,

were conveyed to the plaintiffs in fee simple in possession.

The property comprised a block of buildings at the north-east corner formed by the junction Parliament-street and Bridge-street.

The houses in Parliament-street had vaults or cellars in connection with them which extended beyond the boundary line, as shown upon the plan, under the pavement of the footway, and for some little distance into the roadway as it then existed.

At the date of the conveyance the footway was about 12ft. wide from the wall of the houses to the outer edge of the pavement.

Between 1887 and 1890 the plaintiffs rebuilt the premises, and as rebuilt they consisted of a receiving office for parcels occupied by the plaintiffs, at the corner of Bridge-street, and other offices and shops which were let to different tenants.

In 1899 Parliament-street was widened by pulling down the houses on the western side, and throwing a portion of the site into the roadway, and at the same time the footway or pavement in front of the plaintiffs' premises was widened by being increased from 12ft. to about 21ft.

In Nov. 1900 the defendants, who were the highway and sanitary authority of the district, constructed underneath the middle of Parliament-street certain public lavatories and sanitary conveniences, with approaches thereto by means of subways from both sides of Parliament-street, the entrances and exits to and from the subways and conveniences being by means of staircases placed at or near the edge of the footway.

One of the entrances was placed opposite the doorway of the plaintiffs' premises. The staircase extended for a distance of 33ft. along the footway, and the iron railings which formed part of it and by which it was fenced off from the roadway encroached to the extent of 2ft. 9in. on the footway or pavement as it existed after the street was widened.

The wall of the staircase nearest to the plaintiffs' premises was built up close to the wall of the plaintiffs' vaults.

The railing on the pavement was placed upon stone slabs, which to the extent of a few inches were vertically over the wall of the plaintiffs' vaults.

The plaintiffs, who claimed to be entitled to the soil of the roads adjoining their premises as far as the middle of such roads as they existed when

conveyed to them, alleged the works were not sanitary conveniences merely, but subways, and that the defendants had no statutory power to construct subways; that inasmuch as the subsoil of the roads was vested in the plaintiffs *usque ad medium filum viæ*, constructing the works and excavating the soil under the roadway and footway constituted a trespass upon the plaintiffs' property; that even if for the purposes of making sanitary conveniences the subsoil of the roadway was vested in the defendants and not in the plaintiffs, the subsoil of the footway was not so vested, and that, to the extent to which the staircase was constructed in the footway, it constituted a trespass; further, that the erection of a portion of the staircase over the wall of the plaintiffs' vaults constituted a trespass.

In the alternative the plaintiffs alleged that if the soil as far as the middle of the roads did not belong to them, the defendants had obstructed the highway by erecting the staircase and railings opposite to the entrance to the plaintiffs' premises to the particular damage of the plaintiffs by interfering with the access of the plaintiffs from their premises to the highway.

The plaintiffs therefore brought this action against the defendants claiming (1) an injunction to restrain the defendants from continuing to trespass on the plaintiffs' premises by permitting the subways, staircase, and railings, and other works to remain upon the plaintiffs' land; (2) alternatively an injunction to restrain the defendants from continuing to cause an obstruction of the highway, to the damage of the plaintiffs; and (3) damages.

The defendants by their defence alleged that they had acted in pursuance of their statutory powers vested in them for that purpose by the Public Health (London) Act 1891.

The material section of that Act is as follows:

SECT. 44 (1). Every sanitary authority may provide and maintain public lavatories and ashpits, and public sanitary conveniences, other than privies, in situations where they deem the same to be required, and may supply such lavatories and sanitary conveniences with water, and may defray the expense of providing such lavatories, ashpits, and sanitary conveniences, and of any damage occasioned to any person by the erection or construction thereof, and the expense of keeping the same in good order, as if they were expenses of sewerage. (2) For the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building or the curtilage of a building, shall be vested in the sanitary authority.

In June 1901 the action came on for trial before Joyce, J., when his Lordship reserved judgment.

On the 19th Nov. 1901 it was decided by Joyce, J. (85 L. T. Rep. 544) that the defendants had acted *bonâ fide* in the exercise of their statutory powers, and that the erection of the sanitary conveniences and the approaches thereto, although capable of being used for crossing the street, was not *ultra vires*. The learned judge also decided that the presumption of law—that in the absence of evidence to the contrary (of which none had been adduced) the soil of a highway to the middle of the road (*usque ad medium filum viæ*) belongs to the owner of land adjoining the highway—being equally applicable to streets in a town as to highways in the country: (*Re White's Charities*, 78 L. T. Rep. 550; (1898) 1 Ch. 659) applied; and

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that the land or soil as to the 2ft. 9in. in width was the property of the plaintiffs, and, being part of the footway, was not liable to be taken and used by the defendants under sect. 44 of the Public Health (London) Act 1891 for the purpose of the construction of sanitary conveniences.

A mandatory injunction was accordingly granted for the removal of the portion of the staircase as to 2ft. 9in. in width.

As to the first part of that decision the plaintiffs appealed.

The hearing of the appeal was delayed by reason of negotiations between the parties with a view to a compromise. These negotiations, however, ultimately proved abortive, and the appeal was restored to the paper, and now came on for hearing.

Younger, K.C. and Eustace Hills (with them Montague Shearman, K.C.) for the appellants.—The defendants' only defence is that what they have done was in exercise of the powers conferred upon them by sect. 44 of the Public Health (London) Act 1891. But we submit that they have exceeded the powers under that Act, and that the whole work is *ultra vires*. The subsoil is vested in the defendants by that section for the purpose of making sanitary conveniences and no other. The works which the defendants have constructed are not merely sanitary conveniences within the Act. They are in their essence a subway for foot passengers, and none the less a subway because, owing to the manner in which it has been constructed, it can be used as a means of access to the sanitary conveniences. The plan shows that; and the defendants have described the works in their own language as "a crossing for foot passengers with sanitary conveniences communicating therewith." The test is if there had been no sanitary conveniences would the subway have been a distinct thing of itself? The answer is that it would have been a distinct subway. As to the sanitary conveniences, they are distinct in themselves and shut off from the subway. The real and original intention was to construct a subway, and afterwards it was considered expedient to make sanitary conveniences; and for constructing the subway the defendants have no statutory authority. Having exceeded their statutory authority they must be treated as trespassers. The case of *Mayor, &c., of Tunbridge Wells v. Baird* (74 L. T. Rep. 385; (1896) A. C. 434) is very like the present case, except that the defendants here justify under sect. 44 of the Act of 1891. That section was passed to get over difficulties which were raised outside the metropolis, as in the case of *Mayor, &c., of Tunbridge Wells v. Baird* (*ubi sup.*). [STIRLING, L.J. referred to the railway cases such as *Stockton and Darlington Railway Company v. Brown* (9 H. of L. Cas. 246).]

Hughes, K.C. and Dighton Pollock for the respondents.—There are two things which the plaintiffs must establish in order to entitle them to succeed in their action; first, that the defendants had no power to do what is complained of; and secondly, that they have not acted *bona fide*, and that the construction of the sanitary conveniences was a mere device in order to permit of the construction of a subway at the same time. On the face of the Act of 1891 it is perfectly clear

that the defendants have power under sect. 44 to do what they have done. What they have constructed is sanitary conveniences in the middle of the roadway, with an underground access from the footway on both sides of the street. The suggestion is that the defendants had no power to make an approach by means of a subway to the sanitary conveniences. But to say that the sanitary conveniences could be made without an approach is futile. The subway is merely the approach to the sanitary conveniences, and there is nothing in the attempt to distinguish the approach from the entrance. The fact that there is a subway in connection with the sanitary conveniences does not make them any the less sanitary conveniences. If the defendants were of opinion that the entrance from the footway was more convenient than from the roadway, it was not only within their powers, but it was their duty to construct the works in that manner. It has been found that if the entrance to sanitary conveniences is made in the middle of the street, their usefulness is much reduced. The matter was fully considered, and the defendants in the exercise of their discretion came to the conclusion that their scheme was the best that could be adopted. The approach is no more than an entrance to the sanitary conveniences from the nearest suitable spot. If, having regard to sect. 44 of the Act of 1891, the plaintiffs cannot object to the entrance in the middle of the road, neither can they do so if it is placed at the side of the road. They are sanitary conveniences placed in a situation where they are "deemed to be required." It is not suggested that the defendants have not deemed the sanitary conveniences to be required where they are placed. As regards the question of excess of statutory authority, the following are other railway cases which are in point:

London, Brighton, and South-Coast Railway Company v. Truman, 54 L. T. Rep. 250; 11 App. Cas. 45;

Wilkinson v. Hull and Barnsley Railway and Dock Company, 46 L. T. Rep. 445; 20 Ch. Div. 323;

Lewis v. Weston-super-Mare Local Board of Health, 59 L. T. Rep. 769; 40 Ch. Div. 55.

We submit that the action is wrong *in toto*, but even if it is right as to the excess of 4ft., which is complained of, then it should be limited in that way. All that the court should do is to put right what is regarded as an unreasonable width. But there is no jurisdiction to order the railings to be removed.

Younger, K.C., in reply.—That the court will grant a mandatory injunction in such a case as the present is shown by

Goodson v. Richardson, 30 L. T. Rep. 142; L. Rep. 9 Ch. App. 221.

[VAUGHAN WILLIAMS, L.J. referred to *Finchley Electric Light Company Limited v. Finchley Urban District Council* (88 L. T. Rep. 215; (1903) 1 Ch. 437).] We ask, therefore, that the court will order the subway and works to be removed entirely. The plaintiffs are in exactly the same position as the plaintiffs in

Mayor, &c., of Tunbridge Wells v. Baird (*ubi sup.*).

VAUGHAN WILLIAMS, L.J.—So far as the objects of the vestry, who were the predecessors of the corporation of the city of Westminster, and the objects of the corporation are concerned, I have a good deal of sympathy with them. And

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I cannot doubt myself but that they acted in good faith in this sense; that their desire was a desire to do that which might be best for the public. Of their good faith, in that sense, I have not the slightest doubt. Moreover, I think that they rather drifted into the position which they ultimately took up than took that position up deliberately. Their first object was to make a provision for the comfort and convenience of strangers visiting this part of the metropolis. It is known that a great many persons of all nations, as well as natives of this country, go to see the Houses of Parliament and Westminster Abbey, and the desire at first was that some accommodation of this sort should be provided for those visitors; and it was desired to provide it somewhere near the Abbey or the Houses of Parliament. There was a difficulty about that. The vestry could not do it without obtaining certain consents, which they could not get. Then the notion seems to have occurred to them that they might provide this accommodation at some point more to the north than the Houses of Parliament and Westminster Abbey, and that, inasmuch as there are a considerable number of carriage-ways which converge in that direction, the visitors and others coming from Westminster Abbey or the Houses of Parliament might get their by a subway. Then it seems to have occurred to somebody that if they had a subway there it was just as well to have a system of subways. They found, when they came to deal with this matter, that there was great difficulty in arranging for it, and they then seem to have given up the notion of a convenience to be established in Victoria-street, or in that neighbourhood, or, as was at one time thought, at Great George-street. And it seems to have occurred to them that it would be a good place to have a convenience at the southern end of Parliament-street. Then it occurred to them that it would be a very good position to place that convenience in, if they could place it somewhere adjacent to a subway, and get some public authority—the First Commissioner of Works, and one other authority, I think, were asked about it—to make the subway for them. Then their notion was to make a convenience which should have its entrance from, and its exit to, this subway, which they hoped to persuade other people to make. I think one gets the plainest indication of this view in the minute of the 27th July 1898, which I find in the extracts from the minutes of the united vestry of St. Margaret's and St. John's. It runs thus: "Parliament-street and Parliament-square subway and convenience. The surveyor has submitted a plan showing a proposal for the formation of a subway to facilitate vehicular traffic and to provide a safe crossing for foot-passengers under Parliament-street and Parliament-square in connection with the widening of the first-named thoroughfare, and embracing in the scheme a project for the construction of a large convenience." Then it goes on: "The committee recommend that the vestry give their approval in principle to the proposition, and that the scheme be submitted to the First Commissioner of Works for his consideration with an intimation that the vestry would undertake the construction and maintenance of the convenience." That was on the 27th July 1898. On the 11th Jan. 1899 there is a further minute: "In reference to

the proposal for the construction of a convenience and subways at the south end of Parliament-street, and to the representations made in the matter to the First Commissioner of Works by direction of the vestry on the 27th July last, it has now been reported by the surveyor that the department does not intend to take any steps to provide the suggested subways, and has expressed the opinion that the construction of the convenience should not be commenced until after the coming session of Parliament." That, to my mind, shows very plainly how this matter was initiated—how at first the vestries had no notion of making the subway themselves, and no notion of doing anything more than availing themselves of the subway, when it should come to be made, as a place into which the exit from the conveniences should be made, and from which the entrance should be made. In this state of things which has come about, it seems to me quite clear that eventually the corporation determined that they would make the subway themselves, from which the entrance was to be to the convenience, and into which the exit was to be. Now, for the moment, I will not say any more about the evidence, which, to my mind, shows conclusively that that was the truth, but I will deal for a moment with what the powers of the authority were under the Public Health (London) Act 1891; and in particular sect. 44. [His Lordship read that section and continued:] My view of that section is, first, that I do not think that sub-sect. 2 really intends that there should be vested in the sanitary authority immediately so much of the subsoil as could possibly be used for the purposes mentioned, but I think that what that section seems to point to is, that if the sanitary authority in fact do use the subsoil for this purpose, then *ipso facto* the subsoil shall vest in the sanitary authority. I mention that because, if that is the right view, it seems to me to negative altogether the idea that the sanitary authority are to acquire the land and pay for it, or pay compensation for it, in any shape whatsoever. I do not think, if that is the right view, that it could be that the words "may defray the expense . . . of any damage occasioned to any person by the erection or construction thereof" could possibly cover the money payment in respect of the vesting of the land taken in the sanitary authority. That is of some importance, although in the view that I take of this case, it is not essential that I should determine the matter now. But I think it right to mention that this view which I have taken of the construction of this section might be of importance if one had to decide whether or not the sanitary authority were intended to be the judges of what land should be taken, and how much of it, because when the House of Lords had to deal with a similar question in *Stockton and Darlington Railway Company v. Brown* (*ubi sup.*), I find in the speech of Lord Cranworth these words: "Some general propositions admit of no doubt. In the first place, I think it clear that when the Legislature authorises railway directors to take, for the purposes of their undertaking, any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands provided only that they take them *bona fide* with the object of using them for the purposes authorised by the Legislature, and not for any sinister or collateral purpose. This

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is the construction to be put on all such legislative powers, whether the language of the Act is that the company may take so much of the lands as is necessary for the undertaking, or so much as is required or is expedient to be taken, or simply (as in this case) that the company may take lands for the purposes of the undertaking. In such cases the Legislature, having provided what it considers sufficient means for securing adequate compensation to the owners of the land, leaves it to those interested in the undertaking to say to what extent it will be useful to them to exercise their statutable powers." I am not quite sure myself—assuming it to be an essential part of Lord Cranworth's definition as to the occasions on which the company, or others, taking the land, have jurisdiction to say to what extent they will take the land, that the land so taken shall be taken under the condition that there is secured to the landowner adequate compensation for the taking of the land—that this is a case in which one could say that that was true, because for reasons that I have already given, I have great doubts whether the words in sect. 44 as to damage do secure adequate compensation to the landowner. But I do not propose to decide that question or enter into it, because in my judgment it is not necessary in this case to do so. I say that it is not necessary in this case to do so, because, in my judgment, in the present case, it is not true to say that the corporation have taken this land, which they have taken, with the object of using it for the purposes authorised by the Legislature. If the language of Lord Campbell, who delivered the first judgment, is looked at, as well as this judgment of Lord Cranworth to which I have been referring, both of them affirm in the clearest possible manner that if a company or other authority purporting to acquire the land under the powers of the Act of Parliament is not acquiring it for the purposes mentioned, but is acquiring it for other and different purposes, then the duty of the court would be to restrain that authority. Lord Campbell's words are, "If it had been proved that the company was acting *malá fide*, and trying under the powers of the Act of Parliament to get possession of lands of Brown, which were to be applied to other and different purposes, I think the court would have been justified in interfering by injunction," and Lord Cranworth says precisely the same thing. Now I want to say one word about *malá fides*. Lord Campbell uses the words "*malá fide*." Joyce, J. said that he could not find on the evidence here that the corporation or the vestry, or either of them acted otherwise than *boná fide*. I think that when Lord Campbell says here "was acting *malá fide*, and trying under the powers of the Act of Parliament to get possession of lands which were to be applied to other and different purposes" than those authorised by the Act of Parliament he meant merely to explain there what would be *malá fides*. You are acting *malá fide* if you are seeking to acquire and are acquiring lands for a purpose not authorised by the Act of Parliament. In such a case it is right to restrain persons who are misapplying the powers of an Act of Parliament. Now, as I have already said, my view is that the defendants here, and their predecessors did acquire these lands for purposes not justified by the Act of Parliament. It really was hardly denied during the argument,

but that in truth and in fact the defendants did construct this approach as it has been called, of dimensions which were wider than would be required for the approach to a sanitary convenience, and which were suitable for a subway. It also really was hardly denied, but that in so doing they did it for the very purpose that this subway might be used as a highway. They have no parliamentary authority to acquire land for the purpose of making a subway, and under those circumstances, it seems to me, that they ought to be restrained. I have said that in argument it was hardly denied that the facts were such as I have stated. But really it could not be denied in the face of two such letters as the letters of the 20th Sept. 1900 and the 4th Dec. 1900. The letter of the 20th Sept. 1900, written to the solicitor of the London and North-Western Railway Company, runs thus: "I am constructing on behalf of the Westminster Vestry, and in accordance with their directions, a subway from one side of Parliament-street opposite your offices to the western side which is approached by staircases on footpath. Unfortunately this will necessitate the acquiring by lease or purchase a portion of your vault. I should therefore feel obliged if you would inform me what your company would require for assisting in giving a great convenience to the public at so dangerous a crossing, and inclose a plan." Now, as to that letter I wish to say that it seems to me couched in most accurate language and exactly to describe the true facts, and also to recognise the legal consequences following upon the adoption of the course indicated by the letter. Then we come to the letter of the 4th Dec. 1900, which is again written to the solicitor of the London and North-Western Railway Company: "Your letter of the 19th ult. on the subject of the works in progress at the south end of Parliament-street was laid before the works, sewers, and highways committee of the city council at their last meeting, when I was directed to explain that the intention is the construction of a subway to facilitate pedestrians crossing from one side to the other of a thoroughfare of great width and very considerable traffic, an object with which the committee consider your company will be in the fullest accord. The formation of an entrance at the position in question is necessarily obligatory to give proper effect to the scheme. Admission to the conveniences which will be accessible from the subway could otherwise have been provided from refuges above them." I may add, for your information, that the plan and project generally received the approval of Her Majesty's Office of Works." Now, in the face of those letters it is not to be wondered at that there was considerable hesitation in arguing that the object and purpose which the Corporation of Westminster had in view here was the construction of a subway. We find an argument about whether the Act of Parliament authorised or justified the taking of the subsoil for the purpose of making approaches to the sanitary convenience—I shall say one word about that in a moment—but let me assume to the full that the Act of Parliament does justify that. It only justifies such a course in a case where the making of the approach where it is made is really necessitated by the conditions of access to and egress from the convenience. But how can that be said

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to be so here when this very letter tells us that admission to the convenience, which will be accessible from the subway, could otherwise have been provided from the refuges above? It ceases—if that passage is true—to be true that these subways have in fact been constructed as approaches to the sanitary convenience. It is merely that these subways, having been built by the Westminster Corporation, it is supposed by the Westminster Corporation that it will be a convenient thing that there should be placed sanitary conveniences, the access to and egress from which shall be in a subway which is being constructed by the corporation. With regard to the approaches I agree with a great deal that counsel for the respondents said. I think that where you are to have underground conveniences you must have approaches other than mere access (entrance to) and egress (exit from) them, because in the nature of things you must have some stairs or some slope, which will occupy considerable lateral space, leading you to immediate proximity to the situation of the conveniences. Therefore I think that you must have an approach, and I think, probably, that if the corporation or other sanitary authority had really fixed upon a particular passage as affording a proper approach for the conveniences, as such, it might not have been right for us to review their discretion in that respect. But no such question arises in the present case if you arrive at the conclusion that I have arrived at, in fact which I cannot put better than this, that the true position of affairs is accurately described in the letter of the 4th Dec. 1900, which I have just read. Under these circumstances, I think that this appeal ought to be allowed. I think that the remedy which should be given to the plaintiffs here should be wider than that which Joyce, J., gave. Now what is the best way of giving this remedy? As I said before, one wishes, in giving this remedy, to give it in such a manner as shall be least detrimental to the public. There is the subway; there are the conveniences. Whether they are in a convenient position or not it is not for me to say—the sanitary authority will consider that. But I have no doubt that, apart from the conveniences, the subway at the present moment is a considerable convenience to pedestrians crossing that wide thoroughfare. Under these circumstances, although I think that we ought not to limit our injunction to what has been called the excess of 4ft., yet I want to give an opportunity for the defendants, the corporation, to do that which I am sure they would wish to do—that which is most for the benefit of the public, and at the same time consistent with the law as we lay it down. If we now say that this is a case in which it may be right ultimately to grant an injunction, we can yet give to the corporation an opportunity of making, or undertaking to make, alterations which will relieve us from the necessity of granting any injunction at all. If we hold our hand in that way, and give to the corporation liberty to apply to us—of course the other side must have liberty to apply in case there is delay—it may be that the corporation will satisfy us that they have either made, or are immediately going to make, such alterations as will justify us in saying we shall not grant an injunction at all. I think that is all I have to say at present, except that I take

it for granted that the plaintiffs will, in a matter of this sort, facilitate the work which the corporation has to do, and will be prompt and ready to agree to any alterations which may reasonably and properly be suggested by the corporation.

STIRLING, L.J.—In this case the defendants, the corporation of the city of Westminster, purporting to act under statutory powers conferred on them as the sanitary authority within the city, have erected two subterranean constructions at the south end of Parliament-street, one being a public sanitary convenience and the other a subway. Both those erections stand in part on the subsoil of Parliament-street at a point where that subsoil is vested, or is admitted to be vested for the purpose of the present proceedings, in the plaintiffs, the London and North-Western Railway Company, who are the owners of a house in Parliament-street. The plaintiffs allege in this appeal that that subway has been erected without any statutory power for the purpose. In this appeal, whatever may have been the case at other times, the erection of the sanitary convenience is not complained of, but it is alleged, as I have already said, that the subway has been erected without any proper authority, and, at the Bar, an injunction has been asked against the defendant corporation to restrain that corporation from maintaining or using the subway. That relief is sought on two grounds. First, on a ground which is thus stated by Lord Cranworth in *Galloway v. Mayor and Commonalty of London* (14 L. T. Rep. 865; L. Rep. 1 E. & I. App. 34, at p. 43): "It has become a well settled head of equity that any company authorised by the Legislature to take compulsorily the land of another for a definite object will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing." That is one ground. The other ground is, that the corporation, having erected this subway without any authority, are in the position of trespassers, and continuing trespassers, on the soil of the plaintiffs. And for that reason, in accordance with the decision of this court in *Goodson v. Richardson* (30 L. T. Rep. 142; L. Rep. 9 Ch. App. 221), the plaintiffs are entitled to the injunction which is sought. If the fact be, as is alleged, that the subway has been erected without any statutory authority, it seems to me that relief may properly be given on both these grounds; and that the main question in the action really is, whether or not this subway has been so improperly erected. Now, as regards the statutory authority, the matter stands thus: However useful it may be that in such frequented streets subways for the purpose of the passage of passengers should be made, the Legislature has not yet thought fit to confer that power on any corporate body having authority within the cities. It has conferred by sect. 44 of the Public Health (London) Act 1891, a power on every sanitary authority within the area which is governed by the Act to provide and maintain, amongst other things, public sanitary conveniences in situations where they deem the same to be required, and has provided that for the purpose of such provision the subsoil of any road shall be vested in the sanitary authority and it is under this section of the Act, and under this alone, that the defendants, the corporation of

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Westminster, justify what they have done. The corporation allege that it is within their power under the section not merely to determine the situation where this sanitary convenience is to be placed, but also the proper and reasonable mode of providing for the entrance and exit of the persons who are to use it. And they contend that they are not limited to making those entrances and exits simply by lifts or by stairs, but that they may, if they see fit, make proper approaches to the convenience from the pavement to the place where it is situate in the roadway. I shall assume that that contention is well founded, and then the question simply reduces itself to this, was this subway constructed as an approach to the convenience, or was it constructed with an object that it might be made use of by the public for passing from one side of Parliament-street to the other? Now, upon that I come to the conclusion on the evidence that the latter was the real object with which the subway was constructed. I do not desire to go through the evidence, much of which has already been referred to by my Lord. But I will state very briefly some of the—to my mind—striking passages of the evidence. I refer first of all to the minutes of the predecessors of the defendants—namely, the united vestries of the parishes of St. Margaret and St. John, Westminster, under the dates of the 29th July 1898 and the 27th June 1900, and to the minutes of the defendant corporation under date the 6th Dec. 1900. I also refer, as my Lord has already referred, to the two letters of the 20th Sept. 1900 and the 4th Dec. 1900. In addition to that I should like to read two short passages from the evidence of the defendants' witnesses. [His Lordship did so and continued:] Therefore, it seems to me from its size, and from the statement of the chairman of the committee, it has actually been constructed in such a way as to be far more than an approach, and that it is not a reasonable and proper approach to the convenience which has been lawfully erected. Under these circumstances, I think that the plaintiffs are entitled to the injunction for which they ask. But at the same time, as it is possible that the subway may be so altered as to make it a reasonable and proper approach to the convenience, I think that it is reasonable that the corporation should have an opportunity of making such alteration if they see fit to avail themselves of leave for that purpose. Therefore, I quite agree in the form of judgment which is proposed.

COZENS-HARDY, L.J.—I am of the same opinion, and I entirely agree with what has fallen from my Lord and Stirling, L.J., and I should not desire to add anything were it not for the fact that we are differing from the judgment of Joyce, J. Now, two things, I think, are quite clear here: first, that the Westminster Corporation have no power at all to construct a subway, or at least, if they have power under some of their general Acts to incur the expense of constructing a subway, although no such statutory power has been called to our attention, they certainly have not any power to take the plaintiffs' land for the purpose of constructing a subway. I think it is equally clear that they have power under sect. 44 of the Act of 1891 to provide and maintain sanitary conveniences, and for the purpose of such provision to take and use that portion of the

property of the plaintiffs which is under the road, exclusive of the footway. But those two propositions being quite clear, I think we must approach the consideration of this question having regard to the perfectly well-established and extremely important jurisdiction which the Court of Chancery have exercised from the earliest days of railway legislation, and probably long before, the jurisdiction, I mean, to say that public bodies authorised by Parliament, to take certain land shall not be allowed to take that land except for the purpose authorised by Parliament. And if that doctrine is important in ordinary cases where compensation is provided for all land taken, it is specially obligatory on the court to have regard to it in a case where a public body is authorised to take another person's property without making any provision for his compensation. In my view, therefore, the question for our consideration is really this: With what purpose was this land of the plaintiffs taken? I think you cannot avoid considering that question first. The language of Lord Cranworth in *Stockton and Darlington Railway v. Brown* (*ubi sup.*) was this: That although the railway company are the sole judges of what they require, and will take for their purposes, there is the proviso: "Provided only that they take them *bonâ fide* with the object of using them for the purposes authorised by the Legislature, and not for any sinister or collateral purpose." Now, here I cannot bring myself to doubt what was the purpose for which this land was taken. My Lord and Stirling, L.J. have both gone through the evidence, and it would be a waste of time for me to repeat it. I observe that Joyce, J. said, and this is no doubt the foundation of his judgment, that the defendant's primary object was, in his opinion, the construction of the conveniences with requisite and proper means of approach thereto and exit therefrom. If I had come to that conclusion of fact, I think I should probably have agreed almost entirely with the judgment. But being unable to come to that conclusion, as a matter of fact, having satisfied myself from the documentary evidence that the primary object was to construct a subway for facilitating the passage of passengers from one side of Parliament-street to the other, I come to the conclusion that the Westminster Corporation are now seeking to justify that which was a wrongful act, and saying that they might justify the taking not the whole, but a part of it, for a purpose authorised by sect. 44 of the Act of 1891. I do not think that they ought to be allowed to do that. I feel very strongly that in every case in which a public body intrusted with the duties of performing a public work say that they have, in the exercise of their discretion, fixed upon a particular place and a particular mode, the court ought to be extremely slow to interfere with their discretion. But when they have not really been acting under the authority of the Act, when they have been doing something outside the Parliamentary power, and have been governed by considerations of a different kind, and for a different purpose, the question of discretion seems to me to have no bearing whatever on the case. For these reasons I agree with what has been said, and think that the injunction ought to be granted, qualified as my Lord has said. I observe that in the court below, the learned judge finding as he did that the plaintiffs had succeeded in part and failed

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in part, gave no costs, but the plaintiffs must have the costs in the court below as well as the costs of the appeal.

Their Lordships granted an injunction ordering the defendants to pull down the whole of the staircase railings and other works placed upon the plaintiffs' land other than the conveniences and such further portion of the construction as the court might upon application sanction as a proper approach to the conveniences; and the operation of the order was suspended, with liberty to apply to the court. Their Lordships also acceded to an application that the injunction should be suspended for two months, to enable the defendants to decide whether they would appeal to the House of Lords, and, if they should so appeal, the injunction was to be suspended pending the appeal. *Appeal allowed.*

Solicitor for the appellants, *C. de J. Andrewes*.
Solicitors for the respondents, *Allen and Son*.

Saturday, March 12.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

REX v. PINCKNEY. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Habeas corpus—Jurisdiction of court—Issue of writ—Person out of the jurisdiction.

The court has no jurisdiction to order a writ of habeas corpus to issue directed to a person who, at the time of the application for the writ, is out of the jurisdiction.

APPEAL from an order of the Divisional Court (Lord Alverstone, C.J., Lawrance and Kennedy, JJ.) affirming an order made by Walton, J. at chambers directing that a writ of *habeas corpus* should issue, but that it should be allowed to lie in the office.

On the 29th July 1903 Mr. Pinckney applied to Walton J. at chambers for a writ of *habeas corpus* directing Mrs. Pinckney, his wife, to produce before the judge at chambers the child who was the issue of their marriage.

The learned judge ordered that the writ should issue.

The child was between three and four years of age.

At the time this application was made Mrs. Pinckney was, with the child, out of the jurisdiction.

On the 5th Aug. Walton J. quashed the order he had made on the 29th July, and made a new order directing that the writ should issue, but that it should lie in the office until Mrs. Pinckney should come within the jurisdiction.

Mrs. Pinckney appealed against this order.

The Divisional Court (Lord Alverstone, C.J., Lawrance and Kennedy, JJ.) thought that the question was one for the discretion of the judge, and refused to interfere with the order of Walton, J.

Mrs. Pinckney appealed.

Montague Lush, K.C. and *A. S. Poyser* for Mrs. Pinckney.—The judge at chambers had no jurisdiction to order the writ to lie in the office till the appellant came within the jurisdiction. The

foundation of the high prerogative writ of *habeas corpus* is the right of the King to be informed if anyone within the realm is being illegally detained. The writ cannot be issued where the person said to be detained and the person said to be detaining are both outside the kingdom. Formerly the writ could issue against a person in any part of the dominions of the Crown:

Res v. Cowle, 2 Burr. 834, at p. 856.

But now by 25 & 26 Vict. c. 20 it is provided, by sect. 1, that no writ of *habeas corpus* shall issue out of England by authority of any judge or court of justice therein into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts of justice having authority to grant and issue the said writ and to ensure the due execution thereof throughout such colony or dominion. The issue of the writ is a question that concerns the rights of the Sovereign; it is not a question between party and party:

Richard Bourn's case, Cro. Jac. 543.

It cannot be contended by the prosecutor that a writ of *habeas corpus* can be served on anyone out of the jurisdiction. His only object in obtaining an order that the writ shall issue and lie in the office is to hold it in *terrorem* against Mrs. Pinckney and to prevent her from ever coming back to England. That is not a use to which this writ can be put. It would be an abuse of the writ. The nature and object of a writ of *habeas corpus* was explained by Sir John Eardley Wilmot, Lord Chief Justice of the Court of Common Pleas, in his answers to the questions put by the House of Lords in 1758. He there likened it to a writ of *mandamus*:

Wilmot's Opinions and Judgments, pp. 83, 109, edit. 1802.

The prerogative writ of *mandamus* is never issued unless the court is satisfied that it can be made effective at once. Such a writ is never ordered to lie in the office until the defendant chooses to come within the jurisdiction. Rule 232 of the Crown Office Rules provides that every writ therein referred to when issued by the Queen's Bench Division shall be made returnable forthwith in such division, "provided that every writ of *habeas corpus ad subjiciendum* shall be made returnable immediately." Thus it is a cardinal condition of the issue of the writ that it shall be served and be returnable immediately; and, in fact, the reason why Walton J. quashed his order of the 29th July was that the writ could not be served at once. The object of the writ is to put an immediate stop to an unlawful imprisonment or detention of someone. Lord Halsbury, L.C. said: "Assume the fact that the detention has ceased, then the writ of *habeas corpus* is, in my judgment, inapplicable":

Barnardo v. Ford; *Gossage's case*, 67 L. T. Rep. 1; (1892) A. C. 326.

In that case the House of Lords disapproved of the law as laid down by the Court of Appeal in *Reg. v. Barnardo*; *Tye's case* (61 L. T. Rep. 547; 23 Q. B. Div. 305). It would be a very strange inconsistency in the law of England if the court were bound to do an act nugatory in itself:

Hobhouse's case, 3 B. & A. 420.

A writ of *habeas corpus* is not like a writ of

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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attachment, which can be ordered to lie in the office.

Colefax for the prosecutor.—First, there is no evidence that Mrs. Pinckney is out of the jurisdiction. All we know is that in July she was in France with the child. Next, it is not material that the child is being detained out of the jurisdiction:

Barnardo v. Ford; *Gossage's case* (*ubi sup.*)

Nor is it necessary that the person detaining the child should be within the jurisdiction:

Ex parte Wyatt, 5 Dowl. 389.

There a writ of *habeas corpus* was served on a person in France and was disobeyed. The English proceeding had been recognised and ordered to be obeyed by the French tribunals. The Court of King's Bench refused to grant a rule absolute in the first instance for an attachment, but offered counsel for the applicant a rule *nisi* for an attachment. [COLLINS, M.R.—The court also offered, in the alternative, a new writ of *habeas corpus*, which was accepted, the defendant being at that time a prisoner for debt in the Marshalsea of the King's Bench, so that the case came to nothing.] No objection was taken before Walton J. that he had no power to order the writ to issue on the ground that Mrs. Pinckney was out of the jurisdiction. It is now too late to raise that point.

COLLINS, M.R.—It seems to me that the writ of *habeas corpus* in this case has been issued under a mistake. There is evidence that the last known place where Mrs. Pinckney was staying was somewhere in France, and she had expressed an intention to remain out of the jurisdiction. Under the circumstances it has hardly been contended that the court has jurisdiction to order a writ of *habeas corpus* to issue directed to a person who is not within the jurisdiction. Reliance was placed upon a kind of estoppel, because it was said that at the application to the judge at chambers no point was taken on behalf of Mrs. Pinckney that she was out of the jurisdiction. But the omission to raise that point would not give the court jurisdiction, if otherwise they had none. There was no jurisdiction to order the writ to issue, and the appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. I agree with that part of the order of Walton, J. by which he quashed his order of the 29th July, but I cannot agree with his order substituting a new writ which was to lie in the office till it could be served. I think he had no jurisdiction to make that order. This is not like a case of attachment. A writ of *habeas corpus* must be served immediately it is issued.

COZENS-HARDY, L.J.—I agree.

Appeal allowed.

Solicitors for the prosecutor, *Harries, Wilkinson, and Raikes*.

Solicitors for Mrs. Pinckney, *Futvoys and Baker*.

March 11 and 14.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

MOORE, NETTLEFOLD, AND Co. v. SINGER MANUFACTURING COMPANY. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Landlord and tenant—Distress for rent—Sale by auction—Purchase of goods by landlord—2 Will. & M., sess. 1, c. 5, s. 2—Practice—Appeal from County Court—Claim for less than 20l.—Appeal by leave—"Right of appeal"—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 120—Judicature Act 1873 (36 & 37 Vict. c. 66), s. 45—Judicature Act 1894 (57 & 58 Vict. c. 16), s. 1, sub-s. 5.

Sect. 1, sub-sect. 5, of the Judicature Act 1894 applies to all cases in which an appeal has properly come before the High Court, whether it has come with leave or without leave.

A landlord who has distrained for arrears of rent cannot himself purchase the goods distrained when they are sold by auction under 2 Will. & M., sess. 1, c. 5, s. 2.

Dictum of Blackburn, J. in King v. England (9 L. T. Rep. 645; 4 B. & S. 782) approved.

Judgment of the Divisional Court (88 L. T. Rep. 739; (1903) 2 K. B. 168) affirmed.

APPEAL by the plaintiff company from a judgment of the Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.) reversing a decision of the judge of the Shoreditch County Court.

The action was brought for the conversion of a sewing machine valued at 17l.

In March 1902 the defendants let the machine in question on the hire-purchase system to one Anton, the agreement containing a clause providing that the defendants should have power to seize the machine if the instalments should at any time be in arrear.

Anton was a tenant of the plaintiffs, and in July 1902 was in arrear with his rent.

The plaintiffs distrained for the rent, and seized the sewing machine in question.

The machine was then put up to auction, and at the auction was bought by the plaintiffs, who then let it out to Anton on the hire-purchase system.

In Oct. 1902 Anton made default in payment of the instalments due under his hire-purchase agreement with the defendants, and the defendants thereupon, in pursuance of the power contained in the agreement, seized the machine.

The plaintiffs brought this action for conversion of the machine in the Shoreditch County Court.

The County Court judge held that the purchase of the machine by the plaintiffs at the auction was a valid purchase, and that therefore the property in the machine was in the plaintiffs and that they were entitled to succeed in the action, and he gave judgment accordingly.

The Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.), upon the defendants' appeal, held that a landlord cannot himself purchase goods that he has distrained for rent when they are sold by auction, and that, as the plaintiffs' purchase of the machine was invalid, the defendants were entitled to judgment, and they accordingly reversed the decision of the County Court judge.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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The case is reported 88 L. T. Rep. 739; (1903) 2 K. B. 168.

The Divisional Court refused leave to appeal, but leave was obtained by the plaintiffs on applying to the Court of Appeal.

On the appeal being called on, the defendants raised a preliminary objection.

Hugo Young, K.C. and *H. H. Lawless* for the respondents.—There is a preliminary objection to the hearing of this appeal. The amount recovered by the plaintiffs in the County Court being not more than 20*l.*, the appeal to the Divisional Court was only by virtue of leave given by the County Court judge under sect. 120 of the County Courts Act 1888. The Divisional Court refused leave to appeal, and leave to appeal was given by this court upon the application of the plaintiffs. By sect. 45 of the Judicature Act 1873 the decision of a Divisional Court upon an appeal from a County Court is final "unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which such appeal shall have been heard." That section has not been repealed, and it is still in operation except so far as it has been altered by sect. 1 (5) of the Judicature Act 1894. Sect. 1 (5) of the Act of 1894 only gives the Court of Appeal power to grant leave to appeal "in all cases where there is a right of appeal to the High Court from any court or person." In the present case there was no "right of appeal" from the County Court to the High Court, but only a power to appeal with leave. Therefore this case does not come within the provisions of sect. 1 (5) of the Act of 1894, giving the Court of Appeal power to grant leave to appeal, but remains governed by sect. 45 of the Act of 1873, under which the Divisional Court alone can grant leave to appeal. In *Re Oddy* (71 L. T. Rep. 861; (1895) 1 Q. B. 392) the distinction was pointed out between cases where there is a "right of appeal" and cases where there is only a power to appeal with leave. In *Hawkins v. Great Western Railway Company* (14 R. 360) and *Godman v. Moses* (83 L. T. Rep. 46) it was held that the Court of Appeal could grant leave to appeal when the Divisional Court had refused leave, but this point was not raised. In *Wynne-Finch v. Chaytor* (89 L. T. Rep. 123; (1903) 2 Ch. 475) the decision of the full Court of Appeal was that sect. 1 (5) of the Act of 1894 applies only to appeals from inferior courts, and that decision does not affect the present question.

Lush, K.C. and *Lincoln Reed* for the plaintiffs.—This court had jurisdiction to grant leave to appeal. Sect. 1 (5) of the Judicature Act 1894 was passed for the purpose of making a uniform practice on appeal. It deals generally with all appeals from inferior courts to the High Court, and provides that the determination thereof by the Divisional Court shall be final unless leave to appeal is given either by that court or by the Court of Appeal. The words in sect. 1 (5), "where there is a right of appeal to the High Court," are taken from sects. 120 and 121 of the County Courts Act 1888. Sect. 121 provides for the procedure on appeal "in any action or matter in which there is a right of appeal," and clearly deals with all appeals from the County Court, whether with or without leave of the County Court judge. The distinction referred to by the words "right of appeal" in sects. 120 and 121 of

the County Courts Act and sect. 1 (5) of the Judicature Act 1894 is between cases where there is a right to appeal either with or without leave and cases where there is no right of appeal at all. A party has just as much a "right of appeal" whether he appeals because he has obtained leave to appeal or because he can appeal without any leave. If the contention of the respondents that the words in sect. 5 (1), "where there is a right of appeal," refer only to cases where there is a right to appeal without leave were right, there would be no provision at all for the hearing of appeals by leave of the County Court judge, for those words govern the whole of sect. 1 (5); and, further, the provisions of sect. 121 of the County Courts Act 1888 would not apply to appeals by leave, and the appellant would have no right to a copy of the judge's notes. The decision in *Godman v. Moses* (*ubi sup.*) shows that sect. 45 of the Judicature Act 1873 has been repealed by sect. 1 (5) of the Act of 1894.

Hugo Young, K.C. in reply.—In sect. 120 of the County Courts Act 1889 the expression "right of appeal" is used, and there clearly refers only to cases in which there is a right to appeal without any leave.

Collins, M.R.—I am of opinion that the preliminary objection which has been raised in this case must fail. It seems to me that, when we examine the provisions of sect. 1 (5) of the Judicature Act 1894 and see what they aim at and deal with, it is quite obvious that they are not concerned with the initial condition of the action at all, but are dealing with the time when it becomes necessary to see what is the court by which an appeal can be heard. At the time when appeals have to be dealt with there are cases in which there is a right to appeal with leave and cases in which there is a right to appeal without any leave. The provisions of sect. 1 (5) deal with the court which is to hear all those appeals, and therefore must necessarily consider and deal with all those cases which are appealable and include all appealable cases, both those which are appealable with leave and those which are appealable without leave. It has been contended that the same expression, "right of appeal," is used in sects. 120 and 121 of the County Courts Act 1888, which give power to appeal to the High Court, and that therefore the expression in sect. 1 (5) must of necessity be addressed to the inception of the action, and not to the subsequent stage when the appeal comes before the High Court. But in sect. 1 (5) of the Judicature Act 1894 the provisions are addressed to a different stage, and there is undoubtedly a "right of appeal" when the appeal comes before the High Court, whether it comes there by leave or without leave. I think, therefore, that this objection fails, and that the appeal must be heard.

Romer, L.J.—I am of the same opinion. I think that the words "right of appeal" in sect. 1 (5) of the Judicature Act 1894 ought to be read in their ordinary sense as referring to the time when the court for hearing the appeal is to be constituted, and I should say that a party, if he had leave to appeal, had a "right of appeal" just as much as if he could have appealed without leave.

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MATHEW, L.J.—I am of the same opinion. Sect. 1 (5) applies to all appealable cases. There are two classes of appealable cases—those in which there is an appeal without any leave and those in which there is an appeal only with leave. If a party obtains leave to appeal, he is in just the same position as if he had a right to appeal *ab initio*.

Objection overruled.

March 14.—The appeal being heard this day, it was heard by consent before two judges only, under the Judicature Act 1899 (62 & 63 Vict. c. 6), s. 1.

Montague Lush, K.C. and Arthur Page (Lincoln Reed with them) for the plaintiffs.—The Divisional Court decided this case in reliance upon a sentence of Blackburn, J., who said: "I think the sale in pursuance of stat. 2 Will. & M., sess. 1, c. 5, s. 2, must be a sale to a third person; otherwise many abuses might arise":

King v. England, 9 L. T. Rep. 645; 4 B. & S. 782.

But that was only an *obiter dictum*. The real ground of the decision is given in the judgment of Cockburn, C.J. The landlord in that case had the goods appraised and then took them at the appraised value, and it was his appropriation of the goods to himself in that way that the court held was not to be allowed. The case is no authority for saying that at a public auction the landlord may not buy. It is suggested that to allow the landlord to buy would open the door to abuses. But it is to the tenant's interest that there should be plenty of bidders at the auction, and if the landlord is willing to give more for any particular article put up for sale than any other bidder, it is to the tenant's advantage that the landlord's offer should be accepted. So far as public policy is concerned, there can be no greater objection to a landlord bidding at an auction of goods that he has distrained than an executor creditor bidding at a sale of goods taken in execution. They referred to sect. 5 of the Law of Distress Amendment Act 1888 (51 & 52 Vict. c. 21), which abolishes the necessity of appraisement under 2 Will. & M., sess. 1, c. 5, s. 2, except where it is required by the tenant or owner of the goods. Then it was said that the landlord is the vendor at an auction of goods distrained for rent, and that he cannot sell to himself. That is not the correct view. The landlord is not the vendor. The goods are in the custody of the law. When the goods are sold the property in them is not transferred by the landlord, but by the law, as in the case of a sale by the sheriff. The landlord has no property in them, nor even possession. He cannot maintain trover:

R. v. Cotton, 2 Ves. Sen. 288.

The auctioneer who carries out the sale is the agent, not merely of the vendor, but also of the purchaser:

Emmerson v. Heelis, 2 Taunt. 38.

Therefore the contract of sale in this case cannot be said to be made by the landlord with himself. They cited also

Bishop v. Bryant, 6 C. & P. 484.

Hugo Young, K.C. and Lawless for the defendants.—A landlord distraining for nonpayment of rent is not bound to sell by public auction. He may also sell by private treaty. If he can sell to himself at a public auction, there can be no

reason why he cannot sell to himself by private treaty. That would open the door to great abuses. Even at a public auction the landlord, by arranging the sale at an inconvenient time or place, or by putting the goods together in lots in such a way as to hinder persons from bidding, might be enabled to do great injustice in order that he might himself buy the goods cheap. Though the landlord is not the owner of the goods distrained, yet under the statute of 2 Will. & M., sess. 1, c. 5, he is the vendor of the goods. In the present case the landlord was selling an article which belonged to a third person, and this is a thing which might lead to great abuse. A tenant might arrange with his landlord so that the landlord could buy in the article for a very small sum, and then let it out on hire to the tenant for a less sum than it was worth. In *Rocke v. Hills* (3 Times L. Rep. 298) Day, J. ruled that a landlord's agent could not act as an appraiser of goods distrained by the landlord. *A fortiori* the landlord could not be the purchaser of the goods. The question of whose agent the auctioneer is does not affect the question whether or not the landlord can sell to himself.

Arthur Page in reply.

COLLINS, M.R.—This is an appeal against a decision of the Divisional Court upon a question arising out of a distress for rent put in by the plaintiffs as landlords. They seized among other things a sewing machine which had been let out on hire to the tenant, and upon the machine being put up for sale by public auction they bought it in at what was apparently a fair price. Having bought the machine, they then let it out to their tenant. The defendants are a sewing-machine company, and had originally let out the machine to the tenant on the hire-purchase system. The instalments due under their agreement fell into arrear, and they seized the machine under their powers under their agreement. Now, the landlords have brought this action against the sewing-machine company for conversion of the machine. That raises the question whether the landlords have any title to the machine. Now, it seems to me that the case is really on all fours with *King v. England* (*ubi sup.*). In that case there had been an appraisement of the goods distrained, as was then necessary, and the landlord took over the goods at the appraised value with the consent of the tenant, the goods being at the time of the distress the property of a third person. The true owner of the goods then seized them, and the result was an action against him for conversion, in the same way as in the present case. The only difference is that in this case the formality of a sale by auction took place. But still the substance of the thing is the same—namely, a sale by the landlord to himself. By the statute the landlord is to sell the goods distrained. It is true that the auctioneer selling at an auction is for certain purposes considered as agent both for vendor and purchaser, but primarily he is the agent of the vendor. The mischief in the present case is the same as in *King v. England* (*ubi sup.*)—namely, the landlord being both seller and buyer—and that mischief was pointed out in that case by Blackburn, J., and in the present case by Wills, J. It seems to me that both on principle and authority the decision of the Divi-

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sional Court was right, and that this appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. The case is really the same as *King v. England* (*ubi sup.*). The Act of 2 Will. & M., sess. 1, c. 5, s. 2, makes the matter quite clear. Under that statute the landlord is empowered to sell the goods he has distrained for rent. A sale clearly means a sale to someone else. It is said that there was a sale because there was an auction. An auctioneer is the agent of the landlord to effect the sale, and he may be the agent of the buyer to record the sale. But in the present case there was no one but the landlord in the so-called sale. The case is clearly within the authority of *King v. England* (*ubi sup.*), and the appeal must be dismissed.

Appeal dismissed.

Solicitor for the plaintiffs, James Morley.

Solicitor for the defendants, Gilbert Wansbrough.

Monday, March 14.

(Before COLLINS, M.R. and MATHEW, L.J.)

SOCIÉTÉ GÉNÉRALE POUR FAVORISER LE DÉVELOPPEMENT DU COMMERCE ET DE L'INDUSTRIE EN FRANCE v. JOHANN MARIA FARINA AND Co. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Execution—Discovery in aid—Judgment against a company—Examination as to property of company—Ex-director—"Any officer"—Order XLII., r. 32.

Order XLII., r. 32, provides that when a judgment for the payment of money has been recovered against a company, the court or a judge may order that "any officer thereof" shall be orally examined as to whether the company has any property or means of satisfying the judgment.

Held, that the court or a judge has jurisdiction under this rule to make an order for the examination of a person who has been a director of the company, though he may have ceased to hold that office.

APPEAL by Gottlob Emmanuel Staenglen from an order of Phillimore J. at chambers.

On the 9th Oct. 1902 this action was brought by the plaintiffs, a French société anonyme, upon a bill of exchange for 5000fr. accepted by the defendants.

On the 18th Oct. appearance was entered by Messrs. Marshall and Marshall, solicitors for the defendants, in the following form:

Enter an appearance for Compagnie d'installation pour l'Eclairage et le Chauffage par le Gaz à Bâle, a société anonyme trading as Johann Maria Farina et Cie., gegenüber dem Josephsplatz, and sued as Johann Maria Farina and Co. in this action.

On the 29th Oct. an application was made on behalf of the plaintiffs for summary judgment under Order XIV., whereupon an affidavit was filed on behalf of the defendants, made by the appellant, Gottlob Emmanuel Staenglen, who therein described himself as a director of the Compagnie d'Installation, &c.; and upon such application unconditional leave to defend was given.

On the 24th April 1903 the defendants withdrew their defence, and thereupon judgment was signed by the plaintiffs for the sum of 207l. 0s. 9d. and costs to be taxed.

As this judgment remained unsatisfied, and the plaintiffs were unable to discover any asset of the defendants whereon to levy execution, the plaintiffs, on the 5th Nov. 1903, obtained an order from the master under Order XLII., r. 32, directing an examination of the said Gottlob Emmanuel Staenglen, as a director of the judgment debtors, as to what debts were owing to the judgment debtors, and whether they had any and what property and means to satisfy the judgment obtained by the plaintiffs. This order was not opposed, nor was it appealed against.

The order was duly served on Staenglen.

On the 5th Feb. 1904 Staenglen attended before the master who had been appointed to hold the examination.

At this examination Staenglen admitted that he was a director of the Compagnie d'Installation, &c., at the time when the judgment in this action had been obtained, and that Johann Maria Farina and Co. were never registered as a company, but were merely a name used by the Compagnie d'Installation, &c. After making these admissions, however, he refused, on the advice of his solicitor, to answer any further questions or to give any information as to the debts due or property of the alleged Compagnie d'Installation, &c., or Johann Maria Farina and Co., on the ground that, as he alleged, he had ceased to be a director of the Compagnie d'Installation subsequently to the date of the judgment—namely, on the 30th June 1903.

The master, after hearing the objections of the solicitor who appeared on behalf of Staenglen at the examination, ruled that Staenglen was bound to answer the questions put to him with regard to the debts due and property of the company, but Staenglen still refused to answer, and thereupon the master adjourned the examination to make an application to be made to the judge.

Upon the plaintiffs' application to the judge for an order to commit Staenglen for contempt of court, Phillimore, J. made an order directing Staenglen to attend at his own expense before the master to be examined.

Staenglen appealed from this order of Phillimore, J.

Order XLII. provides as follows:

Rule 32. When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the court or a judge for an order that the debtor liable under such judgment or order, or, in the case of a corporation, that any officer thereof, be orally examined as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or an officer of the court as the court or judge shall appoint; and the court or judge may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents.

C. F. Hohler for Staenglen.—Order XLII., r. 32, provides that "any officer" of the company may be ordered to be examined as to the company's property. That means "any existing officer."

The rule does not enable the court to order any

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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one to be examined subject only to the provision that at some time or another he has been an officer of the company. Staenglen had ceased to be a director of the company when the order for his examination was made, and therefore the court had no jurisdiction to compel him to undergo the examination. The rule must be construed strictly. In a case where the judgment debtor was a married woman, the Court of Appeal held that no one but the judgment debtor herself could be examined under this rule as to her property:

Hood-Barrs v. Heriot; Ex parte Blyth, 75 L. T. Rep. 15; (1896) 2 Q. B. 338.

And in the case of a corporation being a judgment debtor, Lord Esher, M.R. said that the expression "any other person," at the end of r. 32, "does not include within the rule in the case of an individual debtor any other person than himself, or, in the case of a corporation, anyone but officers of the corporation":

Irwell v. Eden, 56 L. T. Rep. 620; 18 Q. B. Div. 588.

He referred also to

Republic of Costa Rica v. Strousberg, 43 L. T. Rep. 399; 16 Ch. Div. 8.

F. M. Abrahams for the plaintiffs.—The expression "any officer" includes past as well as present officers. If it did not, a company, by changing its officers, might prevent a judgment creditor from obtaining the information to which, under this rule, he is entitled. It is enough if the judgment creditor can show that the ex-officer of the company whose examination is desired is a person who is likely to be able to give the required information. Then the court, in its discretion, may order him to be examined. Sect. 115 of the Companies Act 1862 (25 & 26 Vict. c. 89) contains an enactment very similar to rule 32. It provides that when an order has been made for the winding-up of a company, the court may summon before it for examination "any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court may deem capable of giving information concerning the trade, dealings, estate or effects of the company." There the words "any officer" include any ex-officer, within reasonable limits. Further, there is not proper evidence here that Staenglen is not still an officer of the company. We know for certain that he was a director of the company when judgment was signed against it, and against that we merely have his assertion that, in order to avoid being examined, he has resigned his directorship. There is no further evidence of his resignation, and we do not know what he has actually done in order to carry out his resignation, nor what is the legal effect of what he may have done.

Hohler in reply.—This is a foreign company, and the Companies Acts have nothing to do with it. There is nothing to contradict the evidence that the appellant is no longer an officer of the company. The whole question turns on the meaning of rule 32.

Collins, M.R.—This is an appeal from Phillimore, J. at chambers, who ordered the appellant to attend at his own expense and be examined

before the master. The action was brought against Johann Maria Farina and Co., but appearance was entered for the "Compagnie d'Installation pour l'Eclairage et le Chauffage par le Gaz à Bâle, a société anonyme trading as Johann Maria Farina et Cie., gegenüber dem Josephsplatz, and sued as Johann Maria Farina and Co. in this action." That substituted the Compagnie d'Installation in the place of Johann Maria Farina and Co. as defendants in the action. Judgment was obtained against the defendants, and an application was afterwards made under Order XLII., r. 32, for the examination of the appellant as a director of the defendant company. Now, in answer to the application made by the plaintiffs for leave to sign judgment under Order XIV., the appellant swore an affidavit in which he stated that he was then a director of the company, and authorised to make affidavits on their behalf. Naturally, therefore, the plaintiffs, upon their application under Order XLII., r. 32, proposed to have him examined. He attended the examination as directed, but he refused to answer questions put to him, on the ground that he had ceased to be a director of the defendant company since the date when judgment had been recovered against them. Thereupon an application was made by the plaintiffs to Phillimore, J., who has made the order against which this appeal is brought. The appellant's contention is that because he was not a director of the company at the time when the order was made under Order XLII., r. 32, the court or judge had no jurisdiction to make any order against him under that rule. That contention seems to me to put too narrow a construction upon that rule. I see no ground for limiting its application so as to make it apply only to persons who, at the time of the application to the judge, are officers of the company. The rule enables the judge to order "any officer" of the company to be examined. I do not think that it is incompatible with that expression to say that persons who have been officers of the company may be ordered to be examined. It cannot be that an officer of the company can get rid of his liability to be examined and give information as to the company's assets merely by resigning his office. I may add that as regards the appellant, we do not know whether he has resigned his directorship in the proper way or what is the exact effect of what he has done. But, however that may be, I think that it would be too narrow a construction to put upon rule 32 if we limited it so as to make it applicable only to persons who at the date of the order are officers of the company. There are somewhat analogous provisions in sect. 115 of the Companies Act 1862, but the effect of that section has not been limited to persons who are existing officers of the company in question. It seems to me that the expression "any officer thereof" in rule 32 has reference not to a period of time, but to the character of the person to be examined, and I think it is putting a fair construction on the words to say that they give power to examine a person who has been an officer of the company. Though he may have ceased to be an officer of the company, yet he may have some power or control over the company's property, and be able to give information about it. For those reasons I think that the appeal must be dismissed.

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MATHEW, L.J.—I am of the same opinion. The appellant was a director of the defendant company when judgment was recovered against them, but he alleges now that he had ceased to be a director when the order was made for his examination as to the company's property. He made no application to have that order set aside, but, when he attended before the master in obedience to the order, he refused to answer the questions put to him. It is contended that under the words of Order XLII., r. 32, he was not bound to answer the questions. Now, it must be remembered that the object with which rule 32 was made was to enable a person who has obtained judgment against a company to get from persons connected with the company information which he is entitled to have as to the property and assets of the company. I do not think that a company ought to be allowed to escape investigation as to its property by getting its directors to resign. We ought not to put such a construction as that upon the rule. The appellant in this case was certainly a director of the company until quite recently, and he must have the information as to its property which the plaintiffs are entitled to get. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *John Carnegie.*

Solicitors for the respondents, *Michael Abrahams, Sons, and Co.*

March 18 and 26.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

CONTINENTAL CAOUTCHOUC AND GUTTA PERCHA COMPANY v. KLEINWORT, SONS, AND CO. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Principal and agent—Mistake—Money paid to agent—Remittance to banker—Credit given by banker to customer—Remittance made by mistake—Recovery back from banker by payer.

K. was a merchant, financed by two banks. These banks were each in the habit of advancing money to K. on the security of the shipping documents of goods, bought by him. When he sold such goods he was in the habit of obtaining from them the necessary documents to enable him to deliver the goods, and at the same time assigning to them the purchase money. On receipt of the purchase money from the purchasers of the goods, the banks would credit the amount to K.'s account.

The plaintiffs bought several parcels of goods from K., and received from him notice of the assignment of the purchase money. The purchase money of some of the parcels was assigned to one bank, and of the other parcels to the other bank. Through a mistake of their clerk the whole of the money payable by the plaintiffs in respect of all these parcels of goods was paid over by them to only one of the banks, with instructions to credit K.'s account with the amount. This was accordingly done by the bank under the belief that the whole of the money was rightly paid over to them. On discovering the over-payment, the plaintiffs asked the bank to return it. The bank

refused. In an action to recover back the money:

Held (affirming the decision of Bigham, J. at the trial), that the plaintiffs were entitled to the return from the bank of the money that had been thus paid them by mistake.

APPEAL by the defendant company from the judgment of Bigham, J. at the trial of the action without a jury.

The action was brought to recover back a sum of 1480*l.* 15*s.* 11*d.* paid by the plaintiffs to the defendants by mistake.

At the trial Bigham, J. gave judgment for the plaintiffs.

The case is reported 8 Com. Cas. 277.

The following statement of facts is taken from the judgment of Bigham, J. :—

A firm of Kramrisch and Co. carried on business in Liverpool as importers of rubber. The defendants, who were foreign bankers and also carried on business in London, were in the habit of making advances to Kramrisch and Co. on the security of the shipping documents of the rubber, and when the rubber arrived in this country the defendants continued the advances, holding the rubber itself as their security. When Kramrisch and Co. sold any part of the goods it was their practice to apply to the defendants for a corresponding delivery order, which the defendants gave them, thereby enabling Kramrisch and Co. to fulfil their contract of sale with their buyer. In exchange for the delivery order Kramrisch and Co. gave to the defendants a letter containing the particulars of the sale, the quantity, the price, and the name of the buyer, and by the same letter they assigned to the defendants the right to receive the purchase money; this assignment Kramrisch and Co. completed by a written notice to the buyer notifying that the money was to be paid to the defendants. Thus, although when the rubber was sold the defendants parted with the goods, they got in place of the rubber the right to receive the price from the buyer. When the buyer paid the price, the defendants credited the amount to Kramrisch and Co.'s account, and thus the transaction ended. Kramrisch and Co. did business in this way not only with the defendants, but also with a firm of Wm. Brandt, Sons, and Co.

The plaintiffs were customers of Kramrisch and Co., and frequently bought parcels of rubber from them, and following the practice above described they were in the habit from time to time of paying the price to the defendants or to Brandt and Co., as the case might be, in accordance with the directions given to them by Kramrisch and Co.

In Dec. 1902 and Jan. 1903 the plaintiffs had bought from Kramrisch and Co. several parcels of rubber which had been held by the defendants as security for advances made to Kramrisch and Co. The defendants had parted with these parcels of goods, getting from Kramrisch and Co. an assignment of the right to receive the price, of which assignment express notice in writing had been given to the plaintiffs. The goods were delivered to the plaintiffs and from time to time in the early part of January the plaintiffs made remittances to the defendants on account of the price. The total price of the different parcels so bought by plaintiffs was 9505*l.* 17*s.* 3*d.*, and

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

the payments made on account amounted to 8259*l.* 2*s.* 7*d.* Thus there remained a balance of 1246*l.* 14*s.* 8*d.* to be paid by the plaintiffs to the defendants.

It appears that at this time the plaintiffs were also purchasers from Kramrisch and Co. of three other parcels of rubber amounting to 1480*l.* 15*s.* 11*d.*, against which advances had been made to Kramrisch and Co. by Brandt and Co.; and the plaintiffs were, by virtue of an assignment made by Kramrisch and Co. in favour of Brandt and Co., under an obligation to pay the price of these parcels to Brandt and Co. By a blunder on the part of one of the plaintiffs' clerks the fact was overlooked that this 1480*l.* 15*s.* 11*d.* was to go to Brandt and Co., and the remittances for the whole amount (the 1246*l.* 14*s.* 8*d.* and the 1480*l.* 15*s.* 11*d.*) were sent by plaintiffs to the defendants. Thus the defendants received an amount (1480*l.* 15*s.* 11*d.*) which ought to have been sent to Brandt and Co.

On the 7th Feb. Brandt and Co. wrote to the plaintiffs to know why the money for the three parcels of rubber, the 1480*l.* 15*s.* 11*d.*, had not been remitted to them in accordance with the undertaking created by the assignment. The plaintiffs then discovered the blunder which had been made by their clerk, and on Feb. 10 they wrote to the defendants asking to have the matter put right by the return of the money.

The defendants refused to return the money, alleging that in effect it had been paid over to Kramrisch and Co. or had been accounted for to them; and, further, that on the faith of the representation made by the plaintiffs that the money was available for Kramrisch and Co. in the defendants' hands, the defendants had been induced to give fresh credit to Kramrisch and Co.; and, further, that whether the payment had or had not induced the giving of fresh credit, the state of the accounts between Kramrisch and Co. and the defendants had, in fact, been altered between the dates of the receipt of the money and the notification of the mistake.

Shortly after the notification of the mistake Kramrisch and Co. failed; and thereupon Brandt and Co. called on the plaintiffs to pay the 1480*l.* 15*s.* 11*d.* in accordance with the obligation created by the assignment, and the plaintiffs did pay, as indeed they were bound to do. Thus the plaintiffs had paid the money twice over, the first time in mistake to the defendants, the second time properly to Brandt and Co., and the question now was whether they could recover back from the defendants the amount of the first payment or whether they must be satisfied with a proof against the bankrupt estate of Kramrisch and Co.

Before the mistaken remittance was made, Kramrisch and Co. had advised the defendants of large sales of rubber to the plaintiffs in addition to those already referred to, and had obtained corresponding deliveries of goods from the defendants. Such sales had in fact been made, but Kramrisch and Co., instead of delivering the goods to the plaintiffs, converted them to their own use, so that plaintiffs owed nothing in respect of them. Of this, however, the defendants were unaware, so that when they received the remittance they believed that it was properly sent to them against the goods with which they had parted.

By the letters from the plaintiffs to the defendants in which the remittances were inclosed the defendants were requested to credit the amount to Kramrisch and Co., and in accordance with these letters the defendants did credit Kramrisch and Co.'s account with the remittances, and so advised the plaintiffs when they wrote acknowledging the receipt of the money. Not only did the defendants deal with the remittances in the way they were told to deal with them, but they also advised Kramrisch and Co. of the receipt of the money and that the amount had been passed to their credit. Kramrisch and Co., in answer to this, wrote back to the defendants saying that they noted the fact and had made entries in their own books in conformity therewith. Bigham, J. found that Kramrisch and Co. knew well that the plaintiffs ought not to have paid the money to the defendants, and that they (Kramrisch and Co.) had no right to the credit of which the defendants had sent advice; and that they kept their mouths shut. Between the receipt of the money and the notification of the mistake the state of the accounts between Kramrisch and Co. and the defendants underwent considerable changes, the general effect of which was to reduce very considerably the large amount owing to Kramrisch and Co. No doubt, in the course of these changes, some payments were made by the defendants to Kramrisch and Co. or on their account; but they were far less in amount than the payments in, and they were either made against ample security or were of insignificant amounts. Moreover, not one of the payments to Kramrisch and Co. was in any way induced by the receipt of the money from the plaintiffs. This the defendants themselves admitted, and the learned judge was satisfied, as a matter of fact, that it was so. The receipt of the money in no way caused the defendants to make any payment or to grant any indulgence to Kramrisch and Co., or to favour them in any way. Their business with Kramrisch and Co. would have gone on precisely as it did, even if the money had not been received, for the open account was, at the time of the payment, so large and the subsequent dealings were so small and of such little importance that the mistaken payment could not have influenced, as indeed it did not influence, the defendants in any way.

The defendants were still large creditors of Kramrisch and Co.

On these facts Bigham J. held that the 1480*l.* 15*s.* 11*d.* was paid into the defendants' hands in such circumstances of mistake as to make it money paid by the plaintiffs to their own use, and that it had never ceased to have that character. He therefore gave judgment for the plaintiffs.

The defendants appealed.

March 18.—*Asquith, K.C., J. A. Hamilton, K.C., and A. H. Chaytor* for the defendants.

Scrutton, K.C. and F. D. Mackinnon for the plaintiffs.

Cur. adv. vult.

March 26.—*COLLINS, M.R.* read the following judgment:—This is an appeal from the decision of Bigham, J., who has held that the appellants are bound to repay to the plaintiffs a sum of 1480*l.* 15*s.* 11*d.* paid by them to the defendants under a mistake of fact. The defence is that the

sum in question was paid to and received by the defendants as agents for Kramrisch and Co., now bankrupt, with whom they had, previous to the plaintiffs' demand, settled it in account. The facts are fully and lucidly stated in the judgment of Bigham, J., and a bare outline is all that is necessary to make this judgment intelligible. Kramrisch was an importer of indiarubber, carrying on business at Liverpool. He was financed by two "merchant bankers," as they are described in the case, viz., the defendants Kleinwort, Sons, and Co., and Brandt and Co., who only come incidentally into this discussion. The course of business as between Kramrisch and these firms was that when he imported a parcel of indiarubber one or other of these firms made itself liable to the vendor for the price upon the security of the shipping documents, which were deposited with the firm, and as Kramrisch effected sales of the rubber so imported the financing firm released the bills of lading covering such sale and transmitted them to the purchaser, taking from Kramrisch an authority to receive the price from the purchaser direct. The plaintiffs, before the transaction in question, had bought from Kramrisch parcels of indiarubber, some of which he had imported through the aid of the defendants and some through that of Brandt and Co., and had in each case arranged to pay direct to the defendants and Brandt and Co. respectively according to the instructions received with each consignment. The sum in question in this case represented the price of indiarubber which was in fact payable direct to Brandt and Co., but by a mistake of a clerk of the plaintiffs it was sent to the defendants instead of to the account of Kramrisch. The defendants placed it to the credit of Kramrisch in their account with him, and apprised him of the fact, and he acknowledged and approved what they had done. It was contended by the defendants that they were thus discharged from all liability to the plaintiffs. Bigham, J. has rejected their contention, and I am of opinion that he was right. Without going into the question whether there was an absolute assignment of the debt by Kramrisch to Kleinwort, Sons, and Co., with notice to the plaintiffs—a matter that was discussed under somewhat similar circumstances in *Brandt, Sons, and Co. v. Dunlop Rubber Company* (ante, p. 106; (1904) 1 K. B. 387)—the undisputed facts are sufficient, in my judgment, to decide this case in favour of the plaintiffs. It is clear law that *prima facie* the person to whom money has been paid under a mistake of fact is liable to refund it, even though he may have paid it away to third parties in ignorance of the mistake. He has had the benefit of the windfall and must restore it to the true owner. On the other hand, it is equally clear that an intermediary who has received money for the purpose of handing it on to a third party, and has handed it on, is no longer accountable to the sender. In such case he is a mere conduit-pipe, and has not had the benefit of the windfall. A case rather more difficult arises when the mode by which he passes it on is by settlement in account with a third party for whom he has received it, involving the application of the money to the discharge of a debt due from the third party to himself. He has thus no doubt benefited by getting his debt paid, but he has done so in discharging his primary duty of

passing the money on to his principal. He has constructively sent it on and received it back, and has done nothing incompatible with his position as a conduit-pipe or intermediary. He was entitled to be paid, and has been paid by his debtor, who was no doubt put in funds to do so by the receipt of the money, and who therefore, and not the intermediary, has had the benefit of the windfall. Hence the care with which the courts have considered whether the sum has in fact been effectually passed out of the hands of the agent into those of the principal, no entry by the agent in his books sufficing until the assent of the principal has completed the transaction: (see *Buller v. Harrison*, 2 Cowp. 565). But these questions as to whether or not the sum received has been effectually passed on to the principal are only material in those cases where the person receiving is really and primarily a mere intermediary—that is to say, a person who as against his principal has no right to receive the fund for the purpose of passing it on. Once place him in the position of a person who has a right to receive and apply the fund for his own benefit, and he is at once taken out of the category of mere intermediaries for whom alone the defence is available that they have acted as such and passed on to another the liability to refund the windfall. I think the cases of *Buller v. Harrison* (2 Cowp. 565), *Cox v. Prentice* (3 M. & S. 344), *Holland v. Russell* (4 L. T. Rep. 547; 1 B. & S. 424; in error, 8 L. T. Rep. 468; 4 B. & S. 14), and *Newall v. Tomlinson* (25 L. T. Rep. 382; L. Rep. 6 C. P. 405), particularly the judgment of Brett, J., fully establish the above propositions. Now, in this case it is quite clear that, as between Kleinwort, Sons, and Co. and Kramrisch, the former were the persons primarily entitled to receive the purchase money of the goods in respect of which they had released the bills of lading. Had the sum due from the buyer been deposited with a third party and become the subject of an interpleader issue between Kramrisch and the defendants, it must, I think, have been awarded to the defendants. For these reasons I think that the defendants in respect of the sum claimed are in no better position than any other persons who have received for their own benefit money paid to them under a mistake of fact. The grounds on which I base my opinion relieve me from discussing some of the points referred to in the judgment of Bigham, J. and in the admirable argument before us. In my opinion the appeal fails.

ROMER, L.J. read the following judgment:—I am of the same opinion. I will only add that, in my opinion in this case, unlike the one recently decided by us and referred to by the Master of the Rolls, the evidence is sufficient to establish an equitable assignment as between Kramrisch and the defendants. The proceeds of the rubber against which the defendants had made advances and which was consigned to the plaintiffs for sale were equitably assigned by Kramrisch in favour of the defendants. And, if it were essential to the present case (though, in my opinion, it is not), I should come to the conclusion that the plaintiffs had notice of the assignment, and could only disregard that notice at their peril. But, in justice to the plaintiffs, I think they did not disregard the notice. On the contrary, it was, in my opinion, because the plain-

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tiffs recognised the obligation cast upon them that they forwarded the proceeds of the rubber to the defendants, and it was by reason of the mistake in fact made on their behalf, in thinking that the moneys, the subject of this action, were proceeds of such rubber, that these moneys were forwarded to the defendants. When the mistake in fact was discovered the plaintiffs became entitled to recover the moneys from the defendants, unless the defendants could show that they had received the moneys as agents, and before notice of the mistake had parted with them to their principal, or so dealt with them by mandate of their principal as to render it unjust to call upon them to repay the moneys to the plaintiffs. But in the present case the defendants could not show that they had so received and dealt with the moneys. In fact, they received the moneys by virtue of the rights existing between them and Kramrisch, including their rights as equitable assignees, and when they had so received the moneys they dealt with them according to those rights, and not according to any unfettered right of Kramrisch to direct how the moneys should be dealt with. The notice they gave to Kramrisch of the way in which the moneys had been appropriated by them was simply notice that they had applied them according to their own rights as previously pointed out, and not by way of obtaining a ratification from Kramrisch of a previously unauthorised application. I agree, therefore, that the appeal fails.

MATHEW, L.J. concurred. *Appeal dismissed.*

Solicitors for the plaintiffs, *Stephenson, Harwood, and Co.*

Solicitors for the defendants, *Hollams, Sons, Coward, and Hawksley.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, Jan. 28.

(Before BYRNE, J.)

Re FOX; WODEHOUSE v. FOX. (a)

Will—Powers of appointment and advancement—Hotchpot clause.

A testator gave his real and residuary personal estate upon trust for his wife for life, and after her death for his four children as his wife should by will appoint. In default of appointment the children were to take equally. The testator's will contained a power of advancement. Any child who had received any part of the funds under any appointment was, in default of appointment to the contrary, to bring the appointed funds into hotchpot. After the testator's death 705*l.* was advanced to R., one of his children. The widow subsequently by her will appointed one equal fourth part of the property of which she was tenant for life to each of two of her children absolutely, and one equal fourth part upon trust for each of her other children (of whom R. was one) respectively for life, with remainder to their respective children. No reference was made in the widow's will to the 705*l.* advanced to R.

*Held, that R. was not liable to bring into hotchpot or account for the 705*l.* advanced to him out of his expectant share.*

By his will the Rev. W. C. Fox devised and bequeathed all his real estate and the residue of his personal estate to trustees upon trust to pay the income thereof to his wife for her life, and after her death "in trust for all such one or more exclusively of the others or other of my children, Eliza Frances Fox, Lionel Wodehouse Fox, Armine Wodehouse Fox, and Raymond Wodehouse Fox, or their issue respectively born or to be born during the life of my said wife, or within twenty-one years after her death, at such age or time or respective ages or times, if more than one, in such shares and with such future executory or other trusts for the benefit of the said issue, or some or one of them, with such provisions for their respective advancement, maintenance, or education at the discretion either of the said trustees or trustee, or of any other persons or person, and upon such conditions with such restrictions and in such manner as my said wife shall, whether covert or sole, by will or codicil appoint, and in default of such appointment, and so far as no such appointment shall extend, in trust for all such of my four last-mentioned children living at my death, and of the children then living or afterwards born of any such child or children having died in my lifetime as being male attain the age of twenty-one years, or being female attain that age or marry under that age, if more than one as tenants in common in equal shares, so that my children who shall be objects of this trust shall take in equal shares, and the children being objects of this trust of any child of mine having died in my lifetime shall take equally between them the share which the parent would have taken had he or she survived me. Provided always that no child who or whose issue shall take any part of the said premises under any appointment in pursuance of the power hereinbefore contained shall, in default of appointment to the contrary, have or be entitled to any share of the unappointed part of the said trust premises without bringing the share or shares appointed to him or her or to his or her issue into hotchpot, and accounting for the same accordingly. Provided always and I hereby declare that it shall be lawful for the said trustees or trustee after the death of my said wife or previously thereto, with her consent in writing, to raise any part or parts not exceeding in the whole one half of the then expectant or presumptive share of any child under the trusts hereinbefore declared, and to apply the same for his or her advancement or benefit as the said trustees or trustee shall think fit."

The testator died in Oct. 1883.

His widow in 1890 sent to the trustees a request in writing that they would, under the advancement clause in the testator's will, advance to her son Raymond Wodehouse Fox, who was then a minor, the sum of 400*l.* to enable him to be articled to a solicitor. The money was advanced, and the receipt for the same was signed by the widow. In Dec. 1894 the trustees similarly advanced to Raymond Wodehouse Fox a sum of 305*l.*

On the 22nd June 1898 the widow made her will and, after reciting the power given to her

(a) Reported by E. L. HOPKINS, Esq., Barrister-at-Law

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by her husband's will "to appoint his real and residuary personal estate of which I am tenant for life," appointed that the trustees should stand possessed of the trust estate "upon trust, as to one equal fourth part or share thereof, for my said daughter Eliza Frances Williams absolutely for her own benefit, and as to one other equal fourth part or share thereof upon trust for my said son Armine Wodehouse Fox absolutely for his benefit, and as to one other equal fourth part or share thereof upon trust to retain the same and pay the income thereof to my son Lionel Wodehouse Fox until his death or until he shall become bankrupt or assign or charge the said income or some part thereof," and then if he died in trust for his children as he should appoint, and in default of appointment for all his children equally, and if he had no children then for his brothers and sister, but if he became bankrupt in trust for all his children equally. The testatrix gave "the remaining fourth part or share of my husband's trust estate upon trusts similar in all respects *mutatis mutandis* in favour of my son Raymond Wodehouse Fox to those hereinbefore expressed with reference to the one fourth share hereinbefore appointed in favour of the said Lionel Wodehouse Fox."

On the 8th Dec. 1900 the testatrix made a codicil to her will and thereby directed that another sum of 700*l.* which had been advanced by the husband of her daughter Eliza Frances Williams to Raymond Wodehouse Fox should, in the division of the testator's estate, be charged upon the share directed to be retained by the trustees for Raymond Wodehouse Fox and added to the share given to Eliza Frances Williams.

By a second codicil, dated the 29th March 1901, the testatrix directed that the trustees should have power to apply one half of the share of Lionel and Raymond for their advancement respectively, and she gave Raymond a general power of appointment over his share.

There was no reference either in her will or codicils to the advancement of the sum of 705*l.* to Raymond.

Mrs. Fox died on the 9th July 1901.

This originating summons was taken out by the trustees of the testator's will for the determination of the following questions: First, whether the 705*l.* advanced to Raymond Wodehouse Fox out of his expectant share ought to be brought into hotchpot or accounted for; and, secondly, if so, in what manner it was to be done.

Humphry for the trustees.

Crossfield for the defendant Raymond Wodehouse Fox.—The advances made to Raymond were irrevocable, and the sum of 705*l.* was thereby withdrawn from the settlement, and no longer formed part of the settled funds:

Re Gosset's Settlement, 19 Beav. 529, 535;

Lawrie v. Bankes, 4 K. & J. 142.

The money advanced to Raymond became his property for all purposes, and consequently the widow had only power to appoint property which had not been advanced. She only purported by her will to deal with the property of which she was tenant for life; and as she had parted with the 705*l.* she was no longer tenant for life of it.

Her trustees could not "retain" it, for it was gone. It is clear from the codicils that the intention of the testatrix was that Raymond should have an interest in a share of the trust estate equal to the other shares. He is entitled to retain the 705*l.* advanced to him, and also to have a life interest under his mother's will in one fourth of the remainder of the trust funds.

Harman for the brothers and sisters of Raymond.—The sum advanced must be brought into account. The power of appointment given to the testator's widow being a special power, the appointment must be read into the testator's will. The money advanced to Raymond was not taken out of the trust estate absolutely. According to the ordinary practice of conveyancers, the trust estate is to be treated as consisting of the remaining investments, plus any money which may have been advanced:

Davidson's Precedents in Conveyancing, 3rd edit., vol. 3, pt. 2, p. 772.

[*BYRNE, J.*—The hotchpot clause only applies in default of appointment. Mrs. Fox has exercised her power of appointment, and has deliberately abstained from making the shares equal.] She was purporting to deal with everything that could form part of the trust estate, including the money advanced, which had not been taken out of the estate for all purposes. In *Re Gosset's Settlement* (*ubi sup.*) the question was whether the money paid to the son was appointed to him or taken as an advance. The judgment was on that point only, and it was held that the hotchpot clause applied. That case did not decide that money advanced was taken out of the estate altogether. The 705*l.* formed part of the estate which Mrs. Fox appointed. Reading the two wills together, the advance must be treated as having been made subsequently to the date of the testator's will. If it had been made in his lifetime, the rule against double portions would have applied, and the court can treat that rule as applying in the present case. The second question does not arise if the 705*l.* is not to be brought into account.

BYRNE, J. stated the facts and continued:—There are expressions in the lady's will in which she speaks of her husband's residuary estate of which she was tenant for life. There is no reference in it to the advance of 705*l.* to Raymond. It is argued that Raymond ought to bring into account, or that there ought to be brought into account, from the share given to him and his children, a sum equal to the advances made to him. It is admitted that the hotchpot clause has no application to the matter, and that there is no general equity that a person who has been advanced should repay the sum advanced in such circumstances as these. The question is whether, looking at the appointment which has been made, there was an intention that this 705*l.* should be brought into account. I think it clear that such advances as these take the sum advanced out of the trust estate altogether. In *Re Gosset's Settlement* (*ubi sup.*) the will contained a power of appointment and a power of advancement, and a hotchpot clause which was applicable to the latter and not to the former. The Master of the Rolls said: "An advancement has a definite meaning distinct from an appointment. It means that a certain portion of the fund is

actually taken out of the settlement altogether and paid over to the object of the power. But an appointment deals only with the reversion of the fund, leaving the previous life interests untouched." And in *Lawrie v. Bankes* (*ubi sup.*), where there had been an advancement to a son for the purpose of procuring a commission, and he had got possession of the fund, it was held that the amount of the advancement was taken out of the trust estate so as to free him from any liability to bring it into account. The last paragraph of the headnote says: "Proceeds of the sale by an infant of his commission in the army, purchased three months previously at his request by his trustees, under a power to raise money for his maintenance and advancement out of a fund in which he had only a contingent interest: Held, in the absence of fraud, to belong to the infant, although the trustees' object in exercising the power had failed *ab initio*." It appears to me, looking at the will of the widow, that I cannot find anything to make me say that she made an appointment of what at that time constituted her husband's estate so as to ensure the bringing of the advance into account. There is nothing unreasonable in such a scheme as this, for it is always in the power of the appointor to appoint so as to make it certain that money advanced shall be accounted for. As I read her will, the widow intended to appoint the funds so that Raymond should not be liable to account for the 705*l*.

Solicitors: Gribble, Oddie, Sinclair, and Johnson, for Osborne, Ward, Vassall, and Co., Bristol; C. E. S. Whitford.

Feb. 20 and 22.

(Before FARWELL, J.)

CURL BROTHERS LIMITED v. WEBSTER. (a)

Goodwill—Sale of business with goodwill—Vendor interested in new business—Solicitation of old customers who have also become customers of the new business.

The vendor of an interest in a business which with the goodwill thereof had been sold by him to a company solicited on behalf of a competing business in which he was interested customers of the old business, who were also customers of the competing business.

Held, that, on the rule laid down in Trego v. Hunt (73 L. T. Rep. 514; (1896) A. C. 7), the vendor must be restrained by injunction from soliciting the customers of the business which he had sold, whether or not such customers were also customers of the competing business.

WITNESS ACTION.

On the 17th May 1899 a firm known as Curl Brothers, who had some time previously carried on the business of wholesale drapers and warehousemen in the city of Norwich, entered into an agreement with a trustee on behalf of a limited company proposed to be formed for the sale of the business and goodwill to such company. Such company was to be known as Curl Brothers Limited.

At the date of this agreement the firm consisted of Jacob Curl and Henley Curl, Robert William Claxton Skoyles, and William Hucks Webster.

The company was registered on the 18th May

1889, and on the 14th July the agreement was confirmed by the company.

The brothers Curl and Webster entered into an agreement with the company to act as directors thereof until the 3rd Jan. 1903. Webster agreed thereunder that he would, with certain exceptions, devote his whole time to the business of the company and the furtherance of such business, and would not prior to the 3rd Jan. be concerned, either directly or indirectly, as a partner or manager or otherwise in any business whatsoever other than the business of the company.

Webster continued to act as a managing director of the company until Jan. 1903, when he ceased to be a director and left the company's business. He thereupon joined with another firm of drapers in Norwich in promoting and bringing out a company known as the Norwich Warehouse Company Limited, and in this company he was a director and considerable shareholder.

The company commenced business, and Curl Brothers Limited brought an action against Webster to restrain him from soliciting the plaintiffs' customers, either personally by a traveller or by letter.

It was admitted in the course of the trial that the defendant had solicited custom from certain customers of the plaintiffs.

Some of these persons, however, it was alleged, had voluntarily become the customers of the Norwich Warehouse Company Limited prior to the date of such solicitation by the defendant.

The question, therefore, was argued whether in granting an injunction against the defendant the court should confine the injunction to cases in which the customers had not become the customers of Norwich Warehouse Company Limited prior to the date of the defendant's solicitation.

Eldon Bankes, K.C. and R. J. Parker for the plaintiffs.

Upjohn, K.C. and Jessel for the defendant.—The relief to which the plaintiffs are entitled (and we do not deny that they are entitled to an injunction) should be limited so as not to restrain the defendant from soliciting old customers of Curl Brothers, who, prior to any solicitation on his part, had become customers of the Norwich Warehouse. It is unavoidable (as is stated by the House of Lords in *Trego v. Hunt*, 73 L. T. Rep. 514; (1896) A. C. 7), but that customers in the old business, of which the goodwill has been sold, may transfer their custom to a new firm in which the vendor is interested; but when this has been done there is no objection to the vendor soliciting them. Otherwise the vendor could not even send a price list to a person who had once been a customer of the old firm. It would be, further, excessively inconvenient to work such an injunction:

Leggott v. Barrett, 43 L. T. Rep. 641; 15 Ch. Div. 306.

Eldon Bankes, K.C. in reply.—The defendant ought not to be allowed to solicit any person who is our customer, even though, once in a way, he may have bought something from the business with which the defendant is now connected. Having sold his interest in the goodwill, he is not at liberty to recapture it; and the only test that can be applied in deciding whether he is trying to do so, is to ask whether or not the person solicited is a customer of the plaintiffs' business.

(a) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

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ATTORNEY-GENERAL v. SANDOVER AND LONG.

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FARWELL, J.—The only question that I have to consider here is whether the rule which prohibits the vendor of a business from soliciting old customers applies when those customers, although continuing customers of the old firm, have in fact dealt with the vendor's new firm, and so become customers of the new firm. In my opinion it would make no difference. The test is whether or not they can properly be styled customers of the firm of which the goodwill has been sold. The principle governing this class of cases is, unfortunately, wide, and, because of its generality it is difficult to apply. It is, however, the old principle that a man may not derogate from his grant; but it is complicated by the fact that it is, notwithstanding that principle, well settled law, that it is competent for a man who has sold his business to set up a similar business next door next day and to do the best he can short of representing that he is still carrying on the old business, or soliciting the customers of the old business, to attract away all the old business that he has already sold. I take the law as I find it to be; as Lord Davey says in *Trego v. Hunt*, the difficulty of doing full justice ought not to prevent me from meting out such scanty measure of protection to the purchaser of a goodwill, as the circumstances permit. It seems to me that this is the smallest measure of protection that a purchaser can get. It is unfortunate that he cannot get more; but he is entitled on the authorities to say, "You have sold me this business, and you shall not actively solicit the customers who made that business, who formed the value of it, to leave me and come to you." That being the principle, it appears to me a matter of no consequence, whether a particular individual, who is solicited, has also of his own accord done business with the vendor. If a customer, as in the instance before me is the case with every witness, has remained throughout and still is a customer of the old firm, the mischief done by the solicitation is the same, whether he has also dealt with the new firm of his own free will or not. What the purchaser is entitled to say is, "You shall not actively solicit your old customers, who became mine, so long as they are my customers to come to you, whether they have or have not of their own accord come to buy goods from your new firm." I think that I should be wrong to limit the small amount of protection which the purchaser of a business can get by any such restriction as is suggested. The injunction will go without any qualification as against Mr. Webster and his agents. I cannot grant an injunction against the company; but the injunction against Mr. Webster must restrain him from directing or suggesting solicitation by travellers or other agents of the company.

Judgment for plaintiffs.

Solicitors: *Sharpe, Parker, Pritchards, Barham, and Lawford*, for *Stevens, Miller, and Jones*, Norwich; *Christopher and Roney*.

KING'S BENCH DIVISION.

Wednesday, March 9.

(Before CHANNELL, J.)

ATTORNEY-GENERAL v. SANDOVER AND LONG. (a)

Copyhold—Fine—Colourable admittance—Customary tenant—Right of lord to have admittance cancelled.

By the custom of the manor of R. a person not already a customary tenant taking any estate as a purchaser by surrender or otherwise has to pay an arbitrary fine to the lord, but a customary tenant purchasing other customary lands pays only two years' quit rent of the purchase.

S., who was not a customary tenant, having agreed to purchase certain property within the manor, agreed with L. to purchase of him a cottage within the manor for 100l., S. agreeing to pay all expenses in connection with the transfer, to reconvey the cottage within three months for 75l., and to allow L. to collect and retain the rent of such cottage, L. to pay all outgoing. If S. desired to retain the cottage he was to pay 80l. more.

S. was duly admitted to the cottage, and paid an arbitrary fine in respect thereof to the lord. He then applied and was admitted to the certain other property, paying a sum of 6d. as quit rent only.

Held, that, as the transaction with regard to the cottage was a colourable one (though not fraudulent), the lord of the manor was entitled to an arbitrary fine in respect of the property as if S. had not been admitted to the cottage.

INFORMATION.

His Majesty the King, in right of his Crown, is lord of the manor of Richmond, otherwise West Sheen, in the county of Surrey.

By the custom of the manor, if a person not already a customary tenant of the manor takes any estate as a purchaser by surrender or otherwise of the customary lands or tenements within the manor, he is to pay an arbitrary fine to the lord, but if a person being a customary tenant of the manor purchases other customary lands or tenements he is to pay only a sum equal to two years' quit rent of the property purchased.

Shortly before Aug. 1902 the defendant, William Sandover, who was not a customary tenant of the manor, agreed to purchase a messuage, land, and hereditaments, known as Ormond Lodge, copyhold of the manor, from John Thomas Billett, for the sum of 1725l.

The fine payable to His Majesty as lord of the manor by the defendant on the purchase of that property had been duly assessed at the sum of 400l.

In order to avoid payment of that fine the defendant Sandover, it was alleged by the Crown, arranged with the defendant Walter James Long, who is an auctioneer at Richmond and a customary tenant, for a colourable sale by the defendant Long to the defendant Sandover of a copyhold cottage, No. 11, Prospect-place, Richmond, so that the defendant Sandover might appear to be already a customary tenant of the manor when he should apply for admission as purchaser to Ormond Lodge.

In pursuance of that arrangement Sandover

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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signed an agreement on the 22nd July 1902, and on the 13th Aug. 1902 the defendants, representing to the deputy steward that a real sale was taking place between them, procured entries to be made on the court rolls, whereby the defendant Long, in consideration of 100*l.* paid to him by Sandover, purported to surrender the copyhold cottage of which the defendant Long was then tenant on the rolls, to Sandover, and whereby on such surrender Sandover was admitted tenant at a quit rent of 1*d.* yearly, paying a fine of 32*l.*

Sandover then completed his purchase of Ormond Lodge, and on the 29th Sept. 1902 was admitted tenant thereof on the rolls (upon the surrender of John Thomas Billett, and in consideration of 1725*l.*) at 3*d.* quit rent, paying to His Majesty a fine of 6*d.* only, because he was (as the defendants pretended) a tenant already.

On the 11th Oct. 1902 Sandover's solicitor wrote to the deputy steward alleging (contrary, as it was alleged, to the real facts) that Long had recently sold to Sandover the cottage, that he had agreed to sell back the cottage, No. 11, Prospect-place, to Long for 75*l.*, and requesting to have the necessary documents prepared.

On the 2nd Dec. 1902 the defendants again went before the deputy steward, and the defendant Sandover, in consideration of 75*l.* paid to him by Long, purported to surrender, and the defendant Long was readmitted to the copyhold cottage, paying a sum of 2*d.* only.

There never was (the information stated) any sale of the cottage by Long to Sandover, nor any intention on the part of either of them to effect a real transfer of the property, or of any interest therein. There was no negotiation or contract for purchase or valuation or investigation of title or change of possession or of the receipt of rents, and all costs attending the transaction both of conveyance and reconveyance were paid by Sandover. The sum of 100*l.* was an inadequate and not a real price, and the difference between the sums of 100*l.* and 75*l.* was, in fact, the consideration paid by Sandover to Long for the assistance of the latter in enabling Sandover to avoid payment of the fine properly payable on the sale of Ormond Lodge. The real nature of the transaction and the agreement of the 22nd July 1902 were concealed by the defendants from the deputy steward, who would not otherwise have allowed the surrender and admission of the 13th Aug. 1902 to be entered on the rolls or the forms of surrender and admission to be gone through.

Under the circumstances, His Majesty, as lord of the manor, is entitled to the same fine on the purchase of Ormond Lodge as if the surrender and admittance of the 13th Aug. 1902 had not been made. The surrender and admission of and to No. 11, Prospect-place were effected with no other purpose than that of enabling Sandover to avoid payment of the fines, and were covinous and void, or (if not) were voidable by His Majesty, and ought to be set aside, and the entries thereof on the court rolls ought to be cancelled.

The information prayed (1) that it might be declared that the alleged purchase of the cottage and the surrender and admission of the 13th Aug. 1902 were merely colourable and void as against His Majesty, and ought to be set aside, and that Sandover was not before his admission to

Ormond Lodge on the 29th Sept. 1902 a customary tenant of the manor; (2) that Sandover might be ordered to pay to the deputy steward of the manor the sum of 400*l.*, or such other sum as the court might direct, the full fine due in respect of the purchase of Ormond Lodge (less the sums of 32*l.* and 6*d.*), together with interest.

The agreement made between Sandover and Long on the 22nd July 1902 for the sale of the cottage provided that Sandover agreed to purchase the cottage, No. 11, Prospect-place, for the sum of 100*l.* and to pay all expenses in connection with the transfer, and he further agreed to reconvey the cottage at his expense, at the expiration of three months, for 75*l.*, and he agreed to pay and bear all costs in connection with such transfer. The deeds were to be handed to his solicitor, and he empowered Long to collect and retain the rents during the term he (Sandover) held the cottage, and Long was to pay all outgoings in connection therewith. In case he wished to keep the property, it was agreed that Sandover should pay a further sum of 80*l.*

The custom of the manor as stated in the "Certified Extract from Parliamentary Survey. A Survey of the Manor of Richmond," is as follows:

Hee that is a stranger and comes to bee a tenant of the coppiehold lands belonging to ye sd manor is fineable for ye same at ye will of ye lord of the sd manor as the first tenant, but never after hee is once admitted to be a tenant doth hee pay any arbitrable fine for any other lands that hee shall buie within the sd manor.

The defendant William Sandover and the defendant Walter Long gave evidence, and were cross-examined.

The *Attorney-General* (Sir R. Finlay, K.C.) and *Vaughan Hawkins* for the Crown.—The defendant Sandover, for the purpose of getting the benefit and privilege of paying only two years' quit rent, nominally acquired another small tenement in the manor. If that small tenement had been genuinely and really acquired there is no doubt that according to the custom of the manor he would have been let off the payment of anything beyond the nominal fine on the purchase of the large tenement; but what was carried through was not a genuine acquisition of the small tenement at all—it was a mere form. [They referred to the contract of the 22nd July 1902.] We do not for one moment dispute that if there had been a real purchase and a real admittance to the copyhold cottage that would have been good. When the contract is looked at, it is not a real transaction, and there is no real passing of the property in any way. With regard to the question of such conveyances, which are really only forms, the leading case on the subject is *Rex v. Boughey and Fisher* (1 B. & C. 565; 2 Dowl. & Ry. 824; 25 R. R. 516). [They referred to the judgments of Abbott, C.J., Bayley and Holroyd, J.J.] The whole question is, as was put by the judges in that case, Is there a real purchase? Here, *res ipsa loquitur*; the whole thing is transparently not a reality. The purchaser is not to enter into possession of the rents, and he is not to be liable for the repairs. Then, as regards the amount of the fine, we say that, although the admittance could not have been refused, when the true facts are discovered the person admitted to the larger tenement is liable for the fine which he would have

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had to pay if the real facts had come to light. They referred to

Re v. Dillington, Freeman, 494; 1 Shower, 56;
Certified Extract from Parliamentary Survey. A
Survey of the Manor of Richmond.

This last document gives the custom of the manor, and the question was dealt with in *Re v. Dillington* (*sup.*), and in this last case they refer to another cited by Dolben, J., of Pinsent the Prothonotary, where five years' value was set for a fine and it was held to be reasonable, and in such a case seven years' value might have been set. Here four years' improved value has been charged. They also referred to

Kitchin on Courts, 103 B.;
Watkin on Copyholds, p. 372.

In ordinary cases two years' value has been established as what is reasonable, and we say the additional two years—four years instead of two—is only reasonable in consideration of the fact that it franks the tenant for all other purchases in the manor.

Dankwerts, K.C. and *Holman Gregory* for the defendant Sandover. — We ask your Lordship here as a matter of fact to hold that there was a *bona fide* intention on the part of this defendant to be on the rolls as owner for a period of three months at least. We submit that he was the owner. For the purpose of seeing who was the beneficial owner of this property you must look at the real truth, and the truth of the matter is that Mr. Sandover was the legal owner of the property with a superadded contract that he was obliged to resell to Mr. Long at the expiration of three months unless he chose to pay a further 80*l.* and keep it for ever. That is the legal position and the equitable position, and there is nothing whatever upon the face of the agreement to alter the position with the exception of the arrangement about the rents. As to those, that does not make him the equitable owner of the property at all. Long was not to have them in any capacity as beneficial owner, but simply to have them in his capacity as collector. [CHANNELL, J.—The unfortunate result is that Mr. Sandover did not get the property under the circumstances.] We submit that he did. As to the custom of the manor, that shows that the criterion is tenant or not tenant admitted. The custom is not that the man shall be tenant and beneficial owner. They referred to

Re v. Boughey and Fisher (*sup.*).

The custom here is not an arbitrary reasonable fine at all, but is a fine absolutely at the will of the lord. The custom, therefore, is a claim to an arbitrary fine, and that is bad. They referred to

Douglas v. Lord Dysart, 6 L. T. Rep. 327; 10 C. B. N. S. 689.

On these grounds there ought to be judgment for the defendants, and in any case four years' improved value is not a reasonable fine.

Cave, K.C. and *Gilbart Smith* for the defendant Long.—There is not a word in the custom which refers to sale or purchase, and the whole attempt to show that this was not a *bona fide* sale or purchase is beside the mark. The point is this—that the man must be a customary tenant. If he is a customary tenant he does not pay the big fine. The question for decision, then, is: Was he a tenant or not; was he really a

tenant of the manor? We submit that, just as a trustee who becomes entitled as a trustee must be admitted if a copyholder gives the tenement to another, the copyholder can ask the lord to admit him in his place without his being a purchaser. [CHANNELL, J.—Is not *Re v. Garland* (22 L. T. Rep. 160; L. Rep. 5 Q. B. 269) rather against that?] They also referred to

Re v. Manor of Hendon, 2 T. R. 484.

There is a distinct obligation to admit any person who comes with a surrender of a copyhold tenement. The lord is bound to admit, his office being merely ministerial. They referred to

Elton on Copyholds, p. 22, quoting from Burton's Compendium;

Hall v. Bromley, 56 L. T. Rep. 683; 35 Ch. Div. 642;

Re v. Garland, 22 L. T. Rep. 160; L. Rep. 5 Q. B. 269.

The Attorney-General in reply.—I ask your Lordship to deal with the case directly in the way indicated by the court in the case of *Re v. Boughey and Fisher*, and to say that in such a case as this there is no right to be admitted. I concede that a copyholder is entitled to alienate for value or voluntarily, but he must alienate in fact, and here he did not. He referred to

Alexander v. Newman, Barr. & Arn. 657; 2 C. B. 122.

As to the amount of the fine, he referred to

Douglas v. Lord Dysart, 6 L. T. Rep. 327; 10 C. B. N. S. 689;

Scriven on Copyholds, 7th edit., p. 182.

The author of this last-mentioned work refers to a whole series of cases which show that if "arbitrary" meant that the lord might exact any amount he pleased that would be bad and unreasonable. But that is not the legal meaning of "arbitrary." As Scriven puts it: "An admission fine is *prima facie* uncertain, or, in legal phraseology, arbitrary." When it is said that a fine is to be arbitrary, all that it means is that it is uncertain, and then the law imposes the limitation upon it that it must be reasonable in amount. In the present case I submit that the amount of four years' improved value is a very reasonable amount, and we ask that Mr. Sandover may be ordered to pay 400*l.*, the four years' value, minus the 32*l.* and the 6*d.* that he has already paid.

CHANNELL, J.—In this case I must find, subject to the question of amount, for the Crown. I think it is perfectly clear that the transaction was in point of fact colourable, and I think that is the best word to adopt, because I do not think that it was fraudulent in fact as a moral fraud or anything of that sort. To begin with, anyone has a right to evade this custom—that is to say, to so conduct his business as not to come within the custom and not to subject himself to the larger fine. It was perfectly legitimate for Mr. Sandover to have purchased this cottage from Mr. Long, and it would have been perfectly legitimate, in my opinion, for them to have had an understanding between each other that, if desired, at a future date Mr. Long should purchase it back again. The transaction would then have passed the property in the cottage to Mr. Sandover. The rents and profits of it would have been his. It would have been his property, and it would not have signified that he only wanted to become owner of it because he

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could get on the court roll, and, being on the court roll as tenant, he then would have other advantages as tenant—in this particular case the advantage of getting on the roll in reference to another property at a cheaper rate. But it might have been for any other advantage which being on the court roll would give him, for he might have bought it for the purpose of pasturing a cow on the common for a particular time or for any other reason. It does not in the least signify what his motive is, for his motive is to get on the court roll of the manor and to get other rights, which include in this case a very special right. But in order to do that it must be a real transaction, and, if he pretends to purchase property when there is no intention that the property shall pass, it is a colourable transaction. The property not passing, he does not become the person who is entitled to go on the roll of the manor as a tenant. The result is that the lord of the manor is entitled to say: "I admitted you upon a representation that you had become the owner of this cottage, and so gave you the rights of a tenant of the manor, but as you procured admission by representing to me something that was not the fact, and as you did it for the express purpose of paying me a less fine, I am entitled to treat you as if you had not acquired any rights under that first admittance." I think that seems to be supported by the authority of the case of *Rex v. Boughey and Fisher* (1 B. & C. 565; 2 Dowl. & Ry. 824; 25 R. R. 516). It seems to me to be in accordance with that decision and in accordance with ordinary principles. I do not think it is necessary to deal with the case as to what a lord of the manor would be bound to do upon an absolutely voluntary surrender when a person who is tenant of a copyhold property comes forward and desires to put on the roll in his place somebody who has not acquired for any valuable consideration a right to the property, and who is merely going to be there on the rolls as a trustee for the former tenant. It is not necessary to discuss that case. In all probability, when there was a real *bona fide* reason for doing it, the lord would be bound to admit the proposed surrenderee, but, when it is shown that the object of the transaction was to affect the lord's fine, it seems to me quite clear that he has a right to refuse, and possibly *Reg. v. Garland* (22 L. T. Rep. 160; L. Rep. 5 Q. B. 269) may be some authority for that proposition. I am not quite sure that it is, because the circumstances were very different in that case. Now, it only remains just to point out why I say that this transaction was colourable. The principle part, to my mind, is not the agreement to repurchase. As to that, that might be evidence, but no more than evidence, that it never was intended that the property should pass at all; but the thing that shows the property is not to pass is that the supposed purchaser was not to have the rents and profits of the property that he purchased, and not only was not to have the rents and profits, but was not to be liable to the liabilities of the property. Those were both to remain, the rents and profits on the one hand and the liabilities on the other, with the supposed vendor. That seems to me to show quite clearly that the property really never passed, and that the purchase was only one in name, and that it was a colourable transaction. That being the case, and again saying that I do not think there

was anything which could be called intentional fraud, the parties were entitled to avail themselves of any mode that did exist of complying with this peculiar custom, but they made a mistake. The only difficulty is about what the remedy is. I think the lord is entitled to be put in the position in which he would have been if he never had admitted the tenant under this representation. Then he would have had a reasonable fine, and I cannot accept the view that because it is stated in the custom to be arbitrary and at the will of the lord therefore it is bad, because those cases, as I always understood, have been dealt with for many hundreds of years, and a limitation was put upon them by the court, and the usual limitation is the two years. But then there is authority for saying, and it speaks for itself if once you admit that the question is what is reasonable, that when the admittance purchases a special right such as this is—namely, to be admitted to future property at almost a nominal fine—then the fine must be assessed as to what is reasonable for the admission to that property together with that right of being admitted on the purchase of other property at a nominal fine, and something must be added for that. I am asked on my own judgment to say that four years is reasonable—perhaps not entirely on my own judgment—perhaps on the judgment of a gentleman as to whom there was a doubt raised in the course of the argument here as to whether he was judge or counsel, and who turned out to be a judge some 200 years ago or more, who then thought four years was reasonable in one case, and said that he had known as much as seven (Dolben, J. in *Rex v. Dillington*, *sup.*), but I have some doubt about that. I think myself that regard should be had in what is reasonable, to add to the fine in the case of a manor that has got this peculiar custom. I think you ought to consider something as to what is the value of the property, and whether there is some reason to think that the property in question is being bought for the purpose of being admitted to other property. For instance, if it were a question of what would be reasonable for the admission to this small cottage in Prospect-place, I think then I should be very much inclined to go to the length of the seven years Dolben, J. said had been gone to in one case within his knowledge, because with a property of that sort, and especially when you are offering the tenant the privilege of coming in at a much smaller rate upon his giving up this right, then you might reasonably charge him upon the small property as much as the seven years, or at any rate a considerable amount, but I am not quite so sure when you are purchasing a substantial property, as to which there would be no suspicion that the property was being purchased for the purpose of subsequently purchasing other properties, although it does, no doubt, carry the right to do so. I am not quite sure that, having regard to all the circumstances, I should be inclined to say that what was reasonable in that case was as much as double what would be reasonable in the manor without that additional right. It strikes me that to double the two years and to turn it into four when the property is of a substantial amount is going rather far. [His Lordship fixed the amount of the fine at 300*l.* without prejudice to other cases.]

Judgment for the Crown.

K.B. Div.] ELLINGER & Co., &c. v. MUTUAL LIFE INSURANCE CO. OF NEW YORK. [K.B. Div.]

Solicitors: J. W. Gorst, Solicitor, Office of Woods; Trinder, Capron, and Co.; Skewes-Cox, Nash, and Co.

March 9 and 14.

(Before BIGHAM J.)

ELLINGER AND CO. AND SCHLESINGER v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. (a)

Life insurance—Application form—Policy—Construction—Warranty not to commit suicide—Insurance for benefit of creditor—Executor suing as trustee for creditor.

An application for a policy of life insurance was expressed to be the basis and part of the contract, and contained the following undertaking by the assured: "I also warrant and agree that I will not commit suicide, sane or insane, during the period of one year from the date of the said contract." The policy was taken out for the benefit of a creditor, and by the policy the defendants agreed to pay, subject to conditions, 4000*l.* to the creditor "in consideration of the application for this policy which is hereby made a part of this contract." During the period of one year from the signing of the policy, the assured committed suicide in a fit of temporary insanity.

Held, that the undertaking was such that the breach of it rendered the policy void, and that it was not an undertaking the breach of which could only give the insurance company a right to claim against the estate of the assured.

COMMERCIAL CAUSE tried before Bigham, J. without a jury.

The action was brought by the plaintiffs, Ellinger and Co., as the beneficiaries under a policy of life assurance, and by the plaintiff Schlesinger, as executor of the insured person, on a policy of life insurance made and issued by the defendant company.

Max Firnberg being indebted to the plaintiffs, Ellinger and Co., effected the policy on his life for the benefit of Ellinger and Co. by way of securing the payment of his debt to them. The material parts of the application for the policy were as follows:

This application made to the Mutual Life Insurance Company of New York is the basis and a part of a proposed contract for insurance, subject to the charter of the company. I hereby agree that all the following statements and answers, and all those that I may make to the company's medical examiner, in continuation of this application, are by me warranted to be true, and are offered to the company as a consideration of the contract, which I hereby agree to accept, and which shall not take effect until the first premium shall have been paid, during my continuance in good health, and the policy shall have been signed by the secretary of the company and issued.

Twenty statements were then set out, No. 9 being as follows:

The full name of the person to whom the insurance is payable is Ellinger and Co., Manchester.

By No. 12 it was stated that:

The insurable interest of the said beneficiary in the life proposed for insurance, other than that of family relationship, is to cover debt.

(a) Reported by W. TREVOR TURTON, Esq., Barrister-at-Law.

The application also contained the following three clauses:

I hereby warrant and agree that during the next two years following the date of issue of the contract of insurance for which application is made, I will not travel or reside in any part of the Torrid Zone, or north of the parallel of 60 degrees north latitude in the Western Hemisphere, or north of the parallel of 70 degrees north latitude of the Eastern Hemisphere, and will not engage in any of the following extra hazardous occupations or employments—retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labour, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad, train, or track, or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the company.

I further warrant and agree that I will not engage in any military or naval service in time of war, during the continuance of the said contract, without first obtaining written permission from this company.

I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract.

The application was signed by Max Firnberg, and dated the 23rd May 1902.

The policy commenced as follows:

In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its principal agency in Great Britain unto Ellinger and Co., of Manchester . . . creditors of Max Firnberg . . . four thousand pounds sterling upon acceptance of satisfactory proofs of the death of the said Max Firnberg, provided such death takes place within the term of five years from the date hereof, during the continuance of this policy, upon the following condition, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part hereof.

On the back of the policy was the following provision:

Military and naval service of any kind, the volunteer service of Great Britain and Ireland in time of peace excepted, whether as combatant or non-combatant without permission in writing signed by one of the officers of the company, is prohibited under this contract.

The policy was dated the 24th May 1902.

At the time of effecting the policy, Firnberg did not inform Ellinger and Co. that he was insuring his life for their benefit, and it was not until Nov. 1902 when Firnberg was being pressed for payment that he informed them.

In Feb. 1903 Max Firnberg, in a fit of insanity, committed suicide, at a date which was less than a year from the issuing of the policy.

The plaintiffs brought the action to recover the 4000*l.* under the policy.

C. A. Russell, K.C. for the plaintiffs.—This was a policy effected by Firnberg for Ellinger and Co. issued here and subject to the laws of England, though made by an American company. 14 Geo. 3, c. 48, s. 2, provides: "That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote." Sect. 3 provides: "That in all cases

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where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events." That statute was a recognition of policies taken out for the benefit of others, and treated the person for whose benefit it was taken out as the assured. As soon as the fact of the policy having been issued was communicated to Ellinger and Co., there was a trust for Ellinger and Co. It is only because Ellinger and Co. are interested that in this case the defendants are liable to pay. Firnberg told the company that he was taking out the policy for Ellinger and Co. to secure debts. Where a policy is taken out for a third party, he cannot control the promises of the assured. The insurance company ought to state in specific terms in the policy if an undertaking, such as the one under discussion, is to be considered a condition the breach of which renders the policy void. There was no intention to make these warranties or agreements conditions. Suicide whilst insane is an accident, or a misfortune. It is for the person trying to make out a condition to make it clear that certain results will follow certain non-observances. The plaintiffs are entitled to recover, though the defendants may have a claim against Firnberg's estate, in which case the damages might be the amount they would have to pay under the policy. If the action was brought in Firnberg's name alone, the defendants would be liable under the policy, but could counter-claim for damages caused by the act of committing suicide. If Firnberg had become bankrupt, the trustee in bankruptcy could have claimed, and the defendants could put in a proof. If, however, Firnberg had assigned, the assignee could sue, but the defendants could not counter-claim; a counter-claim will only lie against the actual contract breaker or his estate.

Cababé.—These three clauses are three personal independent undertakings by Firnberg himself, the debtor. This is a creditor policy, and these undertakings are not conditions. No agreement as to promises *de futuro* can be treated as a condition, the nonfulfilment of which will avoid the policy, unless the policy clearly states it to be such in express terms. The questions and answers in the application form are put on a different footing from the three undertakings. The policy is a trust policy from the first, by debtor in favour of creditor, and to the knowledge of the defendant company. The plaintiffs are entitled to recover, the three clauses being only personal promises, and not conditions in any sense of the policy.

The following cases were referred to:

Stoneham v. Ocean, Railway, and General Accident Insurance Company, 57 L. T. Rep. 236; 19 Q. B. Div. 237;

Hambrough v. Mutual Life Insurance Company of New York, 72 L. T. Rep. 140;

Fowkes v. Manchester and London Life Assurance and Loan Association, 8 L. T. Rep. 309; 3 B. & S. 917;

Crawley v. National Employers Accident and General Assurance Association, 1 *Cababé & Ellis*, 597; 1 Times L. Rep. 255;

Llanelli Railway and Dock Company v. London and North-Western Railway Company, 29 L. T. Rep. 357; 8 Ch. App. 942.

B. B. Haldane, K.C. for the defendants.—The stipulation not to commit suicide goes to the root of the policy. That is the true meaning of the policy. The measure of damages in an action against the deceased's estate would not necessarily be the same as the amount of the insurance. The contention that promises as to acts *de futuro* not being conditions is not sound; that is shown by the exception in marine insurance policies "warranted free from capture." That refers to a future act, and is a true exception to the risk covered:

Barnard v. Faber, 68 L. T. Rep. 179; (1893) 1 Q. B. 340, at p. 342, per Lindley, L.J.

A term as regards the risk must be a condition:

Barnard v. Faber, at p. 344, per Bowen, L.J.

If the word "warranty" is used in a policy of insurance that is something to lead one to suppose that a condition is meant:

Hambrough v. Mutual Life Insurance Company, per Lopes, L.J. (*sup.*).

The defendant company does not insure against suicide. The plaintiffs at the most are assignees in equity.

Rowlatt.—The undertaking in the policy not to commit suicide goes to the root of the policy. From the business point of view the company are deemed to have said to the assured, "If you will not commit suicide then we will insure you." The plaintiffs cannot recover.

C. A. Russell, K.C. replied. *Cur. adv. vult.*

BIGHAM, J.—On the 23rd May 1902 Max Firnberg signed an application addressed to the defendant company for a policy of insurance for 4000*l.* for five years on his own life. The material parts of the document are as follows:

This application made to the Mutual Life Insurance Company of New York is the basis and a part of a proposed contract for insurance. . . . I hereby agree that all the following statements and answers and all those that I make to the company's medical examiner in continuation of this application are by me warranted to be true and are offered to the company as a consideration of the contract which I hereby agree to accept. . . .

Then follow twenty numbered statements, beginning with name of the applicant. The ninth and twelfth are in these words:

The full name of the person to whom the insurance is payable is *Ellinger and Co., Manchester*. The insurable interest of the said beneficiary in the life proposed for insurance other than that of family relationship is to cover debt.

The words in italics are written. After these statements there are three clauses in the following words:

I hereby warrant and agree that during the next two years following the date of issue of the contract of insurance for which application is hereby made I will not travel or reside in any part of the Torrid Zone, or north of the parallel of 60 degrees north latitude in the Western Hemisphere, or north of the parallel of 70 degrees north latitude in the Eastern Hemisphere, and will not engage in any of the following extra hazardous occupations or employments—retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labour, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad, train, or track, or in switching

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or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the company. I further warrant and agree that I will not engage in any military or naval service in time of war, during the continuance of the said contract, without first obtaining written permission from this company. I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract.

The question in this case is as to the meaning and effect of the last of these three clauses, which refers to suicide. The policy was issued on the 24th May 1902. It commences with these words:

In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay . . . unto Ellinger and Co. . . . creditors of Max Firnberg . . . their successors or assigns 4000l. . . . upon . . . proofs of the death of the said Max Firnberg provided such death takes place within the term of five years from the date thereof . . . upon the following condition, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part hereof. The half annual premium of 56l. 16s. 8d. shall be paid in advance on the delivery of this policy, and thereafter to the company at its principal agency in Great Britain on the 24th day of November and May in every year during the continuance of this contract until premiums for five full years shall have been duly paid to the said company.

A number of provisions are printed on the back of the policy, only one of which need be referred to. It is as follows:

Military and naval service of any kind, the volunteer service of Great Britain and Ireland in time of peace excepted, whether as combatant or non-combatant, without permission in writing, signed by one of the officers of the company, is prohibited under this contract.

I have read the different so-called warranties and provisions, because the plaintiffs relied upon them as showing in some way that the clause as to suicide was merely intended to operate as an independent promise and not as a limitation of the defendants' liability. It appears that when Firnberg took out this policy he owed money to Ellinger and Co. for some business debt. In Nov. 1902 Ellinger and Co. were pressing for payment of this debt, and then for the first time Firnberg told them that by way of securing the payment of their debt he had effected this policy. In Feb. 1903, Firnberg, during a fit of insanity, committed suicide. On the 25th Nov. 1903 this action was brought upon the policy against the defendant company, the plaintiffs being Ellinger and Co., the creditors, and Richard Schlesinger, the executor of Firnberg's will, who is described as suing as trustee for Ellinger and Co. Firnberg died insolvent, owing Ellinger and Co. 4000l. or more. The plaintiffs contend that the policy must be regarded as having been taken out by Firnberg on their behalf, and that they are therefore entitled to ratify and recover on it, and they say that the clause as to suicide amounts to nothing more than a personal undertaking by Firnberg, for the breach of which the defendants' remedy is limited to a claim against Firnberg's bankrupt estate. On the other hand, the defendants contend that the effect of the clause is to exclude liability on their part if death

is due to suicide. I am of opinion that the defendants' contention is the right one. The policy was made by the defendants with Firnberg, and with no one else. It is in no sense a contract with Ellinger and Co. Firnberg alone was responsible for the payment of the premiums. Neither subsequent notice to Ellinger and Co. of its existence nor ratification of it by them could alter or affect its original meaning. What, then, did the parties, Firnberg and the defendant company, intend when they inserted the warranty that Firnberg should not commit suicide? I think it is clear that they intended that in the event of suicide the company should not be liable on the policy. It does not matter, I think, whether the clause is called a warranty or not. It constitutes a limitation of the defendants' liability. Death within five years is the event upon the happening of which the defendants were to pay, but death by suicide within the first twelve months is excluded. Apt words have been used to express that intention, and it is, I think, impossible to read the clause as merely giving to the company a cross-claim against the estate of the deceased for damages.

Judgment for the defendants.

Solicitors for plaintiffs, G. Trenam, for Addleshaw and Co., Manchester.

Solicitors for defendants, Freshfields.

March 10, 11, 14, and 21.

(Before BIGHAM, J.)

GRANGE AND CO. v. TAYLOR. (a)

Bill of lading—Construction—Bulk cargo—Undivided portions of bulk—"Each bill of lading to bear its proportion of damage"—Error in apportioning—Short delivery.

Bills of lading for undivided portions of a bulk cargo of grain contained the following clause and note in margin: "If the parcel herein signed for constitutes part of a larger bulk shipped without separation into parcels, as per bills of lading, each bill of lading shall bear its due proportion of shortage or damage and (or) sweepings, if any:"

"Part of a parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any."

By an error in apportioning damaged grain one consignee received a full consignment of sound grain. One of the other consignees, refusing to accept more than his proportionate share of damaged grain, received a consignment which was 108 quarters short.

Held, in an action for short delivery, that the error was caused by the consignees' agents, and that the clause in the bills of lading cast no duty on the shipowner to apportion the good and unsound grain.

CLAIM for short delivery of a quantity of maize shipped under bills of lading on board the Palestine and discharged at the Victoria Docks, and for breach of contract contained in the bills of lading and for conversion of the plaintiffs' goods.

The cargo of maize was in bulk, and bills of lading were given in respect of undivided portions.

(a) Reported by W. TRAVOR TUNTON, Esq., Barrister-at-Law.

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The plaintiffs were indorsees of two of the bills of lading.

The bills of lading contained the following clause and impressed note in the margin:

If the parcel herein signed for constitutes part of larger bulk shipped without separation into parcels, as per bills of lading, each bill of lading shall bear its due proportion of shortage or damage and (or) sweepings, if any. Part of a parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any.

By an error in apportioning, one consignee received a complete consignment of sound grain and the plaintiffs, refusing to accept more than their proportion of damaged grain, brought an action for short delivery.

The facts sufficiently appear in the following considered judgment.

Hamilton, K.C. and Leck for the plaintiffs; Carver, K.C. and Adair Roche for the defendants.

The following cases and Act were cited:

Porteous v. Watney, 39 L. T. Rep. 195; 3 Q. B. Div. 534, at p. 542, per Brett, L.J.;

Petrocochino v. Bott, 30 L. T. Rep. 840; L. Rep. 9 C. P. 355;

Spicer v. Martin, 60 L. T. Rep. 546; 14 App. Cas. 12;

Nottingham Patent Brick and Tile Company v. Butler, 15 Q. B. Div. 261, at p. 268, per Willes, J.;

Collins v. Castle, 57 L. T. Rep. 764; 36 Ch. Div. 243;

The London and St. Catherine Dock Act 1864 (27 & 28 Vict. c. 178), s. 120.

Cur. adv. vult.

BIGHAM, J.—This is an action by indorsees of bills of lading against shipowner to recover damages for short delivery of a quantity (108 quarters) of maize. The defence is that the maize was delivered to the dock company, and that they were the agents of the plaintiffs to receive it. The defendants' ship, the *Palestrina*, took on board a large quantity of maize in bulk at Odessa to be carried to London. The shipper asked for and obtained from the defendants several bills of lading, each being for an undivided portion of the bulk. This was done to facilitate the sale of the maize. The bills of lading contained the following clause: "If the parcel herein signed for constitutes part of a larger bulk shipped without separation into parcels, as per bills of lading, each bill of lading shall bear its due proportion of shortage or damage and (or) sweepings, if any"; and in the margin there was an impressed note: "Part of a parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any." Two of these bills of lading came into the hands of the plaintiffs, who were buyers of the portion of the bulk thereby represented. The bills of lading for the remainder reached the hands of other buyers, among whom was a Mr. Paul. The vessel arrived in London and went to the I jetty of the Victoria Dock, when she began her discharge by means of an elevator which stands on that jetty. The maize was gathered under the open hatchways and then lifted in the elevator over the ship's side and shot into the barges of the bills of lading holders. Mr. Paul came first in time, and therefore first in turn, and received his full bill of lading quantity. Before the discharge to him was completed, but when it was too late to stop it, part of the remaining bulk was found to be heated. This heated

grain was put on the quay, and was there apportioned among the different bill of lading holders, 108 quarters being the quantity which ought to have been taken by Mr. Paul as the quantity applicable to his bill of lading. He had, however, already received and taken away his full quantity in sound maize. The result was that at the end of the discharge the plaintiffs found that unless they took the 108 quarters they would be short by that quantity of their share of the bulk. They refused to take the 108 quarters, alleging that if they did so they would be saddled with more than their proper proportion of heated grain, and they then brought this action. The question is whether the shipowners are liable. The answer depends on the nature of the obligations of the shipowner under the bill of lading contract and on the usage or practice ordinarily followed in the discharge of those obligations. The bill of lading, of course, obliges the shipowner to deliver goods corresponding with the description in the document, and it also obliges him to deliver such goods to the proper person to receive them. But the plaintiffs contend that, having regard to the words, "each bill of lading to bear its own proportion of damage," the obligation is not discharged by a mere delivery of the bill of lading quantity, but delivery must in such case be made up by the shipowner of the proper proportions of sound and damaged. It is said that the bill of lading is a contract between the holder and the shipowner and between no other persons, and that, as between those two parties, the words relied upon can have no other meaning than that contended for. I am of opinion that the words put no such burden on the shipowner. It would be very unreasonable if they did. The delivery is made to the barges of the receivers turn and turn about. At first nothing but sound grain may come out of the ship, and it will be impossible to say whether there will be any damaged grain or, if any, how much. Again, the character of the damage may vary very much; some part may be badly damaged and the other part only slightly. How is the shipowner to foresee this, and how, where, and when is he to sort the grain? Skilled men are required for such work; the crew cannot do it. Is the shipowner to find and employ such men? Then, where is the sorting to be done? It cannot be done in the ship. Is the shipowner to hire quay space for the work? And when is it to be done? Until the last parcel of the bulk is out the sorting is impossible. Must the shipowner hold back all delivery until that point in the discharge is reached? I agree with Mr. Hamilton that the mere difficulty or even impossibility of discharging a duty affords no excuse for a breach if in fact the duty has been undertaken; but when I am asked to say that the shipowner has undertaken the difficult duty here contended for I expect to find plain and unambiguous words imposing it. I do not find such words in this case. If the shipowner had given but one bill of lading for the whole parcel his duty would have been completely discharged by delivering the grain with the damaged and sound mixed just as it came to hand out of the ship. Was it intended that his compliance with shipper's request to give several bills of lading should throw upon him the burden of sorting the bulk and dividing the damaged grain in the manner suggested? I

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cannot think so. Then why are the words introduced, and what is their effect? This bill of lading is headed, "Chamber of Shipping, Black Sea—Berth Contract Bill of Lading, 1902"; and in the top left corner are the words, "As agreed with the London Corn Trade Association and the Chamber of Shipping, 12 March 1902." Thus the bill of lading appears to be in a form adopted by the members of the Corn Association in this country and shipowners who send their ships to the Black Sea. It is in common use in connection with a very large trade, and is doubtless well known to all people in that trade. Now the shipment of grain in bags and the stowing of it in the ship's hold in separate parcels are expensive operations which add to the cost of the grain when it arrives in this country without enhancing its value. It is therefore apparently often shipped in bulk, and bills of lading are given for undivided portions of the bulk. This is a great convenience to the merchant, for it enables him to sell the grain in small parcels. The form has been drawn with special reference to this practice, and the clause relied upon has been inserted in consequence of it. Then if the shipment is made under this practice (it is not necessarily so made) the impressed note is put in the margin of each bill of lading to draw attention to the fact: "Part of parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any." The London Corn Trade Association's form of sale contract, which was given in evidence before me, contains a corresponding provision: "Should any of the within-mentioned quantity form part of a larger quantity . . . in bulk, no separation . . . shall be deemed to be necessary. All damages and sweepings . . . shall be shared by the various parcels *pro rata*," showing that when the grain comes to be sold the sales are made on the footing on which the bills of lading are drawn. When the bill of lading is read by the light of these facts the meaning and object of the clause in question becomes quite plain. It is put there for the purpose of regulating the rights of the holders of the different bills of lading *inter se*, and is not intended to increase the shipowner's duty at all. But the plaintiffs insist that the contract in the bill of lading does not and is never intended to do more than express the agreement between the shipper and the shipowner; in other words, that it cannot regulate the rights of cargo-owners *inter se*; and they refer to *Porteous v. Watney (ubi sup.)* in support of this contention. No doubt the primary object of a bill of lading is to evidence the terms on which the shipper and shipowner have agreed for the carriage and delivery of goods, and Brett, L.J. at p. 542 of 3 Q. B. Div., is reported as saying: "The bill of lading claims to be a contract between the shipowner and the person taking the bill of lading. There is no relation whatever between the holders or takers of other bills of lading and any one holder of a bill of lading. They are not co-sureties. When, therefore, it is said we can look at all the bills of lading and then divide the days of demurrage or the lay days between them, we are looking at other bills of lading which cannot be given in evidence." These words must, however, be read with reference to the form of the bill of lading in that case. That form contained no reference whatever to the

holders of other bills of lading. The action was by shipowner against bill of lading holder for demurrage. The bill of lading contained the words "on paying freight for the said goods and all other conditions as per charter-party." This charter-party gave a lien on all cargo for demurrage at the port of discharge. The defendant had always been ready and willing to take his goods, but the holders of bills of lading for other cargo lying on top had made default in taking their cargo away so that the defendant's goods could not be discharged. It was held that by the terms of his bill of lading contract the defendant had rendered himself liable for payment of the demurrage, and that he could not escape by saying that the delay was due to the negligence of holders of other bills of lading. Indeed, so much did Brett, L.J. consider the different bills of lading holders strangers to each other that he held that if the man in actual default had paid the shipowner, the defendant could not have relied on the payment by way of defence, an opinion which involved the rather startling conclusion that if there had been goods below belonging to a score of different bills of lading holders, the full amount of the demurrage would have been recoverable from each of them. The Lord Justice at p. 543 uses these words: "I think that if the consignee of a portion of the cargo had a bill of lading in the same words, and had been called upon to pay and had paid the whole demurrage to the shipowner, the holder of another bill of lading, if sued, could not set that up as a defence. That defence would arise in respect of a wholly independent contract between the shipowner and the holder of the other bill of lading. He could not set it up as a defence, because he would have no right to prove that other and wholly independent contract. I accept the proposition that it would be no defence for the owner of the bill of lading to say that the shipowner had been paid the same sum by all other holders of bills of lading for cargo in the ship." But the authority is in truth of no application to the present case. The bill of lading before me appears on its face to be one of a group. The makers and takers of it know it to be one of a group. The same thing is no doubt true in the case of the bills of lading for the remainder of the bulk. The shipowner, not for his own benefit, but merely for the benefit of the various receivers, subscribes to the stipulation as to the division of damaged grain. All the receivers buy their bills of lading with notice, and, in my opinion, become bound towards each other by what the shipowner has done for them. Even if it should be true that the intention has not been legally effected, and that the bills of lading holders are not bound *inter se*, that affords no reason for saying that the words used in the attempt to accomplish the intention should be twisted to a purpose for which they were never used—namely, to impose a heavy obligation on the shipowner. The view which I take of the meaning of the bill of lading contract is borne out by the practice followed in the discharge of grain cargoes at Victoria Docks and at the jetty in question. The practice is for the servants of the dock company to bring the cargo in the ship's hold under the open hatchways; for this service the shipowner pays the dock company 4d. a ton. The grain is then lifted by means of an elevator out of the

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hold and shot from the elevators into the barges of the consignees; for this service the consignees pay the dock company 1s. 9d. per ton. If any of the grain is found to be heated it is discharged on the quay and there sorted by the dock company's servants, the cost being covered by the dock company's charge against the consignees. In this way the dock company act as the agents of the ship to discharge the cargo and as the agents of the consignees to receive it; and the evidence, though in parts conflicting, satisfies me that as a matter of fact the receipt of the grain into the elevator is the receipt by the dock company, as agent for the consignee or bill of lading holder. If this be so, the shipowner has in this case not only discharged the bill of lading quantity, but the plaintiffs have also received it, with the result that the claim for short delivery fails. It was, however, contended on the plaintiffs' behalf that, whatever the general practice might be, the grain in this particular instance was not in fact received by them until it was placed in their barges or trucks. It appeared that upon this jetty there were two elevators belonging to different owners. The elevator which was used on this occasion belongs to a firm of Thompson and Co., who use it for the discharge of their own vessels. But sometimes no vessel of their own happens to be alongside, and the elevator is idle. On such occasions Thompson and Co. solicit other ship-owners to send their ships to the wharf, so that they may be discharged by their elevator, and they have an arrangement with the dock company by which in such circumstances they do all the work above described for the dock company for an inclusive charge of 1s. 11d. a ton. Thus the dock company get the work for which they charge 2s. 1d. (1s. 9d. and 4d.) done for 1s. 11d. This course was followed in the present case. Thompson and Co. were anxious to secure a discharge and delivery by their elevator because, I suppose, they could do the work for less than 1s. 11d. per ton, and so make a profit, and, as they feared that the job might fall into the hands of the owner of the rival elevator, they went to the defendants and induced the defendants to send the ship to the part of the jetty where their elevator stands. It was said by the plaintiffs that the defendants, by allowing the vessel to go under Thompson's elevator in these circumstances, made Thompson and Co. their agents, and that all the work, whether done on the ship or in the elevator or on the quay, was therefore done by the defendants. I do not, however, take this view of the matter. Neither the plaintiffs nor the defendants had anything to do with the arrangement between the dock company and Thompson, and when the time for paying for the work arrived, debit notes were sent in by the dock company to the ship and cargo-owners for the 4d. and 1s. 9d., just as though no such arrangement existed. I wish to add that the practice at these docks appears to have been substantially the same for the last thirty years, although, no doubt, elevators have only recently come into use. Dealing with the question in 1874, Brett, J., after stating the practice in relation to the delivery of bales of hides, says: "I am of opinion that the moment the shipowner has cleared the goods from the dock he ceases to be responsible in any way for them; and that, whatever remedy the plaintiffs

may have against the dock company or anyone else, they cannot under the circumstances charge the shipowner with the loss of the bale": (see *Petrocochino v. Bott*, L. Rep. 9 C. P., at p. 361). It is perhaps necessary to mention one other matter. It appeared that when Thompson's men in working out the ship came across the heated grain, they notified the circumstance to the dock clerks, and after the apportionment the clerks, in the ordinary course of their duty, entered the 108 quarters in the dock books as belonging to Mr. Paul. The plaintiffs suggested that, even if there was no short delivery, this was a conversion. To this there are two answers. The first is that there was no conversion; the book entry interfered in no way with the plaintiffs' rights—the plaintiffs might have taken away the 108 quarters at any moment, and no one would have objected. The second answer is that, even if there was a conversion, it was not by the defendants; they, as I have already said, had finished with the goods when they delivered the grain into the elevator. The fact is that the plaintiffs did not want the 108 quarters. They preferred their action for short delivery. If they had taken the 108 quarters, as they might have done at any moment if they had wished, they would have been left with an action for breach of the duty to properly sort and apportion—an action which, if brought against the present defendants, would have failed, as this action fails, on the ground that the defendants had entered into no contract to do the work of sorting and apportioning. There must be judgment for the defendants with costs, and for the defendants on the counter-claim for freight.

Solicitors for plaintiffs, *Lowless and Co.*Solicitors for defendants, *Botterell and Roche.*

Monday, Feb. 29.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

MILLARD (app.) v. BALBY-WITH-HEXTHORPE URBAN DISTRICT COUNCIL (resps.). (a)

Public health—Street not repairable by inhabitants at large—Expenses of sewerage and paving—Liability of owner of premises—Owner at date of completion of work not owner at date of demand—Liability of person not owner at date of demand—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 150, 257.

Under sect. 150 of the Public Health Act 1875, notices were served by an urban authority upon the owners of premises fronting or abutting on a street (not being a highway repairable by the inhabitants at large) to sewer, pave, and make up the street. These notices not having been complied with, the urban authority executed the necessary works and apportioned the expenses upon the owners of premises fronting on the street. The appellant, both at the time of the notice to pave and at the time of the completion of the works by the urban authority, was the owner of premises fronting the street; but before the date of the notice of apportionment and of the demand upon him to pay the amount apportioned on his premises, he had ceased to be

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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owner, having sold the premises, and upon the date of demand of such amount he was not owner of the premises.

Upon summary proceedings before justices to recover the amount apportioned on the premises, from the appellant as being the "owner in default" within the meaning of sect. 150 :

Held, but only upon the authority of the case of *Reg. v. Swindon New Town Local Board* (40 L. T. Rep. 424; 4 Q. B. Div. 305), that, notwithstanding the words in sect. 257 of the Act that such expenses may be recovered by the local authority "from any person who is the owner of such premises when the works are completed," the appellant not having been the owner at the date of the demand upon him to pay the apportioned amount, was not the "owner in default" within the meaning of sect. 150, although he was the owner of the premises at the time when the works were completed, and that therefore he was not liable to pay the expenses. To be the "owner in default" in such cases, a person must be the owner not only at the time when the works are completed, but also at the time when the apportioned amount is demanded from him.

Reg. v. Swindon New Town Local Board (ubi sup.) followed but questioned.

CASE stated by justices of the peace for the West Riding of the county of York.

At the court of summary jurisdiction sitting at Doncaster, being a petty sessional court, a complaint was preferred by the Balby-with-Hexthorpe Urban District Council (the respondents) against Samuel Millard, of Carr-hill, Balby, builder (the appellant), for that the respondents having, in accordance with the provisions in that behalf of the Public Health Act 1875, executed or caused to be executed certain works, to wit, sewered, levelled, paved, metalled, flagged, channelled, and made good a certain street called Carr-hill road within the district of the respondents, not being a highway repairable by the inhabitants at large, and that the appellant was the owner and occupier of certain premises, formerly a stable, sheds, and buildings, situate in Carr-hill-road, being premises fronting or abutting upon Carr-hill-road, and that the respondents had incurred expenses to the amount of 45*l.* 11*s.* 7*d.* in the execution of the works, and that the respondents within six calendar months then last past—namely, on the 20th May 1903—had duly caused to be served on the appellant a notice in writing demanding payment of the sum of 45*l.* 11*s.* 7*d.*, and that sum, or any part of it, had not been paid to the respondents by the owner or occupier of the premises, or by any person on their behalf, and that there was then due and owing by the appellant to the respondents the sum of 45*l.* 11*s.* 7*d.*, with 7*s.* 3*d.* interest thereon, at the rate of 5 per cent. per annum from the date of the service of the notice of demand.

The information was heard by the justices on the 28th July 1903, when they found that the respondents were entitled to recover from the appellant the sum of 45*l.* 11*s.* 7*d.*, with interest as aforesaid, and they made an order directing payment thereof accordingly.

Upon the hearing of the information the following facts were proved or admitted.

Carr-hill, mentioned in the information, was a street not being a highway repairable by the

inhabitants at large, situate within the respondents' urban district, and on and before the 8th June 1899 such street was not sewered, paved, &c., and made good to the satisfaction of the respondents.

Before the 8th June 1899 the respondents, in compliance with the provisions of sect. 150 of the Public Health Act 1875, caused plans and sections of the structural works intended to be executed under the section and an estimate of the probable cost thereof to be prepared under the direction of their surveyor, such plans, sections, and estimates being prepared in accordance with the provisions of the section, and being deposited for inspection as thereby required, and on the 8th June 1899 the appellant was the owner of certain premises fronting, adjoining, and abutting on such parts of the street called Carr-hill as required to be sewered, paved, &c., and made good, and on the 8th June 1899 the respondents served upon all the owners (including the appellant) of premises fronting, adjoining, or abutting on such parts of the street as required to be sewered, paved, &c., and made good, notices requiring such owners to sewer, level, pave, &c., and make good such parts of the street called Carr-hill as aforesaid, such notices being in the form prescribed by the Public Health Act 1875.

Such notices were not complied with by the persons to whom they were addressed, and after the expiration of one calendar month from the date of such notices the respondents executed the works mentioned therein, and such works were completed on the 4th Dec. 1901.

In the course of the execution of the works mentioned in the notice the respondents incurred certain expenses, which were duly apportioned by the surveyor of the respondents upon the owners in default (being the persons who were on the 4th Dec. 1901, the date of completion of the works, the owners of premises fronting, adjoining, or abutting on such parts of the street called Carr-hill as required to be sewered, levelled, paved, &c., and made good), according to the frontage of their respective premises.

On the 4th Dec. 1901 the appellant was the owner of certain premises fronting, adjoining, or abutting on such parts of the street called Carr-hill as required to be sewered, levelled, paved, and made good as aforesaid, and the surveyor of the respondents duly apportioned upon the appellant and his premises the sum of 45*l.* 11*s.* 7*d.*, as the proportion due from the appellant in respect of his premises of the expenses incurred by the respondents in the execution of the works.

A formal notice in writing of such apportionment, dated the 18th Nov. 1902, was on the 24th Nov. 1902 personally served by the respondents upon the appellant in accordance with the provisions of sect. 257 of the Public Health Act 1875, and the appellant did not within three months from the service on him of such notice of apportionment by written notice dispute the same.

On the 20th May 1903 a formal demand in writing for payment of the sum of 45*l.* 11*s.* 7*d.* was personally served by the respondents upon the appellant in accordance with the provisions of sect. 257 of the Public Health Act 1875, and such notice contained a claim for interest at the rate of 5 per cent. upon the above sum from the date of service of such notice until payment of the sum.

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The appellant had not paid the 45*l.* 11*s.* 7*d.* and interest, or any part thereof, before the 25th July 1903.

On the 20th March 1902 the appellant entered into a contract for the sale of his premises in Carr-hill, and on the 25th April 1902 the premises were duly conveyed by the appellant to a brewery company.

[The evidence adduced in support of the facts above stated to be proved was set out in the case.]

The appellant admitted that the plans, specifications, &c., were duly prepared and deposited, and that the notice of the 8th June 1899 was duly served by the respondents upon the appellant, and that on the 8th June 1899 (the date of service of such notice) he was the owner of the premises fronting, adjoining, or abutting on such parts of Carr-hill as were the subject of the notice, and that he remained owner from that date up to the 20th March 1902, and that the works were not executed by the persons liable to execute the same.

He admitted that certain expenses had been incurred by the respondents in the execution of works in Carr-hill, and that the apportionment was duly made and that notice thereof was duly served upon him, and that the amount apportioned, if recoverable at all, was correct and recoverable in full, and that the apportionment was not disputed in manner provided by sect. 257 of the Public Health Act 1875; and that the apportioned amount was duly demanded as alleged by the respondents, and that he had not paid the sum of 45*l.* 11*s.* 7*d.* and interest, or any part thereof.

On the part of the appellant it was contended (*inter alia*) that by law the appellant was required to be the owner of the premises both in Dec. 1901, when the work was found by the justices to have been completed, and also on the 20th May 1903, the day of the date of the demand, and that as the justices had found as a fact that the appellant was not such owner on the 20th May 1903, the complaint should have been dismissed on that ground, as well as on the other grounds.

On the part of the respondents it was (*inter alia*) contended that the appellant was, on his own admission, the owner of the premises, the subject of these proceedings, on the 8th June 1899 and from that date up to and including the 20th March 1902, and that it was not contended that the appellant was the owner on the 20th May 1903, the date of the demand.

That the appellant was not required by law to be the owner of the premises both at the date of completion of the works and at the date of demand, but that by virtue of sect. 257 of the Public Health Act 1875, the apportioned expenses with interest were summarily recoverable from the person who was the owner of the premises at the time the works were completed for which such expenses had been incurred, and that as the appellant had been proved to be the owner at the time the works were completed he was liable to pay such expenses, notwithstanding the fact that the appellant was not the owner thereof at the date of service of demand therefor. In support of this contention the case of *Re Bettesworth and Richer* (58 L. T. Rep. 796; 37 Ch. Div. 535), was cited on behalf of the respondents.

The justices were of opinion that the respondents in exercise of the powers conferred on them by sect. 150 of the Public Health Act 1875, had

executed certain street works in Carr-hill, a street within the district of the respondents not being a highway repairable by the inhabitants at large, and that the respondents incurred certain expenses in the execution of such works, which expenses the respondents were entitled to apportion upon and recover from the owners of premises fronting Carr-hill, as aforesaid, of whom the appellant was one; that such expenses were duly apportioned and demanded and that all the provisions of the Public Health Act 1875, relative to the matter at issue, had been duly complied with by the respondents, and that such facts as were required to be proved by the respondents had been duly proved, and that the submissions in point of law on the part of the respondents were supported by the authorities cited, and that the appellant was liable to pay to the respondents the sum of 45*l.* 11*s.* 7*d.*, the amount apportioned in respect of his property in Carr-hill, together with 7*s.* 3*d.* for interest thereon, and 2*l.* 11*s.*, the costs of these proceedings, and they accordingly made an order for payment thereof by the appellant by instalments of 5*l.* per month.

The questions for the opinion of the court were whether there was any evidence to justify the justices in finding the facts set out in the case, and whether (if they were justified in so finding) they came to a correct determination and decision in point of law; and if not what should be done in the premises.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 150. Where any street within any urban district (not being a highway repairable by the inhabitants at large), or the carriage way, footway, or any other part of such street, is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may be required to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting the same within a time to be specified in such notice. . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses.

Sect. 257. Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. In all summary proceedings by a local authority for the recovery of expenses incurred by them in works of private improvement, the time within such proceedings may be taken shall be reckoned from the date of the service of

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notice of demand. Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same.

The local authority may, by order, declare any such expenses to be payable by annual instalments within a period not exceeding thirty years, with interest at a rate not exceeding five pounds per centum per annum until the whole amount is paid; and any such instalments and interest, or any part thereof, may be recovered in a summary manner from the owner or occupier for the time being of such premises, and may be deducted from the rent of such premises in the same proportions as are allowed in the case of private improvement rates under this Act.

Israel Davis for the appellant.—The justices were wrong in holding that it was not necessary that the appellant should be owner at the date of the demand. To render the appellant liable to the paving expenses under sect. 150, it is necessary that he should be owner not only at the date of the completion of the works, but also at the date of demand for payment of the expenses. The exact point was raised in the case of *Reg. v. Swindon New Town Local Board* (4 Q. B. Div. 305, reported as *Hinton v. Swindon New Town Local Board*, 40 L. T. Rep. 424), and it was there decided that the person who is made liable for these paving expenses under sect. 150 is the person who was owner not only at the date of completion of the works, but also at the date of the demand. Such person is the "owner in default" within the meaning of that section, and the judgment of Cockburn, C.J. in that case is absolutely conclusive upon the point that it is not enough that the person sought to be charged with the expenses should have been owner at the time the work was completed, but he must also be owner at the time when payment is demanded. Cockburn, C.J. says that the "owner in default" must be "a person who continues to be owner at the time the work is completed, and when the money laid out upon it is demanded from him"; and he repeats the same view in later parts of his judgment, and emphasises the fact that if the owner has ceased to be owner before the money is demanded, then "he cannot be said to be the owner in default at the time the money is demanded, and when another has stepped into his shoes and become the owner." There is nothing due until apportionment and demand. The scheme of the Act is not to create a debt, and does not create a debt, but to provide that the burden goes with the benefit. It creates a charge on the property, and that charge may be enforced in various ways. It may be enforced by this summary jurisdiction, if there is a person who satisfies the definition of "owner in default"; or it may be enforced by a private improvement rate under sect. 213, which is the alternative remedy. There are three or four sections of the Act to be looked at, sect. 150, by the 3rd paragraph of which the urban authority have power to declare these expenses to be private improvement expenses, sects. 213 and 214, which deal with private improvement expenses, and sect. 257, which provides for the recovery of these expenses from owners. Sect. 257 would appear to be against the appellant except for the construction

placed on the word "owner" by the case referred to. [Lord ALVERSTONE, C.J.—That section would seem to put completion as the test of liability.] By itself it does, but the word "owner" in that section has been interpreted as meaning only an owner in possession at the time the notice of apportionment and demand is given. The case of *Reg. v. Swindon New Town Local Board* (*ubi sup.*) reconciled these sections once for all, and persons were entitled to rely upon that decision, which says that the "owner in default" must be the person who was the owner not only when the work was completed, but also at the time when notice of demand was given. The matter was considered by North, J., as between vendor and purchaser, in *Re Bettesworth and Richer* (58 L. T. Rep. 796; 37 Ch. Div. 535) who disregarded every section except sect. 257. The learned judge made observations there with regard to the *Swindon* case (*ubi sup.*), which were wholly *obiter*, and the case merely decides that, as between a vendor and a purchaser, the expenses become a charge on the property from the date of completion of the work, but it is not a decision as to this summary remedy. It is only a decision as to when the expenses become a charge on the property. There is a distinction between the time when the expenses become a charge on the property and the time when they can be recovered summarily in the nature of a debt; and therefore the cases which say that the expenses are a charge on the property from the time when the work is completed are not of necessity inconsistent with those that say that you can recover only from a particular owner who was the owner at the time when the amount was demanded. [WILLS, J.—I do not find in the Act any statement that the man who is liable, and from whom the expenses may be recovered must necessarily be the owner when the demand is made.] There is no express statement to that effect, but taking the sections together they mean that, and that was the meaning placed on them by this court in the *Swindon* case (*ubi sup.*). [Lord ALVERSTONE, C.J.—That particular distinction between completion and demand, although it was discussed by North, J. on the charging point, has never been expressly raised on this point until this case.] That is so, and the view of North, J. in *Re Bettesworth and Richer* (*ubi sup.*) has not been entirely accepted, as, for instance, in *Re Boor* (60 L. T. Rep. 412; 40 Ch. Div. 572). He also referred to

West v. Downman, 42 L. T. Rep. 340; 14 Ch. Div. 111;

Tottenham Local Board v. Rowell, 43 L. T. Rep. 616; 15 Ch. Div. 378.

Macmorran, K.C. (*Scholefield* with him) for the respondents.—The justices were right in holding that the appellant was liable to pay. As far as the summary remedy is concerned, this is a new point; but my proposition is that the summary remedy arises at the same time as the charge, that is to say, that the person liable is to be determined at the time that the charge takes effect, namely, upon the completion of the work, and when the cases are looked at it will be seen that that is so. That part of the judgment of Cockburn, C.J. in *Reg. v. Swindon New Town Local Board* (*ubi sup.*), which points to a contrary view, was really *obiter* and must be disregarded.

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Sect. 257 is the only section which provides for the recovery of these expenses, and it says that such expenses are to be recovered "from any person who is the owner of such premises when the works are completed," and until recovery the same "shall be a charge upon the premises." These words were considered by North, J. in *Re Bettesworth and Richer* (*ubi sup.*), and, after saying (37 Ch. Div., at p. 539) that the expenses are charged from the time of the completion of the work, he goes on to say: "It is quite true that the owner cannot be compelled to pay till the total costs have been made out and apportioned between the owners, and notice has been served, and he has had three months to dispute the apportionment, and at the end of the three months he had written demand served upon him. The Act says payment may be recovered from the person who is owner at the time when the works are completed, and he is the person charged under the Act." In that case there was an open contract of sale, and the question was as between the vendor and the purchaser, who was liable to bear the charge. The decision was that the vendor was liable to indemnify the purchaser because the charge had taken effect before the sale; and North, J. points out that the person who is really liable personally is the person who was owner at the time the work was completed. That case has frequently come before the courts and has never been called in question. In the *Swindon* case (*ubi sup.*), Cockburn, C.J. seems to assume that the personal liability arises immediately the work is completed, and that the previous owner at the time the work is completed becomes liable because the money becomes forthwith payable. He treats the two things, the completion and the demand, as being the same thing, and he assumes that the person who was the owner when the work was completed is liable because the expenses would be demanded at once. He does not appreciate the fact that there is an interval between the two things, and he does not deal with the case where there would be such interval; and, moreover, what he says about the time of demand is really *obiter*. [KENNEDY, J.—Is there any distinction in substance between this Act and the Acts under which *West v. Downman* (*ubi sup.*) was decided? If not, it would seem from what Brett, L.J. there says, that there is no liability at all until apportionment.] There does not seem to be any distinction between the Acts; there is a liability before apportionment, though it cannot be actually enforced by summary proceedings until all the steps are taken. The case of *Hornsey Local Board v. Monarch Investment Building Society* (61 L. T. Rep. 867; 24 Q. B. Div. 1), related to a question of charge, but the court there pointed out that although certain steps were necessary to be taken before the liability could be enforced, the liability existed all the time. Esher, M.R. said: "The charge exists, though the exact amount charged may not exist." So, without regard to the person liable, the personal liability exists against somebody, though it is not ascertained. Though the *Swindon* case (*ubi sup.*) has not been referred to in recent cases, the case of *Re Bettesworth and Richer* (*ubi sup.*) has been referred to with approval by the Court of Appeal in several recent cases, as in *Stock v. Meakin* (82 L. T. Rep. 248; (1900) 1 Ch. 683), where the

Court of Appeal applied to the Private Street Works Act 1892, the decision already given by North, J. in *Bettesworth and Richer* (*ubi sup.*), and Williams, L.J., who delivered the considered judgment of the court, seems to imply that the personal liability is one which arises when the works are completed, although it cannot be enforced till afterwards. In *Surtees v. Woodhouse* (88 L. T. Rep. 407; (1903) 1 K. B. 396), the Court of Appeal simply followed *Stock v. Meakin* (*ubi sup.*). If the charge were enforced, the person who was liable when the works were completed as between vendor and purchaser would be eventually liable, and sect. 257 does appear to justify the proceedings by the local authority in this case, because it makes the person liable to them directly who is owner when the works are completed; and if that person is not personally liable, then the result is that there is nobody against whom there is a personal liability.

Israel Davis in reply.

LORD ALVERSTONE, C.J.—I have no hesitation in saying that if the matter was *res integra*, I should have very great difficulty in coming to the conclusion which is expressed by the judgment of Cockburn, C.J. in the case of *Reg. v. Swindon New Town Local Board* (*ubi sup.*). It seems to me that if sect. 257 of the Public Health Act 1875 is looked at, the person who is to pay is clearly defined; but I have always held, and still maintain the view strongly, that where there has been a clearly expressed opinion or decision which is under ordinary circumstances binding on this court, unless we can see that the judgment has proceeded on a mistake of fact, or that the particular point has not been raised so that the opinion was clearly *obiter*, we ought not to draw fine distinctions. It is very important that we should do so, because, as has been pointed out, persons will act, and ought to act, on such decisions, and those decisions may influence their conduct to a considerable extent; and, moreover, this is one of those matters which, no doubt, would be pretty well known by persons dealing with local government matters. Looking at the case of *Reg. v. Swindon New Town Local Board* (*ubi sup.*), I must say it is quite impossible to hold that what Cockburn, C.J. there said as to the date of demand was a mere matter of dictum or not a matter of judgment in that case. The point had there been raised, and three times over Cockburn, C.J. in his judgment does refer to it, and, speaking of sect. 150, he adds the words (4 Q. B. Div., at p. 307): "We have the words 'owner in default'; that is to say, the person who as owner is required to do the work, and is in default by reason of not having done it, but it must be a person who continues to be owner at the time the work is completed, and when the money laid out upon it is demanded from him." Then later on in his judgment he says: "I think that defect is remedied by the 257th section, which treats owners upon whom notice was originally served, and who are the owners at the time the work is completed, and the expenses demanded, as the persons upon whom the local board shall be able to come for expenses." Later on he again says: "What was meant was this—if the owner who is called upon to do the work, and who makes default in doing it, continues the owner at the time the work is

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executed and when the money laid out upon it is demanded, then he is liable under the 150th section, but if in the meantime he has ceased to be owner, he cannot be said to be the 'owner in default' at the time the money is demanded, and when another has stepped into his shoes and become the owner." Under those circumstances, I think that if this decision is to be questioned and varied in this respect—namely, by rejecting that part of the judgment which refers to the period of time when the money is demanded, as distinguished from the period of time when the work is completed as stated in sect. 257, it must be done by the Court of Appeal. I myself should not have arrived at the same conclusion, but I think we are bound by the decision in *Reg. v. Swindon New Town Local Board* (*ubi sup.*), and that we ought to follow it. Therefore this appeal will be allowed.

WILLS, J.—I am of the same opinion, and I certainly entertain very strongly the view my Lord has expressed that where there is a decision which seems to cover the point it is better to adhere to it than to refine it away because we may think it is not correct, and to leave the correction to be made by the Court of Appeal if they should think it necessary, especially where the judgment is an old one and where many rights may have been created by relying on the judgment as it stands. Also, I entirely agree that I should not myself, after the full discussion we have had, and after consideration of the sections, have come to a similar conclusion, because it does appear to me that the words of sect. 257 are abundantly plain, and that they convey a liability, or an inchoate liability, upon the person who happens to be the owner at the time the work is completed, although it may be the case that there is no personal liability upon him for anything until he has had notice of the demand which is made on him. It is when the demand is made and the notice given that the liability on him arises. That may perfectly well be, and yet it does not change the person upon whom the liability falls. It appears to me that the person liable is expressly defined by sect. 257 as the person who is owner of the premises "when the works are completed" for which such expenses have been incurred.

KENNEDY, J.—I entirely agree with my Lord's judgment. I share with him the feeling of what the position of this court should be, and for my part I question the correctness of the previous decision in the *Swindon* case (*ubi sup.*).

Appeal allowed. Order quashed. Leave to appeal.

Solicitors for the appellant, *Halse, Trustram, and Co.*, for *A. Muir Wilson*, Sheffield.

Solicitors for the respondents, *Speechly, Mumford, and Craig*, for *Frank Allen*, Doncaster.

House of Lords.

Friday, March 25.

(Before Lords MACNAGHTEN, DAVEY, JAMES OF HEREFORD, ROBERTSON, and LINDLEY.)

NEW BALKIS EERSTELING v. RANDT GOLD MINING COMPANY LIMITED. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Company—Shares—Calls—Forfeiture for nonpayment of calls—Sale—Certificate—Liability of purchaser.

Certain shares of the value of 5s. each were issued by the respondent company. The sum of 3s. 4d. each was paid up upon them, and a further call of 1s. 8d. was made, but not paid by the holder. The shares were thereupon forfeited, and sold by the respondents to the appellant company, and by the certificate it was stated that they were 5s. shares on which 3s. 4d. was paid up, and the remaining 1s. 8d. had been called up and was payable by the former holder. It was further stated that the purchasers were "to be deemed to be holders of the said shares discharged from all calls due prior to the date hereof." Subsequently another call was made on the shares.

Held (affirming the judgment of the court below), that the appellants were liable to pay this call.

APPEAL from a judgment of the Court of Appeal, consisting of the Lord Chancellor (Halsbury), the Lord Chief Justice (Lord Alverstone), and Sir F. Jeune, reported 88 L. T. Rep. 189; (1903) 1 K. B. 461, who had affirmed a decision of Bucknill, J., reported 85 L. T. Rep. 780, in an action tried before him without a jury.

The respondent company was incorporated on the 5th July 1895, under the Companies Acts 1862 to 1890, as a company limited by shares, with a nominal capital of 80,000*l.* in 80,000 shares of 1*l.* each, which were subsequently by special resolution (passed on the 24th July 1895 and confirmed on the 8th Aug. 1895) subdivided into 320,000 shares of 5s. each. The material articles of association provided as follows:

8. The directors may from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them, and not by the conditions of allotment thereof made payable at fixed times, provided that no call shall exceed 25 per cent. of the nominal amount of the share, and that no call shall be made payable at a less interval than two calendar months from the date fixed for the payment of a previous call, and each member shall pay the amount of every call so made on him to the persons, and at the time, or, if made payable by instalments, at the times and at the place appointed by the directors. A call may be made payable either in one sum or by two or more instalments.

11. If the sum payable in respect of any call or instalment is not paid on or before the day appointed for payment thereof, the holder for the time being of the shares in respect of which the call shall have been made or the instalments shall be due shall pay interest for the same at the rate of 10*l.* per cent. per annum from the day appointed for the payment thereof to the time of the actual payment. But the directors may, if they think fit, remit altogether or in part any sum becoming payable for interest under this clause.

13. If any member fail to pay any call or instalment

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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on or before the day appointed for the payment of the same, the directors may at any time thereafter during such time as the call or instalment remains unpaid serve a notice on such member requiring him to pay the same, together with any interest that may have accrued and all expenses that may have been incurred by the company by reason of such nonpayment.

15. If the requisitions of any such notice as aforesaid are not complied with, any shares in respect of which such notice has been given may at any time thereafter before payment of all calls or instalments, interest, and expenses due in respect thereof, be forfeited by a resolution of the directors to that effect.

16. Any shares so forfeited shall be deemed to be the property of the company, and the directors may sell, re-allot, or otherwise dispose of the same in such manner as they think fit.

17. Any member whose shares have been forfeited shall, notwithstanding, be liable to pay, and shall forthwith pay to the company all calls, instalments, interest, and expenses owing upon or in respect of such shares at the time of forfeiture, together with interest thereon, from the time of forfeiture until payment at the rate of 10l. per cent. per annum, and the directors may enforce the payment of such moneys, or any part thereof, if they think fit, but shall not be under any obligation so to do.

18. The directors may, at any time before any shares so forfeited shall have been sold, re-allotted, or otherwise disposed of, annul the forfeiture thereof upon such conditions as they think fit.

By sect. 15 of the Companies Act 1862, in the case of a company limited by shares, in so far as the articles do not exclude or modify the regulations in table A, those regulations shall, so far as the same are applicable, be deemed to be the regulations of the company. The articles of the respondent company were not expressed to exclude or modify the regulations in table A.

Among the regulations in table A is the following:

22. A statutory declaration in writing that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated as against all persons entitled to such share, and such declaration and the receipt of the company for the price of such share shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed the holder of such share, discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale.

At various dates previous to May 1900, a large number of the shares in the respondent company had been forfeited and were available for sale. Among these were 40,000 shares held by the African Gold Properties Limited, which had, in fact, been twice forfeited before May 1900, the first forfeiture having been annulled. In May 1900 the appellants purchased the 41,300 shares (including the above 40,000) from the respondent company for 150l. on the terms that "the whole amounts of the shares had been called up and were due before the forfeitures and the sale" to the appellants, and that the appellants were to be holders of the shares "free and discharged from all calls due prior to the purchase." These terms were embodied in the certificates which, on payment of the 150l. purchase money, were issued by the

respondent company to the appellants, who were duly registered as the holders of the 41,300 shares. The certificate relating to the block of 40,000 shares was in the following form:

The Randt Gold Mining Company Limited. Registered office, 19 and 21, Queen Victoria-street, E.C. Capital 80,000l., divided into 320,000 shares of 5s. each. Certificate.—This is to certify that the New Balkis Eersteling Limited, of Winchester House, Old Broad-street, London, E.C., is the registered holder of 40,000 shares of 5s. each, numbered 103,341—108,340, 220,808—247,507, 92,966—103,265 inclusive, in the above-named company, upon which the sum of 3s. 4d. per share has been paid. The remaining 1s. 8d. per share has been called up and is payable by the African Gold Properties Limited, who were the holders of the said shares prior to the same being forfeited, and the said the New Balkis Eersteling Limited is to be deemed to be the holder of the said shares discharged from all calls due prior to the date hereof. Given under the common seal of the company this 17th day of May 1900.—F. CATESBY HOLLAND, Director; C. F. WAINWRIGHT, Secretary. (Seal.)

It was agreed before the Court of Appeal that the form of certificate was in fact copied from the wording of art. 22 of table A set out above. At the trial of the action it appeared from the evidence of the secretary of the respondent company that at various times subsequent to the forfeiture of the block of 40,000 shares previously held by the African Gold Properties Limited that company had paid to the respondent company sums amounting to 627l. 3s. in respect of their liability (by reason of art. 17 of the respondent company's articles of association) to pay, notwithstanding the forfeiture, the calls owing on the shares at the date of the forfeiture. This sum of 627l. 3s. represented between 3½d. and 4d. per share on the 40,000, and there was not more than 3s. 8d. paid on those shares, and there was accordingly upwards of 1s. 3d. (the amount of the call now in question) remaining unpaid on the shares. On the 12th Dec. 1900 the directors of the respondent company resolved that a call of 1s. 3d. per share be made on all the shares held by the appellants, and be payable on the 3rd Jan. 1901, and notice of the said call was duly given. The appellants refused to pay the amount called, and the present action was commenced in the King's Bench Division on the 6th Feb. 1901 to recover that amount, with interest and costs. Bucknill J. ordered judgment to be entered for the respondent company (the plaintiffs) for the amount of their claim (2605l. 5s. 10d.), with 89l. 13s. 4d. for interest from date of writ, and costs and judgment.

Haldane, K.C. and C. C. Scott (A. T. Lawrence, K.C. with them), for the appellants, referred to

Re Dronfield Silkstone Coal Company, 44 L. T. Rep. 361; 17 Ch. Div. 76;

Ramwell's case, 45 L. T. Rep. 431;

Lock v. Queensland Investment and Mortgage Company, 75 L. T. Rep. 3; (1896) A. C. 461;

Trevor v. Whitworth, 57 L. T. Rep. 457; 12 App. Cas. 409.

Sir *R. Reid, K.C. and A. T. Clauson*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

LORD MACNAGHTEN.—My Lords: This case has been presented to your Lordships on the part of

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the appellants with great ability, but, speaking for myself, I rather doubt whether there is any room for argument. The facts are quite clear. There was a company called the African Gold Properties Company Limited, who were holders of shares in the Randt Company; they had 40,000 shares, upon which calls to the amount of 3s. 4d. per share were made and paid. Then there was a call of 1s. 8d., which was not paid, and the shares were forfeited. They were disposed of to the present appellants, and a certificate of proprietorship was granted to them. It seems to me that the whole question depends upon the true construction of that certificate, bearing in mind, of course, that the certificate derived its efficiency from the general principles applicable to such a case as this, and the provisions of the enactment especially in table A of the Companies Act of 1862. The general principle in such a case is, I think, that every member of a company limited by shares is liable, in respect of all moneys payable upon his shares, to pay every call that is duly made upon him. It is contended by the appellants that the company had no power to make this call. Now, the certificate is in these terms: "This is to certify that the New Balkis Eersteling Limited . . . is the holder of 40,000 shares of 5s. each" (then it sets out their numbers) "upon which the sum of 3s. 4d. has been paid." That, of course, means that 1s. 8d. per share has not been paid. Now, the provisions of table A require that in the case of forfeiture "a certificate of proprietorship shall be delivered to a purchaser," and, according to the provisions of the Act, the certificate is to specify the shares held by him, and the amount of liability upon those shares. Therefore, so far, the certificate in this case is entirely in accordance with the requirements of table A. It leaves the appellants liable on the face of the certificate for the 1s. 8d. which is unpaid. The contest is really raised upon the latter part of the certificate, which is in these terms: "The remaining 1s. 8d. per share has been called up, and is payable by the African Gold Properties Limited, who were the holders of the said shares prior to the same being forfeited." That is a statement of fact which is literally and accurately true. Then it goes on to say, "and the said New Balkis Eersteling Limited is to be deemed to be the holder of the said shares discharged from all calls due prior to the date hereof." That follows the language of art. 22 in table A, which says that "a certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed to be the holder of such share discharged from all calls due prior to such purchase. It seems to me to be a very reasonable provision to make, because, if he had not been discharged from these calls, questions might have been raised as to whether he was or was not liable to pay interest upon those shares in respect of the calls which had been made. The intention seems to me to be that he is to get a certificate of proprietorship, like everybody else, specifying what had been paid on his shares, and leaving him liable in respect of the balance to any call which the company may properly make. As regards this call, there is no objection taken to it for want of formality or regularity, or anything of that kind. It seems to me that it is a call that has been duly made, and the appellants are liable to pay it,

and therefore I move your Lordships that this appeal be dismissed with costs.

LORD DAVEY.—My Lords: I confess that in the course of the argument I had some doubt whether the order which is appealed from could be supported or not, but reflection has satisfied me that the decision of Bucknill, J., affirmed by the Court of Appeal, is correct. It appears to me that the certificate in question follows the terms of sect. 22 of table A in the Companies Act 1862. I will remark that, if it is in accordance with sect. 22, no question of *ultra vires* can be raised, because it would be ridiculous to say that what is prescribed by an Act of Parliament, agreeing with other articles of a company formed under that Act, could be *ultra vires*. The question really, as it appears to me, turns upon the construction of a few words in sect. 22—namely, what is meant by saying that the purchaser from the company of a forfeited share is "to be deemed to be the holder of such share discharged from all calls due prior to such purchase." Does that mean that he is to be discharged from the liability to pay the amount of calls already due, or does it really mean that the demand which has been made is no longer to affect the title to his shares? The words rather favour the former construction, because they are "discharged from all calls due." Now, what is due is the amount of the previous call; not the demand itself, the demand is not due, but the amount of the previous call is due. But if I look at the whole section, and the context in which it is found, and also at the nature of the transaction, I think that the meaning must be that the holder of the share as such is to be discharged from any liability under the previous demand. The reason why I say so is this. In the first place, the purport of sect. 22, and the effect of it, and, as you see if you read the whole of it, the intention is to give the holder of the purchased share a good title—that is to say, a clean title to the share which he purchases unaffected by the proceedings which had previously taken place rising out of the nonpayment of the previous demand. He is to have a clean title unaffected by the fact of the previous call having been made; or, in other words, I think that the effect is that, so far as the purchaser and any holder from him of that share are concerned, they are to be in the same position as if that prior call had never been made. But that is a mere question of quieting and perfecting the purchaser's title, and it does not appear to me to affect the question of what it is that he purchases. Now, what is it that he purchases? Upon this certificate there can be no doubt what it is that he purchases—namely, a 5s. share on which 3s. 4d. only has been paid—and therefore the holder of that share, under the Act of Parliament and the previous clauses (I think that the sections are sects. 4 and 6) in table A, will be liable to pay the extra 1s. 8d. Whether the company could make a contract to relieve him from the payment of that 1s. 8d. is, I think, hardly doubtful. They could not do so unless they were expressly authorised. Now, there is nothing in sect. 22, as I read it, which authorises the company to relieve him from the payment of that 1s. 8d. Therefore the result is this, that the purchaser purchases the shares *talis qualis*—that is to say, shares upon which 3s. 4d. only has been paid up. He is relieved from any liability under the previous

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demand or call which has been made by the company, and from any consequences of not complying with that call, but the holder of them is subject to any call which the company may properly make. He holds his shares in all respects as if those previous calls had never been made by the company; and with this consequence, that the company, *quoad* these particular shares (I am speaking only of the forfeited shares which are the subject of the purchase), is at liberty to make another call calling up the money over again. Therefore I think that the order appealed from should be affirmed.

Lord JAMES OF HEREFORD.—My Lords: At first I confess that I shared the doubts to which Lord Davey has referred as having been entertained by him, but, as the case proceeded, it seemed to me that the conclusion which has been now stated by him was perfectly accurate. The question is really contained in the last words which he has uttered. It was contended at the Bar, as I understand, that the company had no power to make a second call on the shares which had been forfeited. It seems to me that it is in that statement that the fallacy lies. I can see no reason why, when the shares have been forfeited, and no call has been received on them, the power of the company should be taken away, and it should be prevented from obtaining the amount that may be necessary to put it in funds for carrying on its business by making a second call. The nonpayment of a call cannot be equivalent to the receipt of it in any shape or form. That being so, there is nothing injurious to the public interest, and nothing contrary to the equities existing between the parties, in this call being made and enforced against the present appellants.

Lord ROBERTSON.—My Lords: I entirely agree.

Lord LINDLEY.—My Lords: I am of the same opinion. I am not surprised at this certificate being construed in different ways by different people; but in order to understand it one must understand the subject-matter to which it relates. It is said that a forfeited share is like a table or a chair or any other property which the company has at its disposal. It is nothing of the sort. A forfeited share, which is either sold or reissued, or parted with with a view to future use, is a share in the company, which involves a great deal. But the short answer to the appellants' case appears to be this. Nobody who knows anything at all about companies, and shares, and the forms of documents which are in use in business, would dream of taking this certificate as a certificate for a fully paid-up share. It is nothing of the sort; it tells you that it is nothing of the sort; it tells you how much is paid; it tells you what is not paid; and then it goes on to say that the person who takes this share is to be "discharged from liability for all calls," which means that there is to be no liability on this share. The holder is not to be liable for the 1s. 8d.; that call, so far as he is concerned, does not affect it. But it tells him in language which I do not say is so plain that it cannot be misunderstood, because evidently it has been misunderstood, that he has become the holder of a share not paid up in full. Now, what is the liability of the man who takes that? It is to pay calls as and when they are made. Then it is said, "You cannot make two calls." If you look at art. 4 you will see that

they are asking the House to put a construction upon it which has never been put upon it yet, so far as I know, and one which would not work in practice at all. What would be the result if under a certificate of this kind, or proceedings of this sort, the company were endeavouring to raise more than 5s. per share, I do not know; but that point is not raised. I can conceive that there might be difficulties then. But, as I understand it, they have given credit to these gentlemen for the money which they have actually got from the previous call; therefore this point is not raised. They are not attempting by this machinery to raise more money per share than they were authorized to raise by the Act. I have no doubt myself that the decision is quite right, and that this appeal ought to be dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, Dale, Newman, and Hood.

Solicitors for the respondents, Sanderson, Adkin, Lee, and Eddis.

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Feb. 26.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

ELLIOTT v. CRUTCHLEY AND ANOTHER (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract—Performance rendered impossible—No default by either party—Money payable before performance became impossible—Right to recover—Construction of contract—Cheque given, but payment stopped.

It was agreed between the plaintiff and the defendants that the plaintiff should provide the refreshments for a steamer which the defendants had hired to carry passengers to the naval review which was arranged to take place on the 28th June 1902 in connection with the Coronation of the King.

The contract provided that 300l. should be paid to the plaintiff on account of the refreshments on the 23rd June; and the defendants stipulated that "in the event of the cancellation of the review before any expense is incurred by the contractor there shall be no liability on our side."

On the 23rd June the defendants sent a cheque for 300l. to the plaintiff. On the 24th June the review was cancelled owing to the illness of the King, and the defendants stopped payment of the cheque. The plaintiff had incurred only a small amount of expense.

The plaintiff brought this action to recover the amount of the cheque.

Held (affirming the judgment of Ridley, J.), that the true construction of the contract was that, in the event of the review being cancelled, the defendants were to be liable only for the expenses incurred by the plaintiff, and that the plaintiff was not entitled to recover the sum of 300l.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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APPEAL of the plaintiff from the judgment of Ridley, J. at the trial of the action without a jury.

The plaintiff brought this action to recover from the defendants the sum of 300*l.* upon a cheque drawn by the defendants in favour of the plaintiff and dishonoured upon presentation.

The plaintiff was a refreshment contractor and caterer. The defendants were members of the executive committee of the Navy League.

The plaintiff provided the refreshments for passengers using the steamers owned by a company called the Coast Development Company.

In March 1902 an arrangement was made by which the Coast Development Company agreed to place their steamer, the *Yarmouth Belle*, at the disposal of the Navy League for the naval review intended to be held on the 28th June in connection with the Coronation of His Majesty the King; and as part of that arrangement it was agreed that the plaintiff should do the catering for the steamer on that occasion.

In pursuance of that agreement, on the 4th March 1902 the plaintiff wrote a letter to the defendants, on behalf of the Navy League, as follows:

We will supply the three meals, lunch, tea, and dinner, as per menu, at 12*s.* 6*d.* per head, you guaranteeing not less than 600 passengers, and paying for all over that number; wines and other drinks to be paid for by you at the company's ordinary tariff prices; 300*l.* to be paid to Mr. Elliott on account of the refreshments on the Monday previous to the review day.

On the 5th March the defendants wrote an answer which accepted the terms proposed by the plaintiff, and contained a postscript as follows:

It is, of course, understood that in the event of the cancellation of the review before any expense is incurred by the contractor there shall be no liability on our side.

On or before the 23rd June the plaintiff incurred some expense in the purchase of extra knives, forks, and crockery, and in printing tickets, but some of this expenditure was for other steamers hired for the same purpose. The learned judge found that the amount so expended for the *Yarmouth Belle* was about 20*l.* No expenditure was incurred for refreshments.

On the 23rd June, being the Monday previous to the review day, the defendants signed a cheque for 300*l.* in favour of the plaintiff, and sent it to him.

On the 24th June it became known that, owing to the illness of the King, the review would not be held, and nothing more was done by the plaintiff or the Navy League with regard to the *Yarmouth Belle*.

On the 25th June the defendants wrote to the plaintiff saying that, as the arrangement for the review was cancelled, they thought that the greater part of the amount of the cheque should be refunded.

The plaintiff did not answer that letter.

On the 15th July the plaintiff saw the defendants, and contended that he was entitled to be paid all the money which he would have been entitled to receive if the trip had been carried out.

The defendants intimated that they were willing to pay all the expenses incurred by the plaintiff, but he refused that offer.

The cheque not having been presented for payment, the defendants stopped payment thereof after the interview on the 15th July.

The plaintiff thereupon brought this action to recover the amount of the cheque.

The action was tried before Ridley, J. without a jury, and the learned judge gave judgment in favour of the defendants (89 L. T. Rep. 417).

The plaintiff appealed.

Witt, K.C. and A. P. Poley for the appellant.—The learned judge was wrong in holding that the plaintiff was not entitled to recover the amount of the cheque. It was a term of the contract that the sum of 300*l.* should be paid in advance on the 23rd June, and the plaintiff had a right to receive that sum upon that day. The postscript to the defendants' letter did not affect that right. It was not a term of the contract that, if the review was cancelled, any money paid under the contract should be paid back, or that any right to receive payment which had accrued should be affected: the meaning of the postscript was only that, if the review was cancelled before any expense was incurred by the plaintiff, no further liability should accrue to the defendants. The sum of 300*l.* became due and payable before the review was cancelled, and it is quite immaterial whether it was actually paid or not. This is like the case of freight payable in advance, when the advance freight is payable whether the voyage is performed or not, and cannot be recovered back if the ship is lost before performance of the voyage:

De Silvale v. Kendall, 4 M. & S. 37.

The test is whether this 300*l.*, if it had been actually paid upon the day when it became due under the contract, could have been recovered back. If it could not, then the plaintiff is entitled to recover it now. The plaintiff had a vested right to be paid this sum before performance of the contract was made impossible by the cancellation of the review, and therefore can now recover:

Blakeley v. Muller, 88 L. T. Rep. 90; (1903) 2 K. B. 760*n*;

Civil Service Co-operative Society Limited v. General Steam Navigation Company Limited, 89 L. T. Rep. 429; (1903) 2 K. B. 756.

The condition contained in the postscript does not apply, for the plaintiff had incurred expense before the cancellation of the review; and, further, this sum had become due and payable before the cancellation. It is impossible to import into this contract a condition that money paid should be recovered back, or that any accrued right to payment should be avoided. The contract cannot be construed as a contract to pay only the amount of expenses incurred, if the review was cancelled.

Montague Shearman, K.C. and Eustace G. Hills, for the respondents, were not called upon to argue.

COLLINS, M.R.—In this case the defendants, who were members of the executive committee of the Navy League, made a contract for the use of a steamer for the purpose of carrying passengers to view the naval review intended to be held on the 28th June 1902. As incidental to that arrangement the defendants thought that it was desirable to provide for the supply of refreshments on the

steamer, and accordingly they made a contract with the plaintiff for that purpose which is contained in two letters. On the 2nd March the plaintiff wrote to the defendants saying: "We will supply the three meals . . . at 12s. 6d. per head, you guaranteeing not less than 600 passengers and paying for all over that number . . . ; 300l. to be paid to Mr. Elliott on account of the refreshments on the Monday previous to the review day." The defendants replied to that letter on the 5th March, accepting the terms offered by the plaintiff, and adding a postscript as follows: "It is, of course, understood that in the event of the cancellation of the review before any expense is incurred by the contractor there shall be no liability on our side." I think that that postscript is very material in this case. The day arrived on which that sum of 300l. became payable according to the terms of the letter—viz., the 23rd June. The defendants were willing to pay, and they sent the plaintiff a cheque for 300l. upon that day. Before that cheque was presented for payment the review was countermanded owing to the illness of the King. The defendants then stopped payment of the cheque, and the plaintiff did not receive any part of the 300l. In my opinion that circumstance makes no difference to the plaintiff's rights; the position is just the same as if the money had been actually paid to him upon the appointed day. The plaintiff's rights are not, I think, in any way affected by the fact that payment of the cheque was stopped. I say that because the learned judge made certain observations in his judgment upon that point. It is not necessary for our judgment on this appeal, but I have said that in order to get rid of any idea that we agree with those observations of the learned judge. The law has been repeatedly stated which applies to cases of contract when performance becomes impossible without the default of either party, and it has been quite recently laid down in this court. In the absence of special provisions, payments which have been already made remain where they were when performance becomes impossible; the party who was bound to pay and has paid cannot recover them back; and neither party is bound to any further performance of the contract. The contract is not to be treated as rescinded *ab initio*, but both parties are excused from any further performance. *Restitutio in integrum* is impossible, but no further performance is required. This rule has been laid down because, the parties not having provided for the event, it is impossible for the court to adjust exactly the rights of the parties so as to effect a complete *restitutio in integrum*. In the present case that general principle is not applicable because the parties themselves have by their contract dealt with that very matter, and have provided what is to happen if the review does not take place. Therefore the decisions to which I have referred do not govern the rights of the parties in this case in the event of the thing contemplated and provided for becoming impossible. That reduces this case to the sole question as to what is the proper construction of the contract contained in the two letters. The postscript to the letter written by the defendants says: "It is, of course, understood that in the event of the cancellation of the review before any expense is incurred by the contractor there shall be no liability on our

side." Those words must be reasonably construed. On behalf of the appellant it is said that they mean only that no further liability is to be incurred after the cancellation of the review—that is, that it only means what the law would imply. I cannot agree with that contention. Those words must be construed reasonably and not too narrowly. It seems to me that those words mean that the parties are to be placed in the position in which they would be if there could be that which ordinarily there cannot be—that is, a rescission of the contract with a *restitutio in integrum*. A *restitutio in integrum* involves the consequence that expenses which have been incurred by the one party are to be recouped by the other party. This contract assumes that the expenses are to be recouped, and that there is to be a wiping out of any liability beyond that. It means that all liability is to be extinguished in the event of cancellation of the review, but subject to the obligation to reimburse the caterer all expenses which he may have then incurred. That is a reasonable arrangement. The parties are to stand as nearly as possible in the same position as if no contract had ever been made. In my judgment the decision of Ridley, J. was right, and therefore this appeal must fail and be dismissed.

ROMER, L.J.—I am of the same opinion. I think that upon the true construction of these letters, looked at from a business and common-sense point of view, this is not a case in which there was a contract to employ the plaintiff to provide refreshments whether the review took place or not. I think that the true meaning of the contract is that if the review was cancelled there was to be no liability on the part of the defendants beyond the obligation to pay the expenses already incurred by the plaintiff and no more. The review was cancelled, and I think that the defendants became liable to pay to the plaintiff the expenses which had already been incurred by him. The defendants offered to pay those expenses; but the plaintiff refused that offer, and claimed the whole 300l. In that contention I think that he was wrong. In my opinion the sum of 300l. was to be paid "on account" assuming that the review took place. That appears to me to be the true meaning of the contract. I certainly cannot gather from the terms of the contract that the sum of 300l. was to be paid to the plaintiff as a kind of retainer or to be his absolutely if there was no review. I agree, therefore, that this appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. If the contract was to pay the money to the plaintiff in any event, he would be entitled to recover. That, however, is not the contract in this case. The contract in this case is not the same as in the other cases where the money was payable before the event became impossible. In this case it is perfectly clear that it was the intention of the defendants to pay, out of the proceeds of tickets sold, the sum of 300l. on account. The common-sense meaning of the postscript is perfectly clear; it means that they are not to be liable for anything beyond the plaintiff's expenses if the review is cancelled. I think that the fact that the cheque was given, but was not paid, makes no difference in this case. The judgment

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of the learned judge was right, and this appeal fails.

Appeal dismissed.

Solicitors for the appellants, *Samuel Price and Sons*.

Solicitors for the respondent, *Dowson, Ainslie, and Martineau*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Dec. 9 and 10, 1903.

(Before BUCKLEY, J.)

CAVENDISH v. STRUTT. (a)

Practice—Costs—Taxation—Refresher fees—Discretion of taxing master—Order LXV., rr. 8, 27, sub-rr. 29, 48.

Sub-rule 29 of Order LXV., r. 27, gives the taxing master a discretion in party and party taxation to allow refresher fees in addition to the maximum fees prescribed by sub-rule 48, if he finds that the higher amount is necessary or proper for the attainment of justice or for defending the rights of any party.

Stewart and Co. v. Weber (89 L. T. Rep. 559) approved and followed.

SUMMONS to review taxation as between party and party, raising the question of the quantum of discretion given to the taxing masters in allowing refresher fees to counsel by the new sub-rule 29 of Order LXV., r. 27, passed in Jan. 1902.

The action was brought to set aside a voluntary settlement made by the plaintiff. It involved a large sum of money, and after a trial which lasted twenty days Byrne, J. gave judgment for the plaintiff setting aside the settlement and ordering the defendants to pay costs as between party and party.

The plaintiff's costs were taxed at nearly 2000*l.*, which included allowances in respect of three counsel, but a sum of over 1500*l.* was disallowed by the master on the ground that he was precluded by sub-rule 48 of Order LXV., r. 27, from allowing more than the maximum refresher fees there specified. The master stated in his answers to objections that, having regard to the importance of the action and the smallness of the brief fees, he would have been prepared to allow a substantial portion of the refresher fees paid by the plaintiff over and above the prescribed maximum, but he considered that the rules gave him no discretion in the matter.

The plaintiff, on the other hand, contended that the effect of the new sub-rule 29 (rule 10 of the Rules of the Supreme Court, Jan. 1902) was to enlarge the discretion of the taxing master and to enable him to allow, in addition to the fees prescribed by appendix N. and sub-rule 48, all costs which appeared to him "necessary or proper for the attainment of justice or for defending the rights of any party."

Sub rule 29 is as follows:

On every taxation the taxing master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party, but save as against the party who incurred the same no costs

shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses.

The plaintiff took out this summons to review the taxation.

Buckmaster, K.C. and Mark Romer for the plaintiff.—The taxing master has discretion under the new sub-rule to allow these refresher fees. The words of Order LXV., r. 8—"no higher fees shall be allowed in any case except such as are by this order otherwise provided for"—are much stronger than those of sub-rule 48; but nevertheless, in *McIver and Co. Limited v. Tate Steamers Limited* (87 L. T. Rep. 320; (1902) 1 K. B. 184), when the former rule was in question, it was held by the Court of Appeal that sub-rule 29 had conferred a discretion to allow fees larger than those prescribed, and that decision has been followed in *Re Ermen* (88 L. T. Rep. 352; (1903) 2 Ch. 156). Moreover, the exact point has been decided in our favour by Kennedy, J. in *Stewart and Co. v. Weber* (89 L. T. Rep. 559).

Sargant for the defendants.—The decision in *Stewart and Co. v. Weber* is wrong and ought not to be followed. Sub-rule 48 deals with refresher fees on the principle of time; the proviso at the end was inserted in 1886 in order to meet the difficulty raised in *Re Harrison* (55 L. T. Rep. 72; 33 Ch. Div. 52) and is confined to taxations as between solicitor and client. General words in a later Act do not affect earlier and special legislation (*Seward v. The Vera Cruz*, 52 L. T. Rep. 474; 10 App. Cas. 59), and sub-rule 29 is in general terms and was not intended to abrogate sub-rule 48. In *Re Ermen* the taxation was as between solicitor and client, and the case does not decide that rule 8 has been enlarged by sub-rule 29. Sub-rule 29 does not apply to party and party taxation; and even if it does, the exception as to "payment of special fees" save the defendants from liability for the refreshers in this case.

BUCKLEY, J.—In this action Byrne, J. on the 14th May 1903 ordered the defendants to pay to the plaintiff, Cavendish, the costs of this action up to judgment, to be taxed by the taxing master. The plaintiff carried in his costs for taxation. They have been taxed, and the summons asks that the plaintiff's objections to that taxation may be allowed, and that it may be referred back to the taxing master to vary his certificate accordingly. The objections were three in number. One of them Mr. Buckmaster did not open; it was only for a small amount. The second objection he agreed that he could not argue, as the taxing master had exercised his discretion upon it. The only one argued before me was the third. It is no doubt of importance. The question I have to decide is whether on a taxation of costs between party and party the taxing master has, under the rules as they now stand, a discretion to allow a refresher fee to counsel in excess of the maximum refresher fee allowed by Order LXV., r. 27, sub-r. 48. The language of sub-rule 48 is that "the taxing officer may allow" fees of certain amounts from one sum named to another sum named. The rule contains no negative words. It does not provide that the taxing officer shall not allow more than those amounts, but on the true construction

(a) Reported by A. L. MORRIS, Esq., Barrister-at-Law.

of the sub-rule I think that is its effect, and in *Re Harrison* (*ubi sup.*) Cotton, L.J., after expressing some doubt on the subject, said that the sub-rule must be read as restricting the fees. That case was decided before the proviso now at the end of the sub-rule was added. The proviso is as follows: "Provided that in the taxation of costs between solicitor and client the taxing officer shall be at liberty to allow larger fees, under special circumstances to be stated by him." The addition of that proviso no doubt supports further the construction previously adopted by Cotton, L.J. as to taxations between party and party. The history of the proviso is as follows: In *Re Harrison* the question was raised whether on a taxation between solicitor and client, when the client had given his solicitor authority to employ a particular leader, and to give him a refresher fee larger than the maximum fee allowed by sub-rule 48, the limit of that sub-rule applied, with the result that the taxing officer was precluded from allowing more than the maximum fee. The Court of Appeal held that it did apply, although it could be displaced by special agreement. The proviso was then introduced in order to give the taxing master a discretion in the case of solicitor and client costs. The discretion thus given was not extended to party and party costs. Therefore I start with this, that sub-rule 48 is to be read as if it provided that in a party and party taxation the taxing officer may allow, by way of refresher fee, so much and no more. The question then arises whether the new rule 10 of Jan. 1902, which is now Order LXV., r. 27, sub-r. 29, has given the taxing master a further discretion—namely, a discretion to go beyond the limits of sub-rule 48 in taxations between party and party. Sub-rule 29 is as follows: [His Lordship read the rule and continued:] In my opinion this has given him a further discretion. It has been decided by the Court of Appeal in *McIver and Co. Limited v. Tate Steamers Limited* (*ubi sup.*) that where the case is one to which Order LXV., r. 8, applies the taxing master has a discretion to make an allowance in respect of a solicitor's attendance in excess of the maximum allowance for such attendance specified in appendix N, No. 147. Rule 8 does, whereas sub-rule 48 does not, contain negative words. It says: "And no higher fees shall be allowed in any case." These words are, it is true, controlled by an exception, "except such as are by this order otherwise provided for." The Court of Appeal, however, rested their decision, not on the words of exception, but on the conclusion at which they arrived, that sub-rule 29 gives the master on every taxation a discretion to allow such costs as appear to him to be necessary or proper within the language of the sub-rule. Sub-rule 48 does not contain the words "and no higher fee shall be allowed," and therefore, of course, contains no words of exception; but, seeing that the Court of Appeal did not rest their decision on those words, the present case is not distinguishable from *McIver and Co. Limited v. Tate Steamers Limited*. In construing the rules, I think I am bound to read them as a whole, with the result that sub-rule 29 qualifies sub-rule 48, and gives the taxing master a discretion with regard to allowing fees under sub-sect. 48 which he did not previously possess. The old sub-rule 29

referred only to costs between party and party, and was in a negative form. It said that "as to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper," whereas the new sub-rule 29 refers to every case of taxation, and is in an affirmative form. The rule committee struck out the old rule and substituted the other. I am bound to hold that they did that deliberately with a view to adding to the power of the taxing master. The taxing master says that if this view is adopted it will tend to abolish the distinction between party and party and solicitor and client costs. I do not think so. Sub-rule 29 consists of two parts. The first sentence is general, and applies to every taxation: "On every taxation the taxing-master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party." The second part applies only to taxation as between party and party, for by the words "save as against the party who incurred the same," it excepts a taxation as between solicitor and client. It says: "But save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses." The result is that in taxations between party and party there is created a new discretion in the taxing master limited by the language used in sub-rule 29. By that I mean that this limitation is imposed on him, that he must find that the higher amount which he allows is "necessary or proper for the attainment of justice or for defending the rights of any party." If the taxation is between solicitor and client, he is not bound by that limitation. In that case he may allow costs incurred or increased by "payment of special fees to counsel," or special charges or expenses to witnesses or other persons, or by other unusual expenses," which he is not to allow on taxations between party and party. The latter part of the sub-rule includes what is generally called a "special fee"—that is to say, a fee paid to counsel who will only go into court on payment of a special fee in addition to the usual fees. But it is not limited to that. "Special fees" there mean unusual or extraordinary or generous fees. Mr. Sargant, who argued the case with great ability, has pressed the argument upon me, that I ought to decide the question upon the principle that where there is a special rule referring to details, and then a rule is made on the same subject but of a general character, the general rule does not abrogate the special rule. He referred to *Seward v. The Vera Cruz* (*ubi sup.*), where Lord Selborne says that: "Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation, directly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." I do not think that is a principle to apply in this case. Into these rules are introduced from time to time alterations and

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variations, and I must take it that the committee in making the alterations are dealing with the rules as a whole. I have to make up my mind whether it was intended to qualify what was in the rules before the alterations or not. Here I think it was so intended. Mr. Sargant also contended that, on the assumption that sub-rule 29 applied to sub-rule 48, nevertheless it left refresher fees as they were before, because sub-rule 48 gives a definite maximum, and sub-rule 29 says that on taxations between party and party special fees and other unusual expenses shall not be allowed. I have dealt with this already. The special fee there referred to is an unusual or extraordinary fee, and not a fee larger than that allowed by sub-rule 48, whose payment is necessary or proper within sub-rule 29. Sub-rule 29 empowers the master to go beyond sub-rule 48, for the purpose, not of allowing in party and party taxations refresher fees which are unusual or extraordinary, but of allowing such refresher fees as are "necessary or proper for the attainment of justice or for defending the rights of any party," notwithstanding that they are in excess of sub-rule 48. In *Re Ermen Farwell, J.*, and in *Stewart and Co. v. Weber Kennedy, J.*, have decided this question in the same way as I have done. *Stewart and Co. v. Weber* is on all fours with this case, and I might have followed it without adding anything; but, having regard to the importance of the question, I have thought it best to give my own reasons. I allow the objections, and send this case back to the master to decide what in his discretion are reasonable refresher fees to allow to the plaintiff's counsel. The plaintiff has succeeded on the more important of his objections, and the defendants must pay two-thirds of his costs of the present application.

Solicitor for the plaintiff, *Charles Everett*.

Solicitors for the defendants, *Ranger, Burton, and Frost*.

April 14 and 16.

(Before JOYCE, J.)

Re VENN; LINDON v. INGRAM. (a)

Will — Construction — Ambiguity — Referring to codicil to clear up ambiguity — Gift contingent on surviving tenant for life — Class gift — Gift to a class and a named person — Lapse.

A testatrix directed her residuary real and personal estate to be converted into money and the income to be paid to a niece for her life, and on the tenant for life's decease the testatrix directed her trustees to divide the trust estate equally between the brothers and sisters of the tenant for life living at the latter's decease and A., B., and C. in equal shares, "and should either of them be dead leaving children such children are to take the share their deceased parent would have been entitled to."

By a codicil the testatrix recited that she had in her will directed her residuary estate to be sold and the proceeds divided between the persons therein named, and desired a great-niece to have a share in her residuary estate equally with the others named in the will and bequeathed her the same accordingly.

The testatrix died in 1901, and the tenant for life in 1902. One brother only of the tenant for life, and no sister, was living at the tenant for life's death. Of A., B., and C., A. had predeceased the testatrix, and B., though he survived the testatrix, died before the tenant for life. A. and B. were half-brothers of the testatrix, but C. was a stranger in blood.

Upon an originating summons taken out for the determination of the questions who were the persons entitled to the residuary estate, whether A.'s share devolved upon the next of kin of the testatrix or became divisible between the other legatees, and whether the gift of a share to B. was contingent on his surviving the tenant for life.

Held, that on the will alone there was an ambiguity as to whether the estate was divisible in moieties or in equal shares among all who took, but that the court was entitled to refer to the codicil to clear up the ambiguity, and that the codicil made it clear that the estate was divisible in equal shares.

*Held, also, that the gift of a share to B. was not contingent on his surviving the tenant for life, and that, in view of the judgments of the House of Lords in *Kingsbury v. Walter* (84 L. T. Rep. 697; (1901) A. C. 187), the gift could not be construed as a class gift, and that A.'s share therefore lapsed to the testatrix's next of kin.*

Darley v. Martin (13 C. B. 683) and *Grover v. Raper* (5 W. R. 134) followed.

ADJOURNED SUMMONS.

By her will, dated the 18th Nov. 1890, Mrs. Sarah Venn, widow, of Gravesend, in the county of Kent, gave, devised, and bequeathed (after directing payment of her debts and bequeathing a pecuniary legacy) all the rest of her real and personal estate to the trustees of her will upon trust to convert the same into money and to pay to the testatrix's niece, Emily Alice Ingram, the interest, dividends, and income arising therefrom for her life.

The will then proceeded as follows:

And upon her decease I direct my said trustees to divide all my said trust estate equally between the brothers and sisters of the said Emily Alice Ingram living at her decease and Thomas William Gaze, Francis Thomas Brooker Gaze, and William Brand Parker in equal shares, and should either of them be dead leaving children such children are to take the share their deceased parent would have been entitled to if living.

On the 1st June 1893 the testatrix executed the following codicil:

Whereas in my will I have directed my residuary estate to be sold and the proceeds divided between the persons therein named, now I desire my great-niece Louisa Emille Ingram to have a share in my residuary estate equally with the others named in the said will, and I bequeath her the same accordingly. In all other respects I confirm the said will.

The testatrix died on the 7th Aug. 1901, and her will and first codicil (with another codicil not material to this report) were proved in the principal registry on the 20th Sept. 1901.

The estate was composed entirely of personalty. The tenant for life, Emily Alice Ingram, died on the 14th May 1902. One only of her brothers was then living, and no sister.

(a) Reported by H. W. LAW, Esq., Barrister-at-Law.

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Francis Thomas Brooker Gaze had predeceased the testatrix, and Thomas William Gaze, though he survived the testatrix, died before the tenant for life. They were half-brothers of the testatrix. William Brand Parker, who was a stranger in blood, survived the tenant for life.

Under these circumstances the trustees of the will and codicils took out an originating summons asking for the determination of the questions who were the persons entitled to the residuary estate of the testatrix; whether the share of Francis Thomas Brooker Gaze devolved upon the next of kin of the testatrix; or whether by reason of his death in her lifetime her residuary estate became divisible between the legatees named in the will and first codicil other than him; and whether the gift by the will of a share in the residuary estate to Thomas William Gaze was contingent upon his surviving the tenant for life.

Burt for the summons.

Fawcus for the surviving brother of the tenant for life.—I take a moiety of the estate, and the great-niece named in the codicil takes a share only in the other moiety with the three persons named in the will. But if it be held that the whole estate is divisible in equal shares, surviving the tenant for life is a condition of sharing in the case of the persons named, just as much as in the case of the brothers and sisters of the tenant for life, and the estate of T. W. Gaze is therefore not entitled to a share. The words "the share their deceased parent would have been entitled to" show that this is the true construction.

R. M. Pattison for the legal personal representative of T. W. Gaze.—The testatrix did not intend to divide the estate into moieties. This is clear even on the will, but, if necessary, the codicil can be referred to, and that puts the matter beyond doubt. There is nothing in the will to make surviving the tenant for life a condition of taking a share except in the case of the tenant for life's brothers and sisters.

G. S. Alexander for W. B. Parker.—I support the contention that T. W. Gaze's estate does not share because he died before the tenant for life. With regard to the share of F. T. B. Gaze, I contend that the gift is one to a class, and that his share therefore did not lapse. The older cases may favour the view that some blood or other tie between the named individual and the class is necessary to a class gift; but in *Re Moss; Kingsbury v. Walter* (81 L. T. Rep. 139; (1899) 2 Ch. 314) *Romer, L.J.* (1899) 2 Ch., at p. 319 lays down the principle that a gift to a class properly so called; and a named individual such as A. equally is *prima facie* a gift to a class. No doubt when the same case came before the House of Lords (84 L. T. Rep. 697; (1901) A. C. 187), Lord Davey (1901) A. C., at p. 193 disapproved of *Romer, L.J.*'s statement; but the House affirmed the decision of the Court of Appeal in which that statement was made and it was not argued before the House, and I contend that Lord Davey's disapproval was dictum only.

Fawcus replied.

JOYCE, J.—The question in this case is as to the mode in which the residuary estate of the testatrix is to be distributed among the persons named or referred to in her will and first codicil. [His Lordship read the passage in the will set out

supra, and the first codicil, and continued:] Various difficulties arise. The first question is whether the trust estate is to be divided in moieties, one moiety going to the surviving brothers and sisters of the tenant for life and the other one to the persons named in the will together with the great-niece named in the codicil, or whether it is divisible in equal shares between all those persons. Taking the will alone, I am of opinion that on its true construction the division is not to be in moieties, but equally between all entitled; but I admit that on the will alone there is an ambiguity as to this, and that it is well arguable that the testatrix intended the division to be in moieties. If, however, I may refer to the first codicil to clear up the ambiguity, there is no doubt but that the estate is to be divided equally among all the beneficiaries. If there had been a recital of the will in the codicil which was obviously erroneous, no doubt that would not alter the construction of the will (see *Skerratt v. Oakley*, 7 T. R. 492; 4 R. R. 504); but, if the recital in the codicil is not absolutely erroneous, I have no doubt that I may refer to the codicil to clear up an ambiguity in the will. The principal authority is *Darley v. Martin* (13 C. B. 683). There *Jervis, C.J.*, in delivering the considered judgment of the Court of Common Pleas, says (at p. 690): "And, as to the effect of the codicil, it was argued that an erroneous reference in a codicil to the dispositions of the will cannot constitute a new bequest in opposition to the will; and *Skerratt v. Oakley* (*ubi sup.*) was relied on. But it appears to us that the argument with respect to the effect of the codicil, when rightly considered, is not that the will is at all revoked or varied by the codicil; but rather that, the will and codicil being all one testament, the language of the will may be interpreted by that of the codicil; and that accordingly, the gift over in the will 'in default of such issue' being capable of importing a bequest over on failure of issue living at the death, it ought to be inferred that the testator employed it in that sense, because, in the codicil, he refers to it as if it were a gift over in default of his daughter's leaving no issue, which, as regards personalty, is tantamount to a gift on failure of issue living at her death. The argument, thus viewed, appears to us to be well founded." Now, *Kindersley, V.C.*, than whom a more careful judge in regard to such matters never existed, did the same thing in *Grover v. Raper*, reported only in 5 W. R. 134. In that case there was an ambiguity in the words of the will; and the Vice-Chancellor, after expressing his opinion as to the meaning of the will, says that the codicil, however, put the matter beyond all doubt. I think, therefore, that I may, following the considered judgment of the Court of Common Pleas in *Darley v. Martin* (*ubi sup.*) and this decision of *Kindersley, V.C.*, have recourse to the codicil to clear up the ambiguity; and I hold that the testatrix's residuary estate is divisible in equal shares among all who take. One of the persons particularly named, T. W. Gaze, died after the testatrix, but in the lifetime of the tenant for life. It is contended that his representatives are not entitled to share, on the ground that on the true construction of the will the gift is contingent on his surviving the tenant for life. There is not a word in the will to that

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effect, though no doubt the testatrix uses the words "would have been entitled to." This, however, is not enough for the purpose, especially as the supposed gift over would, in my opinion, apply equally to a case of death in the lifetime of the testatrix. I therefore hold that T. W. Gaze's representatives are entitled to a share. Then another point arises. F. T. B. Gaze died in the lifetime of the testatrix, and I have to determine what becomes of his share. Does it lapse to the next of kin, or does it pass to the other legatees? Having carefully read and considered the judgments of the House of Lords in *Kingsbury v. Walter* (84 L. T. Rep. 697; (1901) A. C. 187), I am of opinion that this cannot be construed as a class gift, and I therefore hold that F. T. B. Gaze's share has lapsed to the testatrix's next of kin.

Solicitors: *Lewis and Sons; Mason and Co.*

Jan. 21 and Feb. 2.

(Before SWINFEN EADY, J.)

Re RISING; RISING v. RISING. (a)

Will—Power—Excessive execution—Cy-près.

Hereditaments were limited to the use of B. R. for life, with remainder to the use of his children, or other issue born in his lifetime, for such estates and in such shares as B. R. should by deed or will appoint, and in default to the use of his children in fee simple as tenants in common.

B. R. by his will appointed to his son W. for life, with remainder to his sons in tail male, with remainder to his daughters in tail male, with remainder to B. R.'s daughter for life, with remainder to her sons in tail male, with remainder to her daughters, with divers remainders over.

Held, that W. did not take an estate in tail general or in tail male, and that all the remainders subsequent to the life estate appointed to him failed.

ADJOURNED SUMMONS.

Certain hereditaments were by will limited to the use of Benjamin Rising for life, with remainder to the use of his children, or other issue born in his lifetime, for such estates and in such shares as he should by deed or will appoint, and in default of appointment to the use of his children in fee simple as tenants in common.

Benjamin Rising, by his will dated the 6th Dec. 1890, appointed the hereditaments to his son William for life, with remainder to William's sons born during his (Benjamin Rising's) life successively according to seniority for life, with remainder after the decease of each such son to his sons successively according to seniority in tail male, with remainder to the sons of William born after Benjamin Rising's death successively according to seniority in tail male, with remainder to William's daughters successively according to seniority, with remainder after the death of each such daughter to her sons successively according to seniority in tail male, with remainder to Benjamin Rising's daughter Ethel for life, with remainder to her sons successively according to seniority in tail male, with remainder to her

daughters successively according to seniority, with remainder after the death of each such daughter to her sons successively according to seniority in tail male, with divers remainders over.

Benjamin Rising died on the 28th Aug. 1902 leaving two children—William, who was married and had no children, and Ethel, who was married and had an infant son.

The grandchildren not being objects of the power, this summons was taken out to determine whether William took an estate tail *cy-près*.

Ashworth James for the trustees of the will.

D. Pollock for William.—It will carry out the testator's intention if William takes an estate tail:

Farwell on Powers, 2nd edit., p. 315;

Stackpoole v. Stackpoole, 4 D. & War. 320; 65 R. R. 706.

It is no objection that William's daughters will take as coparceners instead of successively:

Pitt v. Jackson, 2 Bro. C. C. 51;

Vanderplank v. King, 3 Hare, 1; 64 R. R. 186.

[SWINFEN EADY, J.—Ethel, who is an object of the power, could not take under the estate tail.]

K. Wood for Ethel.—Subject to William's life interest, Ethel takes a moiety in default of appointment. It is not a case for *cy-près*.

Tomlin for Ethel's infant son.—The testator's intention would be carried out by giving William an estate tail, with remainder to Ethel for life, with remainder to her son in tail male. [SWINFEN EADY, J. referred to *Monypenny v. Dering* (2 De G. M. & G. 145).]

Cur. adv. vult.

Feb. 2.—SWINFEN EADY, J.—It was said that the effect of the appointment in Benjamin Rising's will was to give William an estate in tail general, or, at all events, an estate in tail male by *cy-près*, and that the court ought to adopt a construction of the will which would give effect, so far as possible, to the whole of the testator's intention. The extent and application of the doctrine of *cy-près* were explained by Lord St. Leonards in *Monypenny v. Dering* (*ubi sup.*) The object is to give effect to the general intent, but it is not (as in other cases) to be carried into effect at the expense of the particular intent; in applying the doctrine nothing is to be sacrificed, and neither by implication nor by the doctrine of *cy-près* can an estate be given to a class or a portion of a class for whom the testator did not intend to provide. In *Hampton v. Holman* (36 L. T. Rep. 287; 5 Ch. Div. 183) Jessel, M.R. treated *Monypenny v. Dering* (*ubi sup.*) as deciding that the doctrine of *cy-près*, which he considered was more properly described as a rule of construction, cannot be applied where the effect of so doing will be to make the estate devolve in a line of succession different from that which the testator has expressly designated. The particular intent is only sacrificed so far as may be necessary to carry out the general intent according to law. In the present case no kind of estate tail can be given by implication to William which would not sacrifice the particular intent and defeat the general intention of the testator, as expressed in his will, by excluding persons for whom he intended to provide, or by including a class or portion of a class for whom he did not intend to

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

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provide. I think that it would be going beyond any decided case, and that it would be contrary to the principles laid down in the cases I have referred to, if I were to hold that William takes an estate in tail general or in tail male under the appointment. All remainders subsequent to the estate for life which is validly appointed to him fail in the events which have happened.

Solicitors: *Williams and James*, for *Worship and Rising*, Great Yarmouth.

Thursday, March 24.

(Before SWINFEN EADY, J.)

Re HEATHCOTE; HEATHCOTE v. TRENCH. (a)

Will—Accumulation—39 & 40 Geo. 3, c. 98—Trust to pay debts—Debts paid out of capital moneys—Trust to recoup capital.

H., by his will made on the 22nd July 1881, gave certain annuities and devised and bequeathed the residue upon trust that the trustees should accumulate the rents and profits, until sufficient should be raised to pay off certain sums amounting in all to 116,000*l.*, for twenty-one years from the death of the last surviving grandchild living at his death. Under the will *A.* was the present tenant for life, and *B.* was tenant in tail in remainder.

The will provided that if the debts, directed to be paid out of accumulations, were paid out of capital moneys, the capital moneys should be recouped the sums so paid.

Until 1903 the annuities had exhausted the whole of the income, but on the death of an annuitant there was now a surplus income of about 5000*l.* per annum. One hundred thousand pounds of the debts directed to be paid out of accumulations had been paid out of the proceeds of sale of land sold under the Settled Land Acts, and 16,000*l.* had been paid out of the proceeds of sale of land sold by the trustees under a power of sale contained in the will. It was submitted by *A.* that he was entitled to the whole income, as the trust was not one to pay debts, but to recoup capital. For *B.* it was said that the trust to recoup capital was in fact a trust to pay debts.

Held, that, as to the 100,000*l.* paid out of capital moneys arising under the Settled Land Acts, it was clear that there was no right of recoupment. As to the 16,000*l.*, once debts were paid and satisfied out of capital moneys, a direction that capital should be recouped was not a direction for payment of debts.

ADJOURNED SUMMONS.

By his will, dated the 22nd July 1881, Sir William Heathcote directed his trustees for twenty-one years from the death of the last surviving grandchild living at his death to accumulate rents and profits, after satisfying certain annuities, until sufficient to pay off charges amounting to 116,000*l.* should be raised, and directed that if the debts directed to be paid out of accumulations were paid out of capital moneys, the capital moneys should be recouped the sums so paid.

Sir William Heathcote died on the 17th Aug. 1881.

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

On the 15th July 1882 an order was made for the administration of the estate.

Sir W. P. Heathcote died in Oct. 1903, and thereupon an annuity of 5000*l.* ceased.

The present tenant for life was Gilbert Redvers Heathcote.

One hundred thousand pounds of the charges had been paid by sales under the Settled Land Acts, and 16,000*l.* out of moneys raised by the trustees of the will under a power of sale.

The court had directed payment off, being satisfied that it was for the benefit of all parties.

The question raised by the summons was whether the present tenant for life was entitled to the income, or whether there must be accumulation until the 116,000*l.* was made good.

Sect. 2 of 39 & 40 Geo. 3, c. 98, provides:

That nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settlor, or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or deviser, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that such provisions and directions shall and may be made and given as if this Act had not passed.

Farrer for the trustees.

Eve, K.C. and *Allen* for the tenant for life.—Accumulation is directed for the purpose of paying debts. But there are no debts, so the direction is void. What is suggested is an accumulation to recoup capital.

Macnaghten, K.C. and *Preston* for a tenant in tail in remainder.—There is no case actually deciding that an accumulation such as this would not be good, but *Hall*, V.C. expressed an opinion it would be bad:

Tewart v. Lawson, L. Rep. 18 Eq. 490;

Norton v. Johnson, 30 Ch. Div. 649, 653.

SWINFEN EADY, J.—Two questions are raised by this summons. The first, as to the 100,000*l.* paid out of money arising under the Settled Land Act, is not arguable. As to the 16,000*l.* which was paid out of the proceeds of sale of land sold by the trustees, as the testator has been dead twenty-three years, further accumulation is forbidden by sect. 1 of 39 & 40 Geo. 3, c. 98, unless it is an excepted case. In my opinion, when once debts are paid and satisfied out of capital moneys, a direction that capital moneys shall be recouped is not a provision for payment of debts. When the debts are once paid and satisfied, sect. 2 no longer applies. Where the object of the accumulation is to provide a fund to recoup the estate for sums paid for debts out of capital, the accumulation is not one authorised by the section.

Solicitors: *Houseman and Co.*; *Johnson, Long, and Co.*

Thursday, April 14.

(Before SWINFEN EADY, J.)

GEORGE v. THOMAS. (a)

Vendor and purchaser—Specific performance—Threat of litigation.

At a sale by auction on the 21st July 1903 the defendant contracted to buy a secured profit

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

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rental of 550*l.* per annum for 5500*l.* This profit rental was secured upon two houses in Cheapside, the receipts from tenants amounting to 950*l.*, the ground rent being 250*l.*, and the rates and taxes on one of the houses being 150*l.* No deduction was made in respect of the other house, of which *W.* was the tenant, as there was no covenant by the landlord to pay rates and taxes. As a matter of fact the landlord had from 1876 until 1903 paid the rates and taxes on the house let to *W.*

On the 29th Sept. 1903 *W.* commenced an action for rectification of his lease, but the action was dismissed because he had granted an underlease of the term vested in him which amounted to an assignment.

W. wrote that he intended to take proceedings to make the underlessees join, and bring a fresh action.

The plaintiff said that, the action by *W.* having been heard and dismissed, the plaintiff was entitled to specific performance.

For the defendant it was said that the plaintiff knew *W.* said that he was not liable to pay rates and taxes before the sale, and that the plaintiff was not entitled to specific performance.

Held, that *W.*'s claim was an honest one, and that specific performance could not now be granted, because sufficient time had not elapsed to enable the court to say that no fresh action would be brought. The action was ordered to stand over till the 24th June, and, if *W.* had then taken no steps to obtain rectification, the court might then be in a position to treat his claim as shadowy.

ACTION.

By an indenture, dated the 12th April 1876, the lower ground floor of certain premises in Cheapside were leased to *F. W. Farthing* for forty-six years, less three days, from the 25th Dec. 1875, at 300*l.* per annum.

In 1877 this lease was assigned to *Whiffin*.

On the 21st July 1903, at a sale by auction, the defendant contracted to buy what was described as "a secured profit rental of 550*l.* from 118 and 119, Cheapside.

The receipts from tenants were 950*l.*, the ground rent 250*l.*, and the rates and taxes on one of the houses 150*l.* No deduction was made for rates and taxes on the premises held by *Whiffin*.

From 1876 to 1903 *Whiffin* had not paid rates and taxes, and on the 29th March 1903 *Whiffin* commenced an action for rectification of his lease. This action was dismissed because *Whiffin* had executed what purported to be an underlease, but was in fact an assignment of his whole term. His solicitors wrote that he intended to get the assignee to join, or to get the deed rectified, and bring another action.

The vendors brought this action for specific performance of the contract.

Eve, K.C. and *Methold* for the plaintiffs.—*Whiffin*'s action has been heard and dismissed. Any further claim by him is too shadowy to be regarded, and the plaintiff is entitled to specific performance.

Vernon Smith, K.C. and *Duke* for the defendant.—There has been misrepresentation, for the plaintiff knew at the time of the sale that *Whiffin* said that he was not liable to pay rates and taxes.

A purchaser will not be compelled to complete a contract when litigation is pending :

Bentley v. Craven, 17 Beav. 204 ;

Pegler v. White, 33 Beav. 403.

SWINFEN EADY, J.—This is a vendors' action for specific performance. The property in question was offered for sale as an "amply secured ground rent," and certain figures were given showing a profit rental of 550*l.* The purchaser agreed to give ten years' purchase, 5500*l.* Before the date of completion the question arose whether rates and taxes were payable by the landlord or the tenant. On the title there is no obligation on the landlord to do so. The question arose whether in the lease *Whiffin* holds a covenant to pay rates and taxes had been omitted. It is not disputed that since the lease was granted up to 1903 the rates and taxes were in fact paid by the landlord. The suggestion is that they were paid in error, because there was no separate apportionment until Feb. 1903, when a copy of the lease was obtained. The vendors, relying on the title shown by the documents, have brought this action. The defendant is willing to complete subject to the question of rates and taxes. The plaintiffs are able to make a title, and the only question is whether *Whiffin* is entitled to rectification. *Whiffin* did bring an action and issued a writ for rectification. The action came on for trial, and it appeared that *Whiffin* purported to grant an underlease, but parted with such a term that it amounted to an assignment, and *Buckley, J.* held that *Whiffin* could not maintain the action. The action stood over for a fortnight to see if the assignee could be induced to join, but, as he did not, the action was dismissed. *Whiffin*'s solicitors write that he insists on his claim to rectification, and that a fresh action will be instituted. In any case, the dismissal of *Whiffin*'s action does not finally determine the action. The plaintiffs say that *Whiffin*'s claim is shadowy, and that no attention should be paid to it. If the assignee refuses to join, it may be, he says, disregarded. *Whiffin*'s claim may never be brought and may wholly fail. I have formed the view *Whiffin*'s claim is an honest one, and for a long series of years the landlord paid the rates and taxes. I arrive at the conclusion I ought not to force specific performance, because sufficient time has not elapsed to enable the court to say that no fresh action will be brought. The proper course is to order the action to stand over to a day when the court can see whether *Whiffin*'s claim is a substantial one or not. The court will not refuse specific performance when the only blot on title is a person saying a deed ought to be rectified, if he takes no steps to obtain rectification. I will adjourn the further hearing of the action until the 24th June. If *Whiffin* proceeds promptly, his claim may be judicially considered. If no steps have then been taken, the court may consider the claim shadowy.

Solicitors: *Coldham* and *Birkett*; *Phillips, Cumming*, and *Masser*.

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KING'S BENCH DIVISION.

Tuesday, March 29.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

THOMPSON (app.) v. MAYOR OF ECCLES (resp.). (a)

*Public health—Sewer or drain—"Single private drain"—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 41—Public Health Acts Amendment Act 1890 (53 & 54 Vict. c. 59), s. 19.**T. was the owner of a block of seven houses in a street, and adjacent to these were two blocks of six houses each, belonging to another owner. There were two private passages between the blocks leading to the backs of the houses.**A 6in. pipe passed through the two blocks and across the two passages, passing into a 9in. pipe passing through the block belonging to T., and out into the main sewer in a street running at right angles to the street in which the three blocks were situated.**Held, that the 9in. pipe was a sewer and not a drain, and so was repairable by the local authority.*

CASE stated on a complaint preferred by the respondents under sect. 41 of the Public Health Act 1875 (38 & 39 Vict. c. 55) and sect. 19 of the Public Health Acts Amendment Act 1890 (53 & 54 Vict. c. 59) against the appellant for that on the 16th March 1903 a notice was served upon him requiring him to abate a certain nuisance in or on certain premises situate at No. 428, Liverpool-road, in the district of the respondents, and that he had made default in complying with the requisitions thereof within the time therein specified—that is to say, within fourteen days from the service thereof, and for that purpose to take up the existing defective yard and cellar drains and gullies and tops and in lieu thereof provide and lay down efficient drains constructed of glazed and socketed stoneware pipes, the joints to be properly made good with cement, the cellar drain to be embedded in concrete to a thickness of 6in. all around the pipes, and to provide efficient wash-out gullies with lipped tops.

The complaint was heard on the 28th Sept. and the 19th Oct. 1903, when the justices adjudged that the cellar drain complained of by the corporation (the respondents) was used by two or more houses belonging to different owners, and declared that such drain was a single private drain within the meaning of sect. 19 of the Public Health Acts Amendment Act 1890, and made an order for the defendant (the appellant) to abate the nuisance and to do any works necessary for that purpose within twenty-eight days.

Upon the hearing of the complaint the following facts were proved:—

The appellant is the owner of a block of seven houses numbered 426 to 438, Liverpool-road, in the borough of Eccles, of which the house No. 428, the subject of the complaint, is one.

The houses were built in 1875 and in accordance with plans deposited with the then sanitary authority, the Barton, Eccles, Winton, and Monton Local Board (predecessors of the respondents), and approved by them on the 4th March 1875.

Adjacent to the block of seven houses and only separated therefrom by a private passage giving access to the backs of the houses (but on the same side of Liverpool-road) are twelve houses belonging to one owner, Edward Johnson, and divided into two blocks of six houses each by a private passage giving access to the backs of the houses.

On the 6th March 1903 complaint was made to the respondents that a certain drain or sewer belonging to No. 428, Liverpool-road was a nuisance and injurious to health. On examination the drain or sewer was found to be in a bad condition and to require alteration or amendment, and the respondents thereupon served upon the appellants the notice of the 16th March 1903. The works specified therein were necessary for the purpose of abating the nuisance.

The notice was not complied with.

The drain or sewer was part of a joint drain or sewer running through and under the cellars of the seven houses belonging to the appellant, and receiving the drainage of each house before falling into the respondents' main sewer in Hampson-street, a street running off and at right angles to Liverpool-road.

The 9in. drain or sewer was a continuation of and received the drainage from a 6in. drain or sewer passing through and under the cellars of the two blocks of six houses belonging to Edward Johnson and received the drainage from each of the twelve houses before reaching the 9in. drain or sewer, as shown in the plan given below. The whole of the 6in. and 9in. drain or sewer was laid through private property until it reached the public sewer in Hampson-street.

It was admitted by the respondents that the notice required the appellant to make structural alterations in the drain or sewer.

On the part of the appellant it was contended that, as the drain of the house received the drainage of more than one building not within the same curtilage belonging to the same owner, it became a sewer under the provisions of sects. 4 and 13 of the Public Health Act 1875 as it conveyed the drainage of three separate blocks of dwelling-houses containing six in each in two blocks owned by one owner, Edward Johnson, and the other block containing seven dwelling-houses owned by the appellant, another owner, and was vested in the local authority, and it was the duty of the local authority to repair, cleanse, and keep it so as not to be a nuisance or injurious to health, and that the drain was not a single private drain within the meaning of sect. 19 of the Public Health Acts Amendment Act 1890.

On the part of the appellant it was further contended that the words in sect. 41 of the Public Health Act 1875, "appear to be in bad condition or to require alteration or amendment," did not refer to defects in the structure, and did not empower the respondents to order structural alterations, and the notice of the 16th March 1903 was therefore *ultra vires* and bad.

On the part of the respondents it was contended that the drain or sewer at the place where the nuisance occurred was a single private drain, to which sect. 19 of the Public Health Acts Amendment Act 1890 applied, and, further, that, as the works specified in the notice were necessary for the purpose of abating the nuisance, the

(a) Reported by W. DE B. HERBERT Esq., Barrister-at-Law.

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respondents were authorised to require the execution of the same under and by virtue of the provisions of sect. 41 of the Public Health Act 1875.

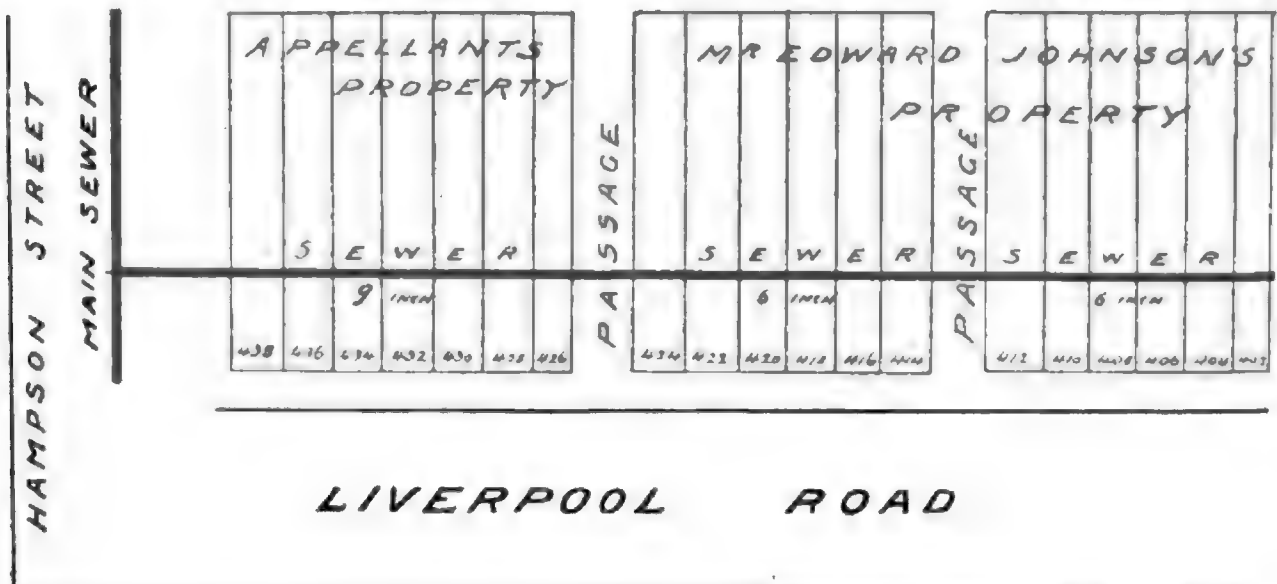
The attention of the justices was called to the following cases:

Travis v. Uttley, 70 L. T. Rep. 242; (1894) 1 Q. B. 233;
Kershaw v. Taylor, 73 L. T. Rep. 274; (1895) 2 Q. B. 471;
Self v. Hove Commissioners, 72 L. T. Rep. 234; (1895) 1 Q. B. 695;
Hill v. Hair, 72 L. T. Rep. 629; (1895) 1 Q. B. 906;
Fulham Vestry v. Solomon, (1896) 1 Q. B. 198;
Bradford v. Mayor of Eastbourne, 74 L. T. Rep. 762; (1896) 2 Q. B. 205;
Seal v. Merthyr Tydfil Urban District Council, 77 L. T. Rep. 303; (1897) 2 Q. B. 543;
Lancaster v. Barnes Urban District Council, 78 L. T. Rep. 355; (1898) 1 Q. B. 855;
Beckenham Urban District Council v. Wood, 60 J. P. 490.

The justices found that the drain was used by two or more houses belonging to different owners, and that the drain was a single private drain within the meaning of sect. 19 of the Public Health Acts Amendment Act 1890, and they made an order upon the appellants to abate the nuisance and to do any works necessary for that purpose within twenty-eight days.

The notice referred to above was as follows:

To Mr. Thompson, of 41, Alexandra-road, Patricroft, in the county of Lancaster, owner of No. 428, Liverpool-road. Whereas on the 6th March 1903 application was made to the said local authority stating that certain drains on or belonging to certain premises situate at No. 428, Liverpool-road, in the said borough, were a nuisance and injurious to health; And whereas on the 6th March 1903 the inspector of nuisances to the said local authority, being duly empowered by the said local authority, entered the premises and caused the ground to be opened and examined the drains; And whereas the drains then appeared to be in bad condition and required alteration and amendment; And whereas you are the owner of the premises; Notice is hereby given to you that the said local authority require you to do the following necessary works and to complete the same within fourteen days from the service of this notice—that is to say, that you take up the existing defective yard and cellar drains and gullies and tops and in lieu thereof provide and lay down efficient drains constructed of glazed and socketed stoneware pipes, the joints to be properly made good with cement, the cellar drain to be embedded in concrete to a thickness of six inches all around the pipe, and to provide efficient wash-out gullies with lipped tops. And further take notice that if this notice be not complied with you will be liable to a penalty not exceeding 10s. for every day you make default, and the said local authority may, if they think fit, themselves execute the works and may recover the expenses thereof in manner provided by the said Acts.—Dated the 16th March 1903.—WM. HENRY HICKSON, Town Clerk, for and on behalf of the said authority.—Town Hall, Eccles.



By sect. 41 of the Public Health Act 1875 it is provided that:

On the written application of any person to a local authority stating that any drain, water-closet, earth-closet, privy, ash-pit, or cesspool, on or belonging to any premises within the district, is a nuisance or injurious to health (but not otherwise), the local authority may by writing empower their surveyor or inspector of nuisances, after twenty-four hours' written notice to the occupier of such premises, or in case of emergency without notice, to enter such premises with or without assistants, and cause the ground to be opened and examine such drain, water-closet, earth-closet, privy, ash-pit, or cesspool. If the drain, water-closet, earth-pit, privy, ash-pit, or cesspool on examination is found to be in proper condition, he shall cause the ground to be closed and any damage done to be made good as soon as can be, and the expenses of the works shall be defrayed by the local

authority. If the drain, water-closet, earth-closet, privy, ash-pit, or cesspool on examination shall appear to be in bad condition or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring to forthwith or within a reasonable time therein specified to do the necessary works, and if such notice is not complied with the person to whom it is given shall be liable to a penalty not exceeding 10s. for every day during which he continues to make default, and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses.

By sect. 4 of the Public Health Act 1875:

"Drain" means any drain of and used for drainage of one building only, or premises within the same curtilage,

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and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed.

"Sewer" includes sewers and drains of every description except drains to which the word "drain" interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act.

By sect. 19, sub-sect. 1, of the Public Health Acts Amendment Act 1890 it is provided that:

Where two or more houses belonging to different owners are connected to a public sewer by a single private drain an application may be made under sect. 41 of the Public Health Act 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor, or in case of dispute by a court of summary jurisdiction.

And by sub-sect. 3 it is provided that:

For the purposes of this section the expression "drain" includes a drain used for the drainage of more than one building.

Rhodes for the appellant.—This 9in. pipe is a sewer, as it receives the drainage of more than one building not belonging to the same owner and not within the same curtilage. That brings it within sect. 4 of the Public Health Act 1875. It is not within sect. 19 of the Public Health Acts Amendment Act 1890. It takes the drainage of twelve other houses, which are separated from the appellant's houses by a private passage, into the main sewer. The decision in *Jackson v. Wimbledon Urban District Council* (90 L. T. Rep. 417) governs this case, and it is clear from *Travis v. Uttley* (70 L. T. Rep. 242; (1894) 1 Q. B. 233) that although a pipe is placed entirely upon private ground it may be a sewer. He also referred to

Bradford v. Mayor of Eastbourne, 74 L. T. Rep. 762; (1896) 2 Q. B. 205;

Fulham Vestry v. Solomon, (1896) 1 Q. B. 198;

C. F. Pritchard for the respondents.—The question is whether this pipe is a sewer or a single private drain. The nuisance arose in the 9in. pipe under the appellant's premises, and at that point the 9in. pipe is a single private drain. He referred to

Seal v. Merthyr Tydfil Urban District Council, 77 L. T. Rep. 303; (1897) 2 Q. B. 543.

Jackson v. Wimbledon Urban District Council (sup.) is in point, but in the respondents' favour, for it was conceded that the pipe which ran between the two properties, and on private ground, and took the drainage of different owners was a single private drain. He also referred to

Mayor of Eastbourne v. Bradford (sup.);

Reg. v. Mayor of Hastings, 75 L. T. Rep. 377; (1897) 1 Q. B. 46;

Southwold Corporation v. Croudy, 67 J. P. 273; 1 L. G. R. 899.

Lord ALVERSTONE, C.J.—Speaking for myself, I can only repeat that I hope either the Court of Appeal or the House of Lords may be able to sweep away some of the decisions and put some logical system before us, or that the Act of 1890 may be amended by some definition of what a

single private drain is. I have always felt that from the beginning there has been rather a wrong view allowed to become law, that a person can put upon a local authority the obligation to repair a drain simply because the owner of the drain has allowed another person to connect his drains with it. I doubt very much whether there is any distinct authority which supports that view directly, but it is involved in so many decisions that, at any rate in this court, I think it is quite impossible to hold that a structure, though made through private property, which does receive, in accordance with the language of sect. 4 of the Act of 1875, the drainage of more than one building or premises in one curtilage, becomes a drain and not a sewer. If it is possible even for the Court of Appeal or the House of Lords to go behind all this and say that the action of a private individual with regard to his own private drain is not enough to make it a sewer, a great many difficulties will be removed. It seems to me, therefore, *prima facie* that, having regard to the decisions and language of the Act of 1875, independently of the Act of 1890, this structure, which was made before the Act of 1890, did become a sewer because it fulfilled the conditions that made it a sewer after the Act of 1875. Mr. Pritchard in arguing this case frankly admitted that, and other learned counsel of great experience in these cases have admitted that, in this court at any rate, they would not argue that a thing was not a sewer but a drain simply because it passed through private property. There is the language of Cave, J. in more than one judgment which showed his opinion was, and he was of great learning in these matters, that that might and ought to have been the rule; but certainly that rule has not been followed. That being so, we get a structure made as this was, prior to the passing, or at any rate prior to the adoption, of the Act of 1890, a sewer. Now, it is said that the decisions in *Bradford v. Mayor of Eastbourne* (sup.) and *Self v. Hove Commissioners* (sup.) and some others have decided that simply because a pipe behind a number of houses received the drainage of houses belonging to different owners, that would still remain a drain for the purposes of sect. 41 although it would have been a sewer if the houses had all belonged to one person. Of course, that as a result is really ridiculous, as has been pointed out, and one hopes that there may be some means of avoiding that absurdity. To say that it is a sewer if twelve houses belong to one person and becomes a drain for the purpose of this section because he sells one is absurd and ridiculous, and that particular test of what would make a particular conduit in a particular condition of things a drain or a sewer, depending on the words "belonging to different owners," scarcely can be a sufficient principle on which to decide whether a particular conduit is at the time being a drain or a sewer. Then come the words "a single private drain." The facts in the *Eastbourne* case are very like this case. The finding or statement in that case is that there was a private pipe or drain which ran through private property which had been allowed to receive the drainage of a number of different houses, and under the circumstances the court thought that in that case the conditions of sect. 19 were fulfilled, and that pipe having become a nuisance (not the drain

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beyond it) it should be treated as being a single private drain. I myself am satisfied that whatever the Legislature intended, they did not mean a single private drain to be determined by the circumstances I have been referring to. They probably thought, as my brother Channell has pointed out, that a drain on private property draining more than one house would be a drain but not a sewer; but it is possible, of course, they may have had in mind other cases where a person has a single private drain not a sewer, and does allow different owners to drain through it by provision for value to himself or any other reason. I must follow the view I expressed in the course of the argument of the case, although I quite agree that the *Wimbledon* case is not an authority in this case. It was conceded by the counsel for the respondents in the *Wimbledon* case that he could not have argued the conduit behind the house was not a sewer but for the fact that it had come out into that which was a single private drain admitted to be so on the case. They contended that because at one end it was a single private drain, it did not cease throughout its length to be a single private drain. For reasons which I explained in the judgment, we held that, notwithstanding that, we must come to the conclusion that the conduit which drained the several houses of one owner or different owners still might be a sewer. I think, for the reasons I have endeavoured to explain (I know how difficult it is), this was a sewer, and that the appeal must be allowed on that ground. The other grounds of the appeal are not required, in my opinion. I think the *Southwold* case did decide, and the language of the section shows that, for the purpose of sect. 41, you have to look at the condition of the sewer as it exists at the time of the nuisance, and that the words "alteration and amendments" refer to alteration and amendment of the *statu quo* of the sewer at the moment. I think this appeal must be allowed, and that, on these grounds, they ought to have held that this was a sewer and not a drain.

DARLING, J.—I was going to say I am of the same opinion, but I will not say that. I assent to what the Lord Chief Justice has said. Really, to have any reasonable view that you can call an opinion upon these various Acts of Parliament and the cases decided upon them. I do not think it is possible. One follows the case when there is one of them, but ultimately there are a great many, some barely reconcilable to the others; and to follow one, the result is that one becomes involved in manifest absurdities from time to time. All sorts of cases are put from the bar in argument, which anyone has to admit at once can be supported by some case or another, and yet involve a manifest absurdity. I should be very glad if the Lord Chief Justice's idea could be reached, and there could be found a court of sufficient authority to make sense of these Acts of Parliament. I think much the simplest thing to do, and what ought to be done, really is to acknowledge that a mistake has been made in this legislation altogether, and that it is not possible to give a decision which will not result in all kind of difficulties or absurdities following from it because of the way in which this 19th section has been passed. The only reasonable and effective

thing to do is to go back and legislate again, sweep away all these decisions, and put the matter upon a reasonable basis, and until that is done I think there will not be a reasonable basis at all. I do not profess to be able to give any kind of reason for the decision at which I have arrived. I think if anybody could explain these Acts of Parliament it is my brother Channell, and he has not yet said what his view about this case is, but I can only say that whatever it may be, feeling certain if anybody can explain it he can, I am content to say I agree with him.

CHANNELL, J.—I am afraid I must repeat what I have said, and I am afraid I shall not satisfy my brother. My opinion is that the problem really is an insoluble one. I should like to give the judgment that would most clearly secure that this case should go before another tribunal in order if possible to get an authoritative solution which would be the best that could be obtained. I do not think any Court of Appeal would say their decision was thoroughly satisfactory, yet we should get a decision for use in these courts, where this question is always turning up. The real problem is to reconcile somehow or other the provisions of the 19th section of the Act of 1890 with the general definition clause in the Act of 1875. To begin with, I get rid of one difficulty in this case as to the words "belonging to different owners" in sect. 19. As to that, I am perfectly clear that the true interpretation of the words "belonging to different owners" is "not all belonging to the same owner." It is quite clear from the purview of the section altogether that that is what is meant. It would not mean to make a difference in a row of nineteen or twenty houses that there was only nineteen owners because two of the houses somewhere or other along the row happened to belong to the same person. That is impossible. Whatever the object of the Legislature was in passing this enactment, it is quite natural they should say in reference to that which is a single private drain, it should not prevent the making of an order under sect. 41 of the Public Health Act 1875 because the houses do not all belong to the same owner. Whatever they meant by "a single private drain," I am quite satisfied that is the natural meaning of sect. 19. The most natural solution of it is that which I suggested during the course of the argument, that that section, which was passed by the Legislature and adopted by the Legislature, was in point of fact framed by somebody who was under the idea that a thing might be a single private drain although it drained different houses provided they all belonged to the same owner. That is not the general law, but there are such cases. Then there is another solution of the problem about how this Act of 1890 came to be passed, and that is this: It is an adoptive Act, and as a matter of fact, the large number of clauses in it are clauses which have been passed from time to time in various local Acts, and this particular clause, clause 19, is a clause that had been in local Acts. It has been discussed in *Self v. Hove Commissioners* and *Hill v. Hair*. I am not sure about it, but I know the clause under discussion was a clause in a local Act, and the fact is, as a matter of history, that this clause has been in local Acts for a considerable time. But then those local Acts in

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all probability and in all the cases where it was properly in, had definition clauses which differed from that in the Public Health Act of 1875. Certainly some of them had clauses somewhat similar to the metropolitan clauses about combined drainage under an order, and whenever you get a definition clause of that character and this 19th clause in the local Act the whole thing was perfectly easy to construe and there was no difficulty about it, but when it got into this Act and the only definition clause was the definition that there was in the Act of 1875, of course a difficulty was at once created. Personally, I do not think it is possible to give a perfectly satisfactory solution of the problem, but I suppose one has to set to work about it as best one can, and it seems to me that the best solution is that which was given by the late Cave, J. He pointed out that, although it was exceptional, yet, nevertheless, there might in law be a single private drain draining more than one house. There are, however, few cases in which the court have found the facts such as they could so hold. But there is a thing called a drain made for the owner's own profit, and there is at least one case where it was held that a drain was a drain made for a person's own private profit and so remained vested in the owner, although otherwise it would have been a sewer vested in the local authority. Now, assuming that to be a possible state of things, you have got a case in which there may be such a thing as a single private drain draining several houses—a thing that is not a sewer, but which drains more than one house and a thing that would have been so apart from this Act of 1890. Then you could apply a sensible interpretation to this sect. 19. You say provided that you can find such a thing as a single private drain, then, when you have got it, notwithstanding that all the houses do not belong to the same owner you may make an order under sect. 41. If that is the true interpretation, then when you have got before you any of these cases you have got to see what is the evidence, if any, that this particular pipe or thing that you are dealing with is a private drain. It will not be a private drain because it belongs to different owners. If it is a private drain you may get it under this section, although it does belong to different owners, but you must first show that it is in point of fact a private drain. You may show it in one way, at any rate, by showing that it was a drain made for profit within the meaning of that clause. That is one way it could be shown, and I do not say that there may not possibly be other ways. I should not like to say that an agreement between a local authority and a building owner that they would sanction such a system of drainage as he proposed upon the terms that the thing should remain a private drain would not be binding. I see no reason why it should not be, but then you must prove it if you want in any particular case to say that was a private drain, because it was built and made in that way. It seems to me that the only reasonable way in which you can reconcile sect. 19 of the Act of 1890 and the definition clause of the Act of 1875 is by saying that provided in any particular case you show that the thing is a private drain and not a sewer, which *prima facie* it will be if it drains more than one house, then

you may make an order under sect. 41, notwithstanding that it drains houses which do not all belong to the same owner. That seems to me to be, on the whole, the most satisfactory solution of this problem, which all the same I think cannot quite satisfactorily be solved. If that is the fair meaning, and applying that to this present case, then in this present case there is no evidence that this thing in point of fact was a single private drain. There is nothing set out in the case to show that it was. The argument that was raised did suggest it is so, because it was said it does drain houses that did belong to different owners, but I do not think that is sufficient.

Appeal allowed.

Solicitors: E. Lorimer Wilson, Manchester; Sharpe, Parker, Pritchards, Barham, and Lawford, for W. H. Hickson, Eccles.

Friday, March 4.

(Before Lord ALVERSTONE, C.J., KENNEDY and CHANNELL, JJ.)

HILL (app.) v. PANNIFER (resp.). (a)

Poor rate—Distress—Sale—Charges in schedule—Further charges—Legality—57 Geo. 3, c. 93—7 & 8 Geo. 4, c. 17—12 & 13 Vict. c. 14.

On a distress for poor rates the costs and charges are not limited to those provided by the schedule to 57 Geo. 3, c. 93, applied to a distress for such rates by 7 & 8 Geo. 4, c. 17, but the "reasonable charges of the taking, keeping, and selling the said distress" may be deducted as provided by 12 & 13 Vict. c. 14, s. 1.

These "reasonable charges" may include a charge for the fee of an auctioneer on the sale.

CASE stated on a complaint preferred by the appellant, Robert William Hill, against the respondents, or some or one of them, for that they (having sold or caused to be sold certain goods of the appellant to satisfy a poor rate for the parish of Bildeston, in the county of Suffolk, and certain costs and charges levied by distress upon the goods) on or about the 28th July 1903 levied, took, and received from the appellant and retained and took from the produce of such goods sold, or caused to be sold, or caused to be levied, taken, or received, or caused to be retained and taken, greater costs and charges than are mentioned and set down in the schedule to the Act 57 Geo. 3, c. 93, to wit, a charge of 14s. for the expenses of an "auctioneer," contrary to the provisions of that statute and of 7 & 8 Geo. 4, c. 17, and 12 & 13 Vict. c. 14.

Upon the hearing of the complaint it was proved that the respondent Robert Pannifer is assistant overseer, and the other respondents, Robert Grimsey and Josiah Shipp, overseers of the poor for the parish of Bildeston.

On the 2nd July 1903 Pannifer obtained from two justices a warrant of distress against the appellant, directing him to make distress of the goods of the appellant and to sell the same if within the space of five days after making the distress the sum of 1l. then due and owing from the appellant in respect of poor rate and the further sum of 5s. 1d., the costs of obtaining the warrant, were not duly paid by the appellant.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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Pannifer, acting under the warrant, duly made distress upon the goods and demanded the payment of the moneys referred to above.

On the 13th July the appellant paid to Pannifer the sum of 1*l.* 4*s.* 1*d.*, being the sum of 5*s.* 1*d.* in respect of the costs and 1*s.* in respect of the poor rate, but declined to pay the balance of 1*s.* claimed to be due in respect of the rate.

On the 28th July 1903 Pannifer, as directed by the warrant, sold the appellant's goods so distrained to satisfy the unpaid balance of the rate, and after the sale he gave the appellant a statutory notice of costs and charges as required by 57 Geo. 3, c. 93.

The sum realised by the sale was 1*l.* 5*s.*, from which the respondent took and retained, in addition to the sum of 1*s.* for the rate, the following costs and charges: Levy, 3*s.*; taking, keeping, and use of room, &c., 6*s.* 3*d.*; auctioneer, 1*s.*; and paid the balance of 9*d.* to the appellant.

The sum of 1*s.* was one-third of a fee of two guineas paid by the respondent to an auctioneer in respect of the sale at one time of the goods of the appellant and two other ratepayers against whom distress warrants had been granted.

In all these matters Pannifer acted with the knowledge and consent and under the authority of the other respondents.

It was contended by the appellant that the costs and charges to which the respondents were entitled were limited by the statute 57 Geo. 3, c. 93, as applied to the levy of a distress in respect of poor rates by 7 & 8 Geo. 4, c. 17, and that the charge of 1*s.* for the auctioneer's fee was an excessive and illegal charge.

The appellant further contended that 12 & 13 Vict. c. 14, did not entitle the respondents to reimburse themselves by appropriating any higher or other costs or charges than those which were authorised by 57 Geo. 3, c. 93, as applied to proceedings for the recovery of poor rates.

On behalf of the respondents it was contended that the words of 12 & 13 Vict. c. 14, s. 1, and the express provisions of the warrant of distress which cited those words, entitled them (notwithstanding the earlier provisions of 57 Geo. 3, c. 93, and 7 & 8 Geo. 4, c. 17) to deduct and retain from the proceeds of the sale of the appellant's goods costs and charges, to wit, in the words of the Act, "the reasonable charges of selling," in excess of and other than those specified in the schedule to 57 Geo. 3, c. 93, and that the last-mentioned statute must be considered to be *pro tanto* revoked and amended.

The justices were of opinion that the respondents' contention as to the effect of the statute 12 & 13 Vict. c. 14, s. 1, was right, and they found that the charge of 1*s.* was a reasonable and proper charge, and one which by law could properly be made in the circumstances of the case, and they therefore dismissed the complaint.

By 57 Geo. 3, c. 93, s. 1, an Act to regulate the costs of distresses levied for payment of small rents, it is provided:

Whereas divers persons acting as brokers and distraining on the goods and chattels of others, or employed in the course of such distresses, have of late made excessive charges to the great oppression of poor tenants and others, and it is expedient to check such practices: Be it therefore enacted that from and after the passing of this Act no person whatsoever making any dis-

tress for rent, where the sum demanded and due shall not exceed the sum of 20*l.* for and in respect of such rent, nor any person whatsoever employed in any manner in making such distress or doing any act whatsoever in the course of such distress or for carrying the same into effect, shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever any other or more costs and charges for and in respect of such distress, or any matter or thing done therein, than such as are fixed and set forth in the schedule hereunto annexed and appropriated to each act which shall have been done in the course of such distress; and no person or persons whatsoever shall make any charge whatsoever for any act, matter, or thing mentioned in the said schedule unless such act shall have been really done.

Schedule of the limitation of costs and charges on distresses for small rents:

	s.	d.
Levying distress	3	0
Man in possession, per day	2	6
Appraisal, whether by one broker or more, 6 <i>d.</i> in the pound on the value of the goods	—	—
Stamp, the lawful amount thereof	—	—
All expenses of advertisement, if any such	10	0
Catalogues, sale and commission, and delivery of goods, 1 <i>s.</i> in the pound on the net produce of the sale	—	—

This Act was extended by 7 & 8 Geo. 4, c. 17, to distresses for land tax, assessed taxes, poor rates, church rates, tithes, highway rates, sewer rates, or any other rates, taxes, impositions, or assessments whatsoever, where the sum demanded and due does not exceed 20*l.*

By 12 & 13 Vict. c. 14, s. 1, an Act to enable overseers of the poor and surveyors of highways to recover the costs of distraining for rates, it is provided:

Whereas provision is already made by law for the recovery of the sum or sums at which any person is rated or assessed to the relief of the poor or is rated or assessed in any rate for the highways, in England or Wales, by distress and sale of goods and chattels and in default of such distress by commitment to prison until the same shall be paid, but no provision is made for levying the costs and expenses incurred by the overseers of the poor or the surveyors of the highways in the recovery of the same respectively: Be it therefore enacted that it shall be lawful hereafter for all justices of the peace, if in their discretion they shall so think fit, in any warrant of distress they shall make and issue for the levying of any sum or sums to which any person or persons is or are now or may hereafter be rated or assessed in or by any rate or assessment for the relief of the poor or for the highways in England and Wales, or in or by any other rate or assessment which by law now or hereafter is or shall be directed to be enforced or recovered in the same manner as a poor rate, or in any warrant for the levying of any arrears of the same, to order that a sum such as they may deem reasonable for the costs and expenses which such overseers or surveyors or the persons applying for such warrant shall have incurred in obtaining the same shall also be levied of the goods and chattels of the person or persons against whom such warrant shall be granted, together with the reasonable charges of taking, keeping, and selling of the said distress.

Robson, K.C., Bodkin, and Bruce Williamson for the appellant. — There is no authority for making this charge, and it is illegal and excessive. The expenses in cases of distress for rent under

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204. were fixed by 57 Geo. 3, c. 93, and 7 & 8 Geo. 4, c. 17, merely extended that statute to distresses other than distresses for rent. The Act 12 & 13 Vict. c. 14, by sect. 1, only allows the justices to order such sum as they deem reasonable for the costs and expenses of the overseers, together with the reasonable charges of the taking, keeping, and selling of the distress. The earlier statutes are not repealed by the Act of 12 & 13 Vict. c. 14, and this statute does not permit the respondents to take any more or any higher costs and expenses than those provided for by 57 Geo. 3, c. 93. They referred to

Ex parte Arnison, 17 L. T. Rep. 480; L. Rep. 3 Ex. 56.

W. Stewart and Nolan for the respondents.—The warrant of distress here recites sect. 1 of 12 & 13 Vict. c. 14. The words, "the reasonable charges of the taking, keeping, and selling of the said distress," are not in any way cut down or limited by the Act of 57 Geo. 3, c. 93. If the earlier and later statute are so inconsistent that they cannot be read together, the earlier must be taken to be repealed *pro tanto*. No authority can be shown for the appellant's contention here. They referred to

Law of Distress Amendment Act 1888 (51 & 52 Vict. c. 21).

Under sect. 8 of that Act there is power to make rules, and there are two scales, one for distresses for rent over and one for the like distresses under 204.

Lord ALVERSTONE, C.J.—I am of opinion that the appeal fails. I think that we have here, for the purposes of this proceeding, to construe sect. 1 of 12 & 13 Vict. c. 14, and the other sections of that Act and the schedules therein referred to. The preamble of the Act says: "Whereas provision is already made by law for the recovery of the sum or sums at which any person is rated or assessed in any rate for the highways, in England or Wales, by distress or sale of his goods and chattels and in default of such distress by commitment to prison until the same shall be paid, but no provision is made for levying the costs and expenses incurred by the overseers of the poor or the surveyors of highways in the recovery of the same respectively." If it be a just criticism to say that that is not an accurate recital, because it ought merely to have referred to the costs of the issuing of the summons, I do not think, to my mind, it affects what the true construction of the enabling words must be. Of course the preamble may be looked at and ought to be looked at for the purpose of forming a guide to any construction which is doubtful, or to decide between two constructions which may be put upon the words. It seems to me, even if Mr. Robson is right, there is a clear enactment that "it shall be lawful hereafter for all justices of the peace, if in their discretion they shall so think fit, in any warrant of distress they shall make and issue for the levying of any sum or sums to which any person or persons is or are now or may hereafter be rated or assessed in or by any rate or assessment for the relief of the poor or for the highways in England or Wales, or in or by any other rate or assessment which by law now or hereafter is or shall be directed to be enforced or recovered in the same manner as a poor rate, or in any warrant for the levying of any arrears of the

same, to order that a sum such as they may deem reasonable for the costs and expenses which such overseers or surveyors or the persons applying for such warrant shall have incurred in obtaining the same shall also be levied of the goods and chattels of the person or persons against whom such warrant shall be granted." That deals with the particular point that Mr. Robson said had been left unprovided for by the existing enactments. Then the section goes on, "together with the reasonable charges of the taking, keeping, and selling of the said distress." When you look at the warrant, that warrant of distress again says, "together with the reasonable charges of taking, keeping, and selling the said distress," and if they—the rates—shall not be paid, then you do sell the said goods and chattels, rendering the overplus on demand, the reasonable charges of taking, keeping, and selling the said distress being first deducted. Mr. Robson says that the earlier statute—57 Geo. 3, c. 93—was still in force, and that it had been extended to a great many other rights. It extended to tithe, land tax, poor rate, church rate, tithes, highway rate, sewer rate, or any other rates and assessments whatsoever. Therefore it may be regarded as a general statute. Notwithstanding the existence of that Act being borne in mind, Mr. Robson suggests this statute means one of two things; it either means reasonable charges within the statutory maximum, or else it means the statutory charges. I think that it would require much clearer words than there are in this statute and much clearer expression of an indication that the old statutory maximum was to be applied to enable us to put that construction on the later Act. It seems to me you either must find words which said the charges are limited or are provided by law as now existing or charges not exceeding those that are already provided in respect of the levying of distress by virtue of those earlier statutes. I cannot help feeling that this is a special statute with regard to poor rates. It is a statute which is enacted in reference to poor rate, and it does not seem to me to be of necessity governed by the same considerations as those referred to when you are dealing with the overseers of the poor, who are to a certain extent public officers, public unpaid officers, and the persons who were considered by the earlier legislation with regard to the broker's charges. Mr. Stewart has properly admitted that the charges in this respect would be charges which would be in the same position as the broker's charges, but I can well imagine the Legislature in dealing with the poor rate meant to give the overseers, subject to the charges being reasonable, a protection against the costs and charges they had to pay. I am satisfied that this construction has been put upon the charges which have been allowed to be levied under a summons for poor rates, and I can find no trace, except the ingenious argument of Mr. Robson, of any authority which says, with regard to 12 & 13 Vict. c. 14, the maximum scale of 57 Geo. 3 was intended to apply. I think the language of the statute is too strong for that. I think the statute did mean to say that the overseers of the poor should be entitled to have their reasonable charges for levying and selling goods. The magistrates have found the charge of 14s. is a reasonable charge, and I think that that was in accordance with the statute enacting that the

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overseers should have their reasonable charges, and therefore I think this appeal should not be allowed.

KENNEDY, J.—On the whole, though not, I confess, without very great doubt, I think that the view my Lord has taken is the preferable one. I think where there is no direct reference in any shape or form in a later Act to an earlier Act, but you have directions or enactments in the later Act which seem, at any rate, to differ from those in the earlier Act, it is not very easy to say whether the proper inference is that the later Act has overruled the earlier Act and abolished it so far as its directions or enactments are concerned, or whether one ought not to find some way in which both statutes can be applied to a certain extent, the one merely being treated as modifying the other. The argument, which I confess seems to me an argument of considerable power, which Mr. Robson has used in this case is this: That while this last Act of 12 & 13 Vict. c. 14, provides that the magistrates may make an order for a distress which shall include the reasonable charges of taking, keeping, and selling the chattels, yet that ought to be read with an Act which has certainly never been specifically repealed, 57 Geo. 3, c. 93, and with a later Act, 7 & 8 Geo. 4, c. 17, which in cases of distress for poor rate, amongst other things, have enacted that those charges for taking, keeping, and selling shall not exceed a certain sum. It is suggested that the fair construction of the later Act is that the charges are to be reasonable, but not to exceed that which by those two Acts of George III. and George IV., which have been referred to have been thought by the Legislature to be sufficient. They are to be reasonable within those statutory limits, those limits being imposed by unrepealed Acts of Parliament. It is true that even the later of those Acts is now an old Act, and costs and charges will and must vary; but, on the other hand, it does seem to me that there is a good deal, at any rate, to be said in favour of the appellant's argument where Parliament passes a later Act without reference to an earlier Act, and that earlier Act is one which has been in force for a long time and therefore well known. It seems reasonable that one should try to construe the two consistently if it is possible. The question is, is it reasonable for us to do so in this case? That seems to me to be the whole matter. Another, it seems to me, still weightier argument was this: In regard to poor rate, it affects a number of poor people, very often people not of great means—people with regard to whom Parliament has, as long back as these earlier statutes show, given a protection in the form of a limitation of the costs. Apparently the procedure for questioning the reasonableness of the charges has disappeared, as far as the magistrates are concerned, if the view of the respondents is right. So far as I can see, and so far as the argument has called our attention to the sections, the right of a person who has unreasonable charges attempted to be forced upon him in the levying would be by bringing an action to recover money which had been obtained by a sort of duress—in other words, driving him to the courts instead of a speedier and cheaper method of going to the magistrate by such a summons as was taken out in the present case. I think, on the

whole, we ought to face the conclusion that the Legislature has done two things which are inconsistent. It may be said, on the other hand, how very easy, when the limitation in the latter Act is merely of a reasonable charge, to have said if you intended to retain the old and well-known maximum and the reasonable charges of taking, keeping, and selling shall be charges not exceeding those at present by law allowed. They have not said that. Therefore, on the whole, although I think there is a good deal to be said for the contention as regards the protection of those upon whom these distresses are made, which seems to me a serious matter, I think that the case is strong enough to make one say, if Parliament has chosen in the latter Act to use the words "reasonable charges" without reference to the past or the limitation, we must consider that to be the law now, and therefore inferentially the earlier sections, so far as poor rate is concerned, have been repealed.

CHANNELL, J.—I agree. I think the only question we have to consider is whether the words of the operative part of the statute 12 & 13 Vict. are inconsistent with the continued existence of a statutory limit of the charges of these distresses which had previously existed. It seems to me it is inconsistent with there being a limit of maximum of charges to be charged to say that a man is to have his reasonable costs. The present case shows it. Here are costs which do exceed that maximum limit, and which are found to be in point of fact reasonable. It seems to me, therefore, that the second statute is necessarily inconsistent, not with the continued existence of the other statute as a whole, but of the other statute as applicable to the poor rate which is the subject of the sale.

Appeal dismissed.

Solicitors: Lloyd George, Roberts, and Co., for Birkett, Ridley, and Francis, Ipswich; Salmon and Sons, Bury St. Edmunds.

Wednesday, March 2.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

REX v. JUDGE OF THE BIRMINGHAM COUNTY COURT AND ANOTHER; *Ex parte* ROGERS. (a)

County Courts—Jurisdiction—Specific performance—Sale of equity of redemption—Purchase money less than 500l.—Value of property exceeding 500l.—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 67, sub-s. 4.

Sect. 67, sub-sect. 4, of the County Courts Act 1888 gives the County Court jurisdiction in actions for specific performance of any agreement for the sale or purchase of any property where the purchase money does not exceed 500l.

Held, that under this sub-section the County Court has jurisdiction to hear an action for specific performance of an agreement for the sale of an equity of redemption in any property where the actual purchase money agreed to be paid for such equity of redemption does not exceed 500l., although the property itself may be of a value exceeding 500l., or may be subject to a charge exceeding 500l., the test of the jurisdiction in such

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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cases being, not the value of the property or the amount of the charge, but the actual amount of the purchase money to be paid.

RULE calling upon the judge of the Birmingham County Court and H. C. Humphreys, the defendant in a certain action in the County Court brought by one John Henry Rogers, to show cause why the judge should not proceed to hear and determine the matter of the action.

The action was one brought by John Henry Rogers, a chartered accountant in Birmingham, as trustee for the creditors of one Edward Clissold, against the defendant H. C. Humphreys, for specific performance of an agreement. The particulars of claim in the action set out that by an agreement made verbally at an interview on the 3rd Feb. 1903, the plaintiff, as trustee for the creditors of Edward Clissold, agreed to assign, and the defendant agreed to purchase, the interest of Edward Clissold in twelve leasehold houses erected in Newcombe-road, Handsworth, in the county of Stafford, numbered 231 to 253 (odd numbers), the agreed price being a sum sufficient to pay a composition of 3s. 6d. in the pound to the creditors of Edward Clissold, under and by virtue of a deed of assignment dated the 30th Jan. 1903, and the costs and expenses of the deed and the distribution of the composition.

The plaintiff claimed specific performance of the above agreement, and in the alternative damages, and in the further alternative the plaintiff claimed 19l. 10s. 3d., money had and received by the defendant to the use of the plaintiff, the particulars of this latter sum being rents of the houses from the 28th March to the 6th July 1903, 20l. 8s. 6d., less credit for rates 18s. 3d.—19l. 10s. 3d.

The plaintiff in his affidavit in support of the rule set out the following facts:—

On the 5th Nov. last the action came on for hearing before His Honour Judge Whiteborne, in Birmingham County Court.

The purchase money payable to the plaintiff under the agreement (specific performance of which was claimed in the particulars of claim) was admitted by both parties to amount to 76l. 1s.

Counsel for the defendant took the preliminary objection that the action was outside the jurisdiction of the County Court, on the ground that, although the purchase money payable to the plaintiff under the agreement sought to be enforced was only 76l. 1s., yet as the property sold for such sum was subject to certain equitable charges given by Clissold in favour of one Mr. Newcombe and another to the extent of about 1696l., this sum of 1696l. should be added to the purchase money for the purpose of deciding the question of jurisdiction under sect. 67, sub-sect. 4, of the County Courts Act 1888, and that if this were done the limit of 500l. prescribed by that section would be exceeded.

The plaintiff's counsel, in reply to that contention, opened so much of his case as was necessary to show the circumstances of the dispute so far as they touched the question of jurisdiction, and admitted the facts stated by the defendant's counsel—namely, that the purchase money payable to and recoverable by the plaintiff was 76l. 1s., and that the property agreed to be sold was subject to the equitable charge for 1696l.;

but he contended that, inasmuch as the amount of the purchase money which would pass from the purchaser to the vendor was only 76l. 1s., the case was clearly within the jurisdiction of the court.

The agreement between the parties was verbal, and the plaintiff relied on the part performance of the contract by the parties as taking the case out of the operation of sect. 4 of the Statute of Frauds. The judge did not deal with that or with the other points in the case by reason of the above preliminary objection and his decision thereon. He gave judgment on the preliminary objection on the following day, and decided that he was bound in law to take into consideration not only the actual purchase money which would have passed between the parties, but also the charges subject to which the property was to be sold, even though neither the plaintiff nor the defendant would be liable therefor, and that he therefore held that the case was beyond his jurisdiction and refused to hear it.

The learned judge afterwards stated that he also decided that the proper course for him to adopt was to order that the action be transferred to the Chancery Division of the High Court pursuant to sect. 68 of the County Courts Act 1888, which he accordingly did, notwithstanding the protest of the plaintiff's counsel; and he also refused to hear the plaintiff's alternative claim for money had and received, and ordered that the whole action should be transferred as above described.

The County Courts Act 1888 (51 & 52 Vict. c. 43) provides:

Sect. 67. The court shall have and exercise all the powers and authority of the high court in the actions or matters hereinafter mentioned; (that is to say)

(4) For specific performance of or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of any property, where in the case of a sale or purchase the purchase money, or in the case of a lease the value of the property, shall not exceed the sum of five hundred pounds.

Henry Sutton, for the County Court judge showed cause against the rule.—The learned judge was right in refusing to hear the action. The question arises upon the construction of sect. 67, sub-sect. 4, of the County Courts Act 1888, and the ground upon which the judge refused to hear the action was that he came to the conclusion that on the facts the limit of the jurisdiction of the County Court (namely, 500l.) had been exceeded. The contract was a contract for the sale of the equity of redemption only, and the judge thought that, although the equity of redemption was only a small sum (76l.), yet that he had no jurisdiction because the whole value of the property far exceeded the limit of 500l. The word "purchase money" in sub-sect. 4, when used in a case like the present, is used in a technical sense, and does not mean the actual amount fixed or agreed upon for the sale of the equity of redemption, and does not mean the amount of the money appearing on the face of the contract; but the "purchase money" means the "purchase money" in the sense in which it is used in the Stamp Acts. This jurisdiction in actions for specific performance was originally given to County Courts by the County Courts Equitable Jurisdiction Act 1865 (28 & 29 Vict. c. 99), a. 1, and was extended

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by the County Courts Acts Amendment Act 1867 (30 & 31 Vict. c. 142), s. 9; and at the time this jurisdiction was originally given the Stamp Act in force was the Stamp Act 1853 (16 & 17 Vict. c. 59), and by sect. 10 of that Act, where any lands or other property were sold and conveyed subject to any mortgage or other debt, the mortgage money was to be deemed to be part of the "purchase or consideration money," whether agreed to be paid by the purchaser or not. So that at that time, when property was sold subject to a mortgage, the mortgage debt had to be added to the purchase money actually paid, to arrive at the "purchase money" upon which the stamp duty had to be paid. The wording of the Stamp Act on this point has been altered since that time, but it has been decided that when property is sold subject to a mortgage debt the *ad valorem* stamp duty is payable on the money actually paid, plus the mortgage debt. The corresponding Stamp Act in force when the County Courts Act 1888 was passed was the Stamp Act 1870 (33 and 34 Vict. c. 97), and sect. 73 of that Act provided: "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty." Those were the considerations upon which the judge relied in deciding as he did. The consideration for this contract would be, not the mere 76*l.* which was actually paid over, but that sum added to the amount of the charge upon the property, and that sum would far exceed the 500*l.* and therefore would be far beyond the County Court jurisdiction. That total sum would be the sum in respect of which the stamp duty would be payable upon the conveyance. All the questions of title which could be raised in an action for specific performance of an agreement for the sale of the whole property could be raised on a claim for specific performance of an agreement for the sale of the equity of redemption; and if an owner had a doubtful title he could mortgage the property for nearly its whole value, leaving a small sum in respect of the equity of redemption, and then, if the contention on the other side is right, by selling the equity of redemption for a small sum he could give the County Court jurisdiction, although the property itself might be worth a very large sum. The object of the statute was to confer upon the inferior court only a very limited jurisdiction in these matters, and therefore we ought to give such a meaning to the words "purchase money" as will carry out that object.

McCardie in support of the rule.—The County Court judge had jurisdiction to hear the case. All the risks that have been referred to are safeguarded by sect. 126 of the Act, because those who framed the Act assumed that cases of importance of this kind might arise, and sect. 126 was inserted to meet the difficulty. That section gives the High Court power to remove into the High Court any action or matter in the County Court if it is deemed desirable that the same shall be tried in the High Court. That power of

removal by *certiorari* meets any difficulties of this kind that may arise. In sect. 67, sub-sect. 4, we find the distinction taken between the case of a sale of property and a lease of property, and whereas in the case of a lease of property what is taken as the test is "the value of the property," which must not exceed 500*l.*, in the case of a sale of the property what is taken as the test is, not the value of the property, but "the purchase money," and so long as the "purchase money" in the case of a sale does not exceed 500*l.*, the County Court is given jurisdiction. So that in the case of a sale and purchase the Act assumes that the parties themselves have fixed that which is to give the County Court jurisdiction. The word "purchase money" is to be taken in the ordinary sense of the term as the sum which is actually given or agreed to be given for the purchase. We have thus a clear test laid down as to that which is to give the County Court judge jurisdiction; and if any difficulty arises as to the amount or value of the property involved, there is always the remedy of removal by *certiorari* under sect. 126. [Lord ALVERSTONE, C.J.—In effect, in such a case as the present, the County Court judge might be trying the title to property worth, say, 10,000*l.*] Yes, that is conceded, and the remedy for that is by *certiorari* under sect. 126. The sub-section itself lays down the test of the actual purchase money, and if we depart from that all kinds of difficulties arise, and in the present case the actual purchase money was 76*l.* The particulars of claim set out the agreement, specific performance of which is claimed, and in any event the judge was bound to try that part of the claim which was within his jurisdiction. He referred to sects. 57, 60, and 68, under which latter section the judge has power, during the hearing of the action, to transfer it to the Chancery Division, if it is made to appear that it exceeds the limit.

Lord ALVERSTONE, C.J.—I can well understand the learned County Court judge raising the point that has been raised in this case. I think the case does call attention to what I will not call a defect, because it may very likely be right as to jurisdiction, but to a point which may require further consideration—namely, the question whether or not it was intended or is desirable that the County Court judge should have jurisdiction in a case where the subject of the contract, the purchase money of an equity of redemption, is below the 500*l.*, but the value of the property which is actually being transferred subject to a charge may be very much larger. It seems to me that in this question of undoubted difficulty the only safe guide and rule that we can follow is to give the best construction we can to the language of the section, by giving that language its natural construction, and that we ought not to put an artificial construction upon the section, unless we see that the consequences are such that we are driven to the conclusion that the Legislature has used the words in a limited sense. As has been pointed out by the learned counsel on each side, the section is a general section relating to all classes of property, and, including chattels as well as real property; therefore it is not specially directed to the cases in which the purchase money of land only would be the subject of consideration. The language of the sub-section is: "For specific performance of . . . any agreement

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for the sale, purchase, or lease of any property, where in the case of a sale or purchase the purchase money, or in the case of a lease the value of the property, shall not exceed the sum of five hundred pounds." It seems to me that as the section contemplates all kinds of property being sold, land, chattels, interests of all kinds, shares, *choses in action*, and so on, we must assume *prima facie* that the words "purchase money" refer to the price, and mean the purchase money for that which was the subject of the purchase and sale; and to a certain extent that view is fortified, though I do not think it is very materially fortified, by the following words, "or in the case of a lease the value of the property," being an especial exception where the Legislature could not ascertain, so to speak, any standard of purchase money. Under those circumstances, though it may be that indirectly the County Court has been given *prima facie* (subject, of course, to the power of removal under sect. 126) a jurisdiction in cases in which the questions will really affect property of a much larger value than 500*l.*, I do think it would not be safe to put an artificial construction on the words "purchase money," and that we must read those words as referring to that which was the actual purchase money of the subject matter of the contract sought to be specifically performed, or to be reformed or cancelled. The facts of this case show that what was being sold was the equity of redemption for 76*l.*, and that therefore the learned County Court judge had *prima facie* jurisdiction; and I think it is not immaterial, as has been pointed out, that there are powers of removal under sect. 126, which can be exercised if it should turn out that the interest in much more valuable property is at stake. I quite follow the line of argument which impressed the County Court judge, which counsel has very clearly brought before us, that for a long period of years, when property is sold subject to any charge, for the purposes of the Stamp Act and of the stamp duty the consideration or purchase money has been taken to be the total amount of the value of the property, including the charge. I do not, however, think that the statutes dealing with the stamp duty can be said to be *in pari materia* with the County Courts Act; but whether they be so or not, if it was intended to draw the distinction, I think it should have been done in clearer language than is used in this section, and I feel constrained to give the natural meaning to the words, "the purchase money," in construing the words, "where in the case of a sale or purchase the purchase money . . . shall not exceed the sum of five hundred pounds," and to say that the County Court judge had jurisdiction. I can quite understand his entertaining a doubt upon the matter, and I think we ought to give him assistance by saying that we are of opinion that in such a case as this the jurisdiction exists and ought to be exercised unless the case has been removed by *certiorari*. If it is thought that the result of our judgment is to give the County Courts a jurisdiction which they ought not to have, then the Act must be altered by amending it so as to make this matter clearer than the language of this present section makes it.

WILLS, J.—I am of the same opinion. It appears to me that there is nothing to guide us

as to what the meaning of the Legislature is except the words they have used in this specific sub-section, because to my mind the Stamp Acts do not throw any light upon the present question. The Stamp Acts are Revenue Acts, and they are always, or generally, framed with a view to getting as much out of the subject as can possibly be got, and therefore it is very natural that they should use language which will cover the whole amount as the amount upon which duty is to be charged—namely, the whole value of property, including that sum by which its real value is diminished, which is the charge upon it. Therefore I do not feel that the Stamp Acts give us any assistance whatever in dealing with a case like the present. That being so, there is only one safe rule to apply in construing an Act of Parliament where we have nothing but the bare words to guide us, and that is to give those words their natural meaning. "Property" is a very large word, and certainly would include an equity of redemption, and I think if anybody were asked with respect to this transaction what property was being sold his answer would be the equity of redemption. And, moreover, that is made rather more clear by the use of the words "the purchase money." That means the purchase money for the property sold, and the reference to the purchase money makes the sum which has been agreed between the parties to be given the standard of what the property is worth—the property which is the subject of sale; and in that way it throws a reflected light upon the interpretation which ought to be given to "property." In my opinion, therefore, this really was a contract for the sale of the equity of redemption for 76*l.*, and the action is therefore within the jurisdiction of the County Court judge.

KENNEDY, J.—I am of the same opinion. It seems to me very much as my brother Wills has put it, that the proper rule in this case is, as far as we can, to follow the natural and fair meaning of the words in their position as used in the sentence. Now, if anybody had said in this case "What money did you purchase the equity of redemption for?" he would have been told "76*l.*," and the section says that if the purchase money does not exceed a certain limit the County Court judge has jurisdiction. In this case, apparently, that limit was not reached.

Rule absolute.

Solicitors for the applicant, *Field, Roscoe, and Co.*, for *Sherwin and Rogers*, Birmingham.

Solicitor for the County Court judge in opposition to rule, *Solicitor to the Treasury*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Wednesday, Feb. 3.

(Before Sir F. JEUNE, President, and BARNES, J.)

THE ARNE. (a)

Bill of lading—Discharge of cargo—Goods to be taken "as fast as steamer can deliver"—

Deficiency of railway waggons—Option of ship-owner to discharge in other ways not exercised.

Goods were shipped under a bill of lading which

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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provided: "The goods to be taken from the ship by the consignees (at their expense) immediately after arrival, and as fast as steamer can deliver or the same will be transhipped into lighters, or landed, or warehoused at the expense and risk of the proprietors of such goods." On arrival of the vessel the consignees neither took delivery nor did the master exercise his option of landing or lightering the goods.

In an action by the charterers against the consignees for damages for detention of the vessel: Held, that the plaintiffs were not deprived of their remedy because the master had not exercised his option as to landing or lightering the goods, and were entitled to recover.

Held, further, that the plaintiffs having made out a *prima facie* case of delay in taking delivery by the defendants, the onus was upon the defendants to show that the delay arose from no default on their part, and was due to the want of appliances in the port, and that they had failed to do so.

APPEAL by the plaintiffs from a judgment of the judge of the Swansea County Court in favour of the defendants.

The plaintiffs were Gebruder van Uden, of Rotterdam, the time charterers, and J. Roebe, the master of the steamship *Arne*, and claimed 51*l.* 5*s.* damages for detention of the steamship.

The defendants were W. Gilbertson and Co. Limited, the indorsees of bills of lading and consignees of the cargo.

The cargo was shipped in two parcels. The first parcel consisted of about 1078 tons of pig iron and 28 tons of old rails, and the second of about 910 tons of pig iron. It was shipped on board the *Arne* at Antwerp for Swansea by the same shipper in each case.

By the bills of lading, which were dated the 6th April and the 28th April 1903 respectively, it was stipulated:

The goods to be taken from the ship by the consignees (at their expense) immediately after arrival and as fast as steamer can deliver, or the same will be transhipped into lighters, or landed, or warehoused at the expense and risk of the proprietors of such goods. All goods consigned to "order" will be delivered upon the quay, or into lighters, or warehoused at the option of the agents of the steamer, such delivery to be for account and risk of owners of the goods.

The discharge took place out of the ship direct into railway trucks.

According to the admission of facts the respondents commenced to take delivery of the first consignment of cargo at 9 a.m. on Tuesday the 14th April, but did not complete taking delivery until 12 30 p.m. on Saturday, the 18th April, making altogether 99½ hours. The respondents commenced taking delivery of the second consignment of cargo at 7.45 a.m. on Monday, the 4th May, and completed taking delivery at 10 p.m. on Thursday, the 7th May, making 86½ hours in all.

The appellants contended that a reasonable time for taking delivery of the first consignment of cargo expired at noon on Thursday, the 16th April, and of the second consignment at noon on Wednesday, the 6th May. The appellants claimed two days at 15*l.* per day making 30*l.* as damages for the first voyage, and one day ten hours for the second voyage, making 21*l.* 5*s.*—51*l.* 5*s.* in all.

On the hearing of the appeal these damages were reduced to 41*l.*

The appellants alleged that their vessel was capable of delivering about 500 tons a day, and that the cause of the delay was that the defendants failed to see that a sufficient number of railway waggons were provided.

The respondents alleged that a reasonable amount to discharge per day based on averages in the case of previous steamers would be from 250 to 300 tons.

The learned County Court judge gave judgment for the defendants. His judgment was as follows:

I consider that the defendants are entitled to judgment on the construction of the clause in the bill of lading.

The plaintiffs appealed.

Meager for the appellants.—It is submitted the respondents did not on the arrival of either cargo take delivery within a reasonable time. The clause enabling the shipowners to land the goods is discretionary; it does not bind them to do so. It is inserted for their own protection, and their omission to do so is no answer to a claim for detention. As Lindley, L.J. put it in *Hick v. Rodocanachi* (65 L. T. Rep. at p. 303; 7 Asp. Mar. Law Cas. at p. 100; (1891) 2 Q. B. at p. 632): "These clauses are obviously inserted in the interest and for the benefit of the shipowner, and they give him an additional remedy for the recovery of what is due to him, and not a remedy in substitution for any which he would have apart from these clauses. The master is under no obligation to land the goods and assert his lien instead of allowing the consignee to land them, and leaving him to be sued for the payments he ought to make. The master is empowered to do this, but he is under no obligation to exercise the power. He is the person to decide whether he will exercise it or not." The ship could have delivered 500 tons of cargo a day, and the consignees ought to have provided sufficient trucks. He also referred to the case of

Modesto Piniro and Co. v. Dupré, 86 L. T. Rep. 560; 9 Asp. Mar. Law Cas. 297.

Balloch, for the respondents, *contra*.—If there was no unreasonable delay the shipowner has no cause of complaint, and if he had one he could by exercising the power given him by the bill of lading compel the consignees to take delivery as there provided. The ordinary course of delivery is into railway trucks, and the evidence goes to show that under this method only 200 to 300 tons of cargo could be received per day. The supply of trucks is dependant on the railway company, over whom the respondents have no efficient control. The words "as fast as steamer can deliver" only mean as fast as the facilities of the port where delivery is taken will allow of:

Wyllie v. Harrison, 13 Sess. Ca. (4th), 92.

In that case the vessel had been chartered to carry iron ore "to Glasgow General Terminus or Queen's Dock, in charterer's option," and then "deliver as customary." It was also provided by the charter-party, "cargo to be discharged as fast as steamer can deliver after being berthed." At the general terminus the customary mode of discharge was into trucks, and the only trucks permitted were those of the Caledonian and North

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British Railway Companies. The Court of Session held the charterers were not responsible for the delay caused by want of trucks. As the Lord Justice-Clerk (Lord Moncreiff) said: "The place of delivery may be a port which is subject to regulations which are not within the powers of the charterer, and which must be complied with before delivery can be given at all. Where these regulations, which are incorporated into the charter-party, provide that goods shall not be laid down on the quay, but put into trucks, I think the whole obligation of delivery is subject to the possible contingency of trucks being available." This decision was approved by the Court of Appeal in *Good v. Isaacs* (67 L. T. Rep. 450; 7 Asp. Mar. Law Cas. 212; (1892) 2 Q. B. 555). There a vessel with a cargo of fruit went into a fruit berth, but the cranes which had to be used for the discharge were under the control of Government officials, who refused to allow them to be used at once. It was held that the charterers were not liable for the delay. See also

Hulthen v. Stewart, 88 L. T. Rep. 702; 9 Asp. Mar. Law Cas. 403; (1903) A. C. 389.

In *The Jaederen* (68 L. T. Rep. 266; 7 Asp. Mar. Law Cas. 260; (1892) P. 351) the vessel was "to be discharged as fast as she can deliver." The custom of the port was then imported into the contract, and the defendants succeeded because the plaintiffs failed to make out any breach of the contract to discharge as fast as the ship could deliver. In *Lyle Shipping Company v. Cardiff Corporation* (83 L. T. Rep. 329; 9 Asp. Mar. Law Cas. 128; (1902) 2 Q. B. 638) it was held that as the charterers had done their best to obtain sufficient waggons for the railway company they were not liable. Smith, L.J. expressed the opinion (83 L. T. Rep., at p. 333; 9 Asp. Mar. Law Cas., at p. 133; (1900) 2 Q. B., at p. 643) that it did not matter whether the words "as customary" were in the contract or not, "for if not they would be implied." He also referred to

Postlethwaite v. Freeland, 42 L. T. Rep. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599;

Carver on Carriage by Sea, 3rd edit., sect. 619 (a).

Meager in reply.—It is really a question of fact whether delivery was taken within a reasonable time or not under the circumstances:

Metcalfe v. Thompson, 18 Times L. Rep. 706.

The PRESIDENT.—I thought at first that we had not the materials before us for deciding the whole of the case; but, on considering the matter carefully, it seems to me that we are in a position to deal with it as it stands. I have no doubt that the learned judge's decision was based on the view that on the true construction of the bill of lading the shipowners had their remedy, and their sole remedy, in the power to land the goods on the quay or in lighters if they were not taken away by the consignees. In addition to the words "I consider that the defendants are entitled to judgment on the construction of the clause in the bill of lading," the learned judge says that counsel for the plaintiffs contends that that condition was optional, showing that what he based his decision on was, not that there was no right of action in the case, but that the sole remedy for a breach of the condition as to taking delivery was in the terms provided by the bill of lading. I am unable to agree with the learned

judge that that view is correct. It seems to me clear that the words in the bill of lading do not take away the ordinary right of bringing an action if the terms of the bill of lading are departed from. It seems to me that it would be unreasonable to say that the landing of these goods was the sole remedy. Supposing the sole cause of the non-delivery was that the trucks were not ready, it would be hard to throw upon the master the responsibility of saying that the delay was so great that he could not allow it to continue; and, on the other hand, if the trucks could not be supplied by the railway company, I am by no means sure that the hardship would not be on the consignees of the goods. It would be far more reasonable to say that the ordinary remedy of the shipowner remained the same, but that he had an alternative option which he could have exercised. In this case he does not seem to have exercised it, and I do not think the learned judge was right in holding that that debarred him from bringing an action to enforce his ordinary rights under the bill of lading. Then comes the question whether or not we are able under the circumstances to enter judgment for the plaintiffs. I think we are, because what is said now is that judgment ought not to be entered for the plaintiffs because there is some defence which the defendants either have set up or might have set up. I do not know that they might not possibly have raised in the court below a defence other than that which they have raised; but in the court below they did raise the defence as to the non-supply of trucks by the railway company, and clearly also raised a further defence—namely, that they were justified in taking the average quantity of goods discharged per day of similar cargoes as a test of their own obligations under the bill of lading—and I think it is too late for them now to come forward and say that a totally different defence might have been raised. It appears to me clear that no such defence ought to be successful. The plaintiffs showed, without contradiction, what the capacity of their steamer was, and then it was shown further that the delay arose from the dearth of waggons. That, I think, made out a *prima facie* case in favour of the plaintiffs. It may well be that the obligation of the consignee was to take delivery as fast as the steamer could deliver, having regard to the mode of delivery and the state of the appliances with which delivery could be taken; but then if their answer was that they had done all they could, and that the delay arose from no default on their part, and that they did everything on their part, then they ought to have shown that. It was upon them to do so. But the moment the plaintiffs showed that but for the want of waggons they could have delivered at a certain rate, then, if the defendants could have shown that by no fault of theirs, but by the fault of other people, such as the want of railway trucks, the delay was caused, it would have been a different matter; but they did not attempt to show that. I do not agree that the question of average quantity was material here, though, in taking into consideration what the steamer could do, you have to consider the actual state of things—the appliances of the port, and the mode of delivery; still, that does not relieve the defendants from their liability to show that they have done all they could, and that it

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was not their fault. A *prima facie* case is made out against them, and there is no answer either set up, or which, to my mind, can be set up, to meet the case of the plaintiffs. In these circumstances I am prepared to give judgment for the plaintiffs. The figures work out at 41l. as the amount, on the plaintiffs' evidence, which they are entitled to recover. I think, therefore, the proper course will be to reverse the judgment of the court below, and give judgment for the plaintiffs.

BARNES, J.—I agree with the learned President as to the construction of the bill of lading, and also, on the facts, I think with him that the plaintiffs made a *prima facie* case of non-acceptance or non-taking of delivery from the ship by the consignees, immediately after arrival, as fast as steamer can deliver, whether the words "as customary" are implied or omitted. They made a *prima facie* case that they were ready to deliver, and to deliver easily at a rate which they say could have been exceeded. No answer is made to that by the defendants upon the facts. No explanation is given, and there is nothing to show that they could not have discharged the ship as fast as customary, assuming those words to be inserted in the bill of lading. All that they have done is to attempt to set up a case of delivery of average quantities of similar cargoes, the contracts respecting which are not dealt with in the evidence before us, and there is an attempt to make out a case of a fair and reasonable amount. They do not seem to have answered the *prima facie* case made out by the plaintiffs, and, therefore, I agree that there should be judgment for the plaintiffs.

Solicitors for the appellants, *Spence, Chapman, and Co.*, agents for *John R. Richards, Swansea*.

Solicitors for the respondents, *Botterell and Roche*, agents for *William Cox, Swansea*.

Feb. 29, March 1, 2, 4, 8, and 15.

(Before BARNES, J. and TRINITY MASTERS.)

THE MERCEDES DE LARRINAGA. (a)

Collision—Compulsory pilotage—Port of Liverpool—Vessel proceeding through the port to Manchester—8 Anne, c. 8—Mersey Dock Acts Consolidation Acts 1858 and 1899 (21 & 22 Vict. c. 92 and 62 & 63 Vict. c. 172)—Upper Mersey Navigation Act 1876 (39 & 40 Vict. c. 104) ss. 4, 51—Manchester Ship Canal Act 1885 (48 & 49 Vict. c. 188)—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), ss. 605, 633.

Pilotage is compulsory on a vessel inward bound from the sea through the port of Liverpool to Manchester until she enters the Ship Canal at Eastham.

Sect. 128 of the Mersey Dock Acts Consolidation Act 1858 requires that "the pilot in charge of any inward bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool."

The fact that a vessel anchors for the purpose of waiting for the tide does not put an end to the compulsory services of the pilot.

(a; Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

Seamble, pilotage is also compulsory on vessels going out from Eastham through the port of Liverpool to the sea.

ACTION for damage by collision brought by the owners of the Swedish steamship *Bifrost* against the owners of the steamship *Mercedes de Larrinaga*.

The *Bifrost* was a steamship of 2122 tons gross register, and at the time of the collision was on a voyage from Skutskar to Manchester with a general cargo on board, and manned by a crew of twenty-five hands all told. The *Mercedes de Larrinaga* was a steamship of 4154 tons gross register, and was on a voyage from Galveston to Manchester with a cargo of cotton, and manned by a crew of thirty-four hands all told. While on her way up the Mersey she stopped and anchored in order to wait for the tide before entering the Eastham Docks.

The collision occurred in the Eastham Channel, river Mersey, near the No. 4 buoy. Both vessels at the time were in charge of pilots.

Barnes, J. came to the conclusion on the facts that the collision was caused by the negligent navigation of the *Mercedes de Larrinaga*, and held that the fault was that of the pilot alone.

The defendants alleged that the pilot was compulsorily in charge at the time, and that they were not therefore liable for the collision.

The material sections of the various Acts of Parliament dealing with the question are as follows:

By sect. 3 of 8 Anne, c. 8—an Act for making a convenient dock or basin at Liverpoole for the security of all ships trading to and from the said port of Liverpoole—the limits of the port are defined as:

The limits and extent whereof are as far as a certain place in Hoyle-Lake called the Redstones, and from thence all over the river Mersey to Warrington and Frodsham Bridges.

Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. 92):

Sect. 118. The board shall have the whole and sole regulation and management of pilots and of pilot boats, and of the pilotage annuity fund, and one of the committees to be appointed by them under or by virtue of the powers vested in them by the Mersey Docks and Harbour Act 1857, and of this Act, shall consist of not less than twelve persons, who shall be called the pilotage committee.

Sect. 121. The board may examine any person, being of the age of eighteen years and upwards, who shall have served as an apprentice in any of the Liverpool pilot boats for not less than three years . . . and every such apprentice or other person who upon any such examination shall be found to be qualified to act as a pilot, and shall be approved of by the board, shall receive a licence in writing, signed by the secretary of the board, certifying that he is duly qualified to act as a pilot for the port of Liverpool.

Sect. 123 provides for a penalty on persons acting as pilots without a licence.

Sect. 124 provides that pilots misbehaving themselves are to have their licences recalled.

Sect. 125. If any pilot, after being personally required, or after a proper signal shall be made by the master of any inward bound vessel, shall refuse to take the charge of such vessel . . . or shall without reasonable cause refuse to afford any extraordinary assistance required by the master of any vessel in distress from the boat of such pilot or the crew thereof, such pilot

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shall for every such offence be liable to a penalty of not exceeding ten pounds, and may, at the discretion of the board, be deprived of his licence.

Sect. 127. Every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot such vessel, if sailing out of the port of Liverpool, through the Queen's Channel, so far to the westward as the buoy commonly called or known by the name of the Formby North-west Buoy, or Fairway Buoy of the Queen's Channel; and, if sailing through the Rock Channel, pilot the same so far to the westward as the north-west buoy of Hoyle; and any pilot who shall in any case refuse to pilot such vessel to such distances as aforesaid shall forfeit his right to receive any sum of money for piloting such vessel, and may also at the discretion of the board be deprived of his licence.

Sect. 128. The pilot in charge of any inward bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool, whether belonging to the board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the river Mersey, and before going into dock, in which case he shall be entitled to receive five shillings per day for such attendance.

Sect. 130. In case the master of an inward bound vessel, other than a coasting vessel in ballast or under the burthen of one hundred tons, shall refuse to take on board or to employ a pilot, such pilot having offered his services for that purpose, such master shall pay to such pilot, or if more than one then to the first of such pilots who shall have offered his services, the full pilotage rates which would have been payable to him if he had actually piloted such vessel into the port of Liverpool.

Sect. 133. The board may from time to time determine, vary, and alter and fix rates of pilotage to be paid to pilots for piloting vessels, such rates to be according to the draught of water of such vessels, and to be within the limits following—that is to say, . . .

Sect. 138. If the master of any vessel shall require the attendance of a pilot on board any vessel during her riding at anchor, or being at Hoylake, or in the river Mersey, the pilot so employed shall be paid for every day or portion of a day he shall so attend the sum of five shillings and no more; provided that the pilot who shall have the charge of any vessel shall be paid for every day of his attendance whilst in the river; but no such charge shall be made for the day on which such vessel, being outward bound, shall leave the river Mersey to commence her voyage, or being inward bound shall enter the river Mersey.

Mersey Docks (Pilotage, &c.) Act 1899 (62 & 63 Vict. c. 172).

Sect. 3. Where a vessel outward bound from the port of Liverpool calls at any stage in the river Mersey to the northward of an imaginary straight line drawn from the Dingle Point on the Lancashire shore of the Mersey to the New Ferry Slip on the Cheshire shore or anchors or moors in the river to the northward of such line . . . the duties of the pilot shall extend to and include the taking her to and from and attending her at every such stage or mooring.

Sect. 4. The duties of a pilot in charge of any vessel inward bound shall extend to and include the taking her to and from and attending her to any stage, anchorage, or mooring in the river Mersey to the northward of the imaginary line hereinbefore mentioned to which she may go for the purpose of discharging any passengers, crew, animals, or cargo, or while waiting for tide or weather, or otherwise for any purpose incidental to the voyage before entering any wet dock, and the obligation of the master to employ a pilot when inward bound shall extend to and include an obligation to employ a pilot to perform the duties above mentioned.

Sect. 5. When a vessel is neither inward bound nor outward bound the master shall be obliged to employ a pilot (a) For her navigation or movement. Provided, further, that this section shall not apply to any vessel when passing to or from any place lying to the northward of the said imaginary line from or to (i.) Garston Weston Point or Ellesmere Port; (ii.) any of the Manchester Ship Canal Company's docks at Runcoorn; (iii.) any dock, quay, or wharf lying to the southward of the said imaginary line and being within the jurisdiction of the Upper Mersey Commissioners.

Schedule.—Pilotage rates.—(2) In the case of vessels referred to in the section of this Act of which the marginal note is "Pilots to be employed when moving vessel in the river," for each time a vessel is navigated or moved in the river Mersey northward of the imaginary line hereinbefore mentioned, a sum not exceeding . . . 2s.

Upper Mersey Navigation Act 1876 (39 & 40 Vict. c. 104):

Sect. 4. This Act shall apply to that part of the river Mersey lying between an imaginary straight line drawn across that river from the Eastham Ferry Slip to a point on the north-east bank of that river distant twenty chains measured along that bank in a south-easterly direction from the lighthouse at Garston, and another imaginary straight line drawn across the river at a place called Bank Quay in Warrington in the county of Lancaster, and which part of the river Mersey is in this Act referred to as the Upper Mersey.

Sect. 51. Saving always and reserving to the Mersey Dock and Harbour Board . . . all their several and respective rights and interests, in as full and ample a manner as they or any of them could or might have held or enjoyed the same if this Act had not been passed, except so far as by this Act is declared.

Manchester Ship Canal Act 1885 (48 & 49 Vict. c. 188):

Sect. 3. From and after the completion and opening for traffic of the canal by this Act authorised the said canal and so much of the navigable waters of the rivers Mersey and Irwell as lie between Hunt's Bank in the township and parish of Manchester and the limit of the port of Liverpool at Warrington, and all channels, canals, cuts, docks, and works of the company within those limits shall be and are hereby constituted the harbour and port of Manchester, and the company shall be the harbour authority of that harbour and port.

Sect. 211. Nothing in this Act shall take away, alter, or prejudicially affect any power, jurisdiction, or authority of the Mersey Docks and Harbour Board.

Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 605 (1). The master and owner of any ship passing through any pilotage district in the United Kingdom on a voyage between two places both situate out of that district shall be exempted from any obligation to employ a pilot in that district, or to pay pilotage rates when not employing a pilot within that district. (2) The exemption under this section shall not apply to ships loading or discharging at any place situate within the district or at any place situate above the district on the same river or its tributaries.

Sect. 633. An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law.

The following is the "Notice to Pilots" issued by the Mersey Docks and Harbour Board:

Piloting of vessels inward bound.—The pilots are hereby reminded that it is the duty of the pilot in charge of any inward bound vessel to pilot her into

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some one of the wet docks within the port, whether belonging to the board or not, without making any additional fee for so doing. Note.—Wet docks within the port include (*inter alia*) the docks at Garston and the locks to the Ship Canal at Eastham. If, before pilotage is completed, a master wishes to supersede the pilot, the pilot must warn the master that he and any unqualified person he may intend to employ will be committing a pilotage offence, and the pilot must also distinctly offer to complete his pilotage services. If the master still persists, the pilot must then take such course as he may deem best, and report the circumstances at the first possible opportunity.—By order, (Signed) MILES K. BURTON, General Manager and Secretary, Dock Office, Liverpool, July 22, 1902.

Evidence was called from which it appeared that the river Irwell, which enters the canal at Woden-street Bridge, is absorbed into the river Mersey at Mersey Weir. The Manchester Docks are on a portion of the river which has availed itself of the bed of the Irwell, and the docks are entirely supplied by water from that river.

Aspinall, K.C. and *Noad* for the plaintiffs.—It is submitted that the port of Manchester, as it is connected with the port of Liverpool by a canal, is not situated "on the same river or its tributaries" within the meaning of sect. 605 (2) of the Merchant Shipping Act 1894. The case is not covered by the provisions of the Mersey Dock Acts Consolidation Act 1858, because that Act only deals with vessels inward bound to or outward bound from the port of Liverpool. The terminus must be the port of Liverpool, and beyond that the Mersey Docks and Harbour Board have no power to impose terms. If the terms "outward bound" and "inward bound" were given their unfettered meaning they would include vessels bound to Manchester and far beyond the limits of the port of Liverpool. The intention of the Act of 1858 was to deal with the class of larger vessel which did not, and could not at the time the Act was passed, go beyond Liverpool. The sections form a complete code based on the requirements of the port of Liverpool, and it is submitted none of the provisions apply when the port is not used for business purposes. As soon as the *Mercedes de Larrinaga* came to anchor the duties of the pilot were at an end:

The Servia and Carinthia, 78 L. T. Rep. 54; 8 Asp. Mar. Law Cas. 353; (1898) P. 36.

The *Mercedes de Larrinaga* anchored when she was to the northward of the imaginary line laid down in sect. 3 of the Mersey Docks (Pilotage, &c.) Act 1899. She was not proceeding to a wet dock, for she was out of the region of wet docks, and therefore the compulsory services of the pilot were at an end as soon as she had come to anchor. The Eastham Locks cannot be said to be in any sense a wet dock. Wet docks must mean docks of such a nature that they can be used for loading and discharging cargo in or repairing ships. It is a straining of words to say the locks could be a wet dock. The Legislature has expressly granted exemptions to vessels passing through pilotage districts. See sect. 605 of the Merchant Shipping Act 1894 and sect. 5 of the Mersey Docks (Pilotage, &c.) Act 1899. The whole scheme of the latter Act deals with vessels to the northward of the imaginary line laid down in sect. 3. The pilot can refuse to take the vessel on any further, or if he does take her

on he is entitled to demand further payment. The case is within the principles laid down in *The Charlton* (73 L. T. Rep. 49; 8 Asp. Mar. Law Cas. 29). In that case and the earlier case of *General Steam Navigation Company v. British and Colonial Steam Navigation Company* (20 L. T. Rep. 581; 3 Mar. Law Cas. O. S. 237; L. Rep. 4 Ex. 238) it was held that the owners were not responsible for the fault of the pilot because at the time of the collision it was not established that the relationship of master and servant existed at the time of the collision between the owners and the pilot. Sect. 5 of the Act of 1899 deals with a vessel that is being moved within the limits of the port—that is to say, northward of the imaginary line there laid down. The area of the pilot's duties in *The Charlton* (*ubi sup.*) went much further than this. Unless an Act of Parliament says so in clear language the courts are always slow to say that there is an obligation to take a pilot. The obligation in this case ceases when there are no longer any wet docks, and when these have been passed there cannot be any.

Pickford, K.C. and *Dawson Miller*, for the defendants, *contra*.—According to the plaintiffs' contention if a ship bound to Manchester arrives off the bar at a time when she may get through to the Eastham Locks without having to stop and anchor for the tide then she is under compulsory pilotage, but if she does stop and anchor, then pilotage is not compulsory after she has come to anchor. Sect. 128 of the Mersey Dock Acts Consolidation Act 1858 is not a complete code of the duties of the pilot. All that it provides is that the pilot shall move and take a vessel into a wet dock. The works at Eastham are a wet dock within the meaning of the Act. See the notice to pilots issued by the Mersey Docks and Harbour Board. As an inward bound vessel the *Mercedes de Larrinaga* was bound to take a pilot, and she was no less an inward bound vessel because she was bound through the port. Mere temporary anchorage does not put an end to the terms of service on which the pilot is employed:

The Rigborgs Minde, 49 L. T. Rep. 232; 5 Asp. Mar. Law Cas. 123; 8 P. Div. 132.

If the plaintiffs' contention is right, the words "inward bound" must be limited to a vessel bound to a wet dock in the port of Liverpool. The code can only be a complete one as far as compulsion goes. They also referred to

The Maria, 16 L. T. Rep. 717; L. Rep. 1 A. & E. 358;

The Annapolis, 4 L. T. Rep. 417; 1 Mar. Law Cas. O. S. 69; Lush. 295;

The London Gazette, Jan. 2, 1894, setting out the Treasury warrant of Nov. 21, 1893, defining the limits of the port of Manchester.

Aspinall in reply.—The works at Eastham were expressly taken out of the limits of the port of Liverpool by sect. 3 of the Manchester Ship Canal Act 1885, and therefore the locks cannot be said to be a wet dock within the limits of the port of Liverpool.

BARNES, J.—This case is one which one may say bristles with points, and in giving my judgment I have to deal with it in the way it stands and after such argument as I have had. I feel, however, that there may be some points

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which may have escaped my attention, and possibly the attention of counsel, too. My opinion of the case has been come to upon the argument which I have had, and I now proceed to deliver it. The collision in this case took place between the *Bifrost* and the *Mercedes de Larrinaga* on Monday, the 21st Dec. last, in the Eastham Channel of the river Mersey, near a buoy which is marked No. 4 on the chart. I think it is the last buoy in coming in towards Eastham before the Eastham Ferry is reached. Of course, the place where this collision took place is material. Both the vessels were proceeding to the Eastham Locks on the way to Manchester, and both of them were in charge of duly licensed Liverpool pilots. The conclusion of fact to which I came on hearing the case, with the assistance of the Elder Brethren, was that so far as the navigation was concerned the *Mercedes de Larrinaga* was alone to blame for the collision, and that the fault was the fault only of her pilot, and as the defendants, the owners of the *Mercedes de Larrinaga*, had pleaded a plea of compulsory pilotage, the point was then raised as to whether, the fault having been the fault of the pilot alone, he was compulsorily in charge of the ship so as to exclude the owners from responsibility. Therefore the question now to be determined is whether the pilot of the *Mercedes de Larrinaga* was compulsorily in charge of the ship. The main point that was made on behalf of the plaintiffs was that a vessel inward bound from the sea to Manchester, *viâ* the Ship Canal, is not subject to compulsory pilotage in the port of Liverpool. That is a point of very considerable importance, because it appears to me that it affects the whole question of pilotage of ships, other than coasting vessels in ballast or under 100 tons burden, inward bound from the sea to Manchester, *viâ* the Ship Canal, and that, although not directly, yet indirectly, it practically touches upon the question of pilotage of vessels outward bound from Manchester, *viâ* the Ship Canal, to sea. The place which I have mentioned as being the place of the collision is in the port of Liverpool. I noticed—this was one of the reasons for further discussion—on looking at the plan of the Manchester Ship Canal and river Mersey, that there is a line to distinguish the limits of the powers of the Upper Navigation Commissioners, and drawn across the river from Eastham Ferry to a point above Garston. But that does not affect this case at all, because I have been informed by counsel that practically those powers deal with the buoying and so forth of part of the Mersey which is in the port of Liverpool. Then, again, there is another line drawn across the same map from a point on the Lancashire side called Dungeon Point to a point on the opposite side called Ince Ferry—one side being in the port of Liverpool and the other in the port of Manchester, and that, I understand, is only a line drawn for Customs purposes, and does not affect the question in this case at all. The point that has to be considered turns principally, if not entirely, on the Mersey Dock Acts Consolidation Act of 1858. Now, one of the early Acts relating to the port of Liverpool is the statute of 8 Anne, c. 8, and the port is there defined in sect. 3. [His Lordship then read the section.] I need not concern myself with Frodsham, because, if I understand rightly, that is on the Weaver. So that the port includes the whole of the river Mersey from the sea,

according to this definition, up to Warrington. One of the contentions that was made in this case was in connection with the suggestion that Eastham Locks at the end of the canal might be treated as in the port of Liverpool, and as a wet dock in the port of Liverpool. But, since the matter was first discussed, it was yesterday pointed out that the Manchester Ship Canal Act of 1885 has made a difference about this, because sect. 3 of that Act is as follows: [His Lordship then read the section.] I do not know what that latter proviso really preserves. It is suggested by Mr. Pickford that, notwithstanding the provision that the canal is in the port of Manchester, it still remains in the port of Liverpool for certain purposes, because of the proviso that "nothing in this Act shall be deemed to affect any of the rights or privileges of the port or harbour of Liverpool," &c. It seems to me difficult to construe exactly what this was intended to do, but I can hardly regard that which is part of the port of Manchester as still being within the port of Liverpool. There is another section which was referred to in the Manchester Ship Canal Act of 1885—namely, the 211th section. I do not myself at present see that that section really affects the present question. Now, the sections of the Mersey Dock Act of 1858 which bear directly upon the present question come under part 6 of the Act, which is headed, "With respect to pilots and pilot boats"; and the sections which deal with inward bound vessels were considered by me in the case of *The Servia and Carinthia* (*ubi sup.*). Some of those sections cover the cases both of inward and outward bound vessels, and some only relate to outward bound vessels. Considering for the moment that I am dealing with an inward bound vessel, the sections that are material are the 121st, which gives power to the board to licence persons to act as pilots for the port of Liverpool, the 123rd, which imposes a penalty upon any person who shall pilot any vessel into or out of the port of Liverpool without a licence, and the 124th section, which imposes penalties upon any pilot who shall refuse to take charge of any inward bound vessel upon a proper signal being made for a pilot, and of any outward bound vessel upon the request of the master thereof. Those sections apply to both inward and outward bound ships, but the 125th section applies only to inward bound ships. That section imposes a penalty upon any pilot refusing to conduct an inward bound vessel. I think that clearly refers to a vessel bound from sea into the port of Liverpool, having regard to the terms of the 123rd section. The 128th section is as follows—and this gives rise to one of the arguments addressed to me—"The pilot in charge of any inward bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey and shall pilot the same into some one of the wet docks within the port of Liverpool, whether belonging to the board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the river Mersey and before going into dock, in which case he shall be entitled to receive 5s. per day for such attendance." Sect. 130 provides that in case the master of any inward bound vessel other than a coasting vessel in ballast, or under the burden of 100 tons, shall refuse to take on board or employ

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a pilot, such pilot having offered his services for the purpose, such master shall pay the full pilotage as if the vessel had been piloted into the port of Liverpool. That, again, clearly applies to inward bound ships coming in from the sea, and coming into the port of Liverpool. Sect. 133 gives power to the board to fix rates for pilotage as stated in it. There are rates for piloting distances from Great Orme's Head to the port of Liverpool, at not less than 5s. and not more than 8s. per foot, according to the draught of water, and from any greater distance into the port of Liverpool at not less than 6s., nor more than 9s. per foot. Those are the sections which I think deal with the inward bound ships, and it has been held that under those sections vessels, other than the small coasting vessels which are referred to, are obliged to employ pilots coming into the port of Liverpool; and, as I have already said, the principal question in the case is whether the present case comes within those sections. I think it is desirable to refer to the sections which apply to outward bound vessels, because they throw light upon the "inward bound" sections. The 1st section which deals more particularly with the outward bound vessels in addition to those I have already referred to, which seem to cover and deal also with the case of inward bound vessels, is the 127th, which specifies the distance to which vessels are to be piloted when they are sailing out of the port of Liverpool. It makes no mention of where the pilot is to take charge. I have had already to refer to the 126th section. It does not matter very much in this case. The next section which deals with outward bound vessels is the 133rd, which gives, again, power to the board to fix rates for pilotage, and gives the rates for piloting a vessel out of the port of Liverpool. The 139th section also deals with the case of outward bound ships, and in that the provision is that in case the master of any vessel being outward bound and not being a coasting vessel in ballast, or under the burden of 100 tons, for which provision is otherwise made, shall proceed to sea and shall refuse to take on board or to employ a pilot, he shall pay the full pilotage rates. Those seem to be the material sections which deal with both inward and outward bound vessels, and I think it is to be observed in fact that generally the wording of the sections does not confine them to vessels which are bound to or from Liverpool. I am now using them in a general sense, but I think if all the sections are examined that general sense, which is one which pervades them, is that those sections deal with vessels which are either coming out of or going into the port of Liverpool, without saying what is to become of those vessels after they have come into the port of Liverpool, or where they are to start from in the port of Liverpool. There seems no doubt that the general effect of those sections is that every vessel, with the exception of the small vessels which are dealt with otherwise, coming into the port of Liverpool is bound to take a pilot; and so also it seems to me that every vessel outward bound which goes out of the port of Liverpool is bound to take a pilot for that purpose, although that is not a point which has to be determined in this case. The view which I take of the broad point put forward by the plaintiffs is that the pilotage is not to be confined

to vessels which simply come out of some dock or anchorage through the port of Liverpool, or are bound into some dock or anchorage in the port of Liverpool; because it seems to me to make no difference with regard to these sections whether the vessel, after having come into the port of Liverpool, passes into some other jurisdiction which is not to be treated as being in the port of Liverpool. I cannot help thinking that that is the correct view to take of these sections, although, of course, it is obvious that one is applying these sections to a state of things which did not exist at the time when the Act of 1858 came into force. Whatever the view which may be entertained about compulsory pilotage, and I am quite aware that many people object altogether to the law of compulsory pilotage as administered in England, I am not here to express an opinion upon such a question. It is urged that it would be better to allow ships to be navigated by their masters and officers, and that although it might be desirable to compel them to employ a pilot and have him on board for the purpose of advice, yet it is not a satisfactory state of things that he should take charge, and they should be compelled to leave him in charge. Whichever view is the correct view to take as to what is advantageous, the law is that the pilotage is compulsory; and again, whichever view you take about it, whether it is to be compulsory in the sense that he is in charge, or only in the sense that he is put on board as adviser, the general consideration for having a pilot on board at all applies with equal force for the purpose of navigation, whether the ship is coming simply into a dock, or anchorage in any port of the river Mersey which is in the port of Liverpool, or whether she is going through the same waters and afterwards going on to Manchester. The difficulties of navigation are precisely the same, and the advantage of having someone on board who knows the locality is precisely the same in each case. So my conclusion with regard to this first point, this main point, is that the *Mercedes de Larrinaga*, was compelled to take a pilot into the port of Liverpool. The next contention which the plaintiffs put forward was based on sect. 605 of the Merchant Shipping Act. They contended that this vessel was passing through a pilotage district between two places outside that district—namely, the sea on the one hand and the port of Manchester on the other. I am not quite sure whether that section strictly applies where the employment is not compulsory in the district in the sense in which the matter was discussed yesterday; because in some cases one finds that the pilotage is made compulsory for a district, and in others, like this Mersey case, one finds it is made compulsory on ships doing certain things—namely, moving in or out. But if the first part of the section does apply then the question would be whether the exemption under the section does or does not apply to this ship, because she was discharging at a place situate above the district on the same river or its tributaries. Now, one has with regard to this question to look at the facts, and I have had evidence which shows this state of things—first of all that the Irwell is a tributary of the Mersey. The Irwell pours its waters into the Manchester Ship Canal Docks at Manchester, and the waters then run down to a place where the Mersey joins the canal, and I understand that the canal really

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runs along the old bed of the Irwell till it joins the Mersey. Then the waters of the Mersey and the Irwell run on together until they come in the canal to a place called Rixton Junction, where they pour out into the Mersey as it still exists, and the only water which goes on down the canal from that point is the water which is used for lockage purposes. This matter was dealt with by the engineer of the Ship Canal, who was called as a witness by the plaintiffs. The effect of that is to leave the Manchester Docks as situate on a tributary of the river Mersey, and the result is that this vessel was going to discharge at a place above the port of Liverpool on a tributary of the river Mersey, and so it seems to me that the exemption which is referred to in the 605th section cannot be brought into force. In fact, Mr. Aspinall, who argued the case for the plaintiffs, although he contended that the 605th section applied, was candid enough to admit that he did not think there was any argument of weight which would support that contention. The third point is a minor point, but one of very considerable difficulty, and is this: If a vessel bound in from sea into the port of Liverpool is bound to take a pilot into the port, yet in a case like the present, where the ship anchored before she got to Eastham, the compulsory service then comes to an end. Of course this argument assumes that there was compulsion to begin with, as I have already held. In this case the vessel anchored off Laird's yard, which is, if I remember rightly, just a little above the Woodside Ferry, and she did so to await a suitable tide, in order to go on to Eastham. I think, speaking from recollection of the evidence, that the plaintiffs' vessel did something of a similar character. Both vessels had to anchor for a similar object, and the collision happened afterwards when they were going up to the entrance to the Eastham Locks. The point made about this is made under the 128th section of the Act of 1858, and the point is that the compulsory services ceased so soon as the vessel came to an anchor, because it is said that that section only requires a pilot to moor a ship at anchor in the Mersey and to pilot her into one of the wet docks of the port of Liverpool, whether belonging to the board or not, without making any additional charge for doing so. The argument was that as she was brought to anchor in the river Mersey the compulsory pilotage finished, because she was not going on to a wet dock in the port of Liverpool, and therefore the pilot had nothing more to do. The way in which that argument was met by the defendants at first was this: That the ship was bound to a dock in the port of Liverpool, because the Eastham Locks might be treated as being a wet dock within the port of Liverpool. But that now seems rather to be got rid of by the section of the Manchester Ship Canal Act, which seems to make the end of the canal within the port of Manchester. I think if this case were to turn simply upon the construction of sect. 128 it would be very difficult to say that this was a wet dock within the port of Liverpool, within the meaning of that section, although the term wet dock might not unreasonably in such circumstances be held, according to the definition in the dictionaries and so forth, to include a place which admitted ships and then excluded the tide if required. But the argument for the plaintiffs was further supported by reference to the case

of *The Servia and Carinthia* (*ubi sup.*), to which I have already referred, and it was contended that the decision in that case had the effect of showing that compulsory services must in such a case as this come to an end at any rate when the vessel anchored. I remember that case very well, and I have also read the judgment in it, and it does not, in my opinion, really determine the case in the way the plaintiffs contend, because the question there was as to additional remuneration in circumstances which are stated shortly in the headnote to that case. The headnote is as follows: "The Mersey Docks and Harbour Board, as the pilotage authority for the port of Liverpool, has under sect. 221 of the Mersey Dock Acts Consolidation Act 1858 power to fix, in addition to the ordinary compulsory pilotage rates, a reasonable charge by way of 'extra' remuneration for a pilot licensed by the board taking an outward bound vessel from a dock alongside a landing stage to complete her loading, as in the case of embarking passengers, their baggage, and the mails. The board has also power to fix an additional charge as extra remuneration (besides the charge per day for attendance whilst a vessel is necessarily lying in the river in the course of her navigation inward or outward) in the case of an inward bound vessel taken by a pilot to a landing stage to land passengers, baggage, and mails, before discharging the rest of her cargo, including the case of vessels disembarking cattle and sheep at certain landing stages in pursuance of the orders made under the provisions of the Diseases of Animals Act 1894. *Semble*, that in the case of an outward bound vessel compulsory pilotage will not commence until the vessel proceeds from the stage to sea, and that, in the case of an inward bound vessel, the employment of the pilot by compulsion of law will cease or be suspended as soon as the vessel deviates to the stage from the route which she would otherwise follow to the dock." The real point that was raised in that case was simply a question as to extra remuneration of pilots, and it arose in the case of inward bound ships, in consequence of the vessels bringing cattle to Liverpool going first of all into the river, then to a stage where the cattle was landed, and then into one of the docks, and, with regard to outward bound vessels coming out of dock first and then proceeding to one of the stages—I think the Prince's Landing Stage—for the purpose of taking up passengers, cargo, and mails, and then proceeding to sea. It was contended that these were onerous and difficult duties for the pilots and they were entitled to extra remuneration, and that in such circumstances they were doing something which was not contemplated as part of the pilot's duties without extra remuneration. It does not appear to me when that case is examined very carefully, that it really affects in any material degree the question which I have to decide now. Going back to the 128th section, I think it is necessary to construe it in connection with the other sections, and one must face this sort of point. First of all, with regard to a vessel which comes in from the sea and is going straight up to the Eastham Locks, she is an inward bound vessel, bound in from the sea to the port of Liverpool. She does not come to an anchor at all, and it seems to me she is bound to take a pilot coming in.

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Then the question must be raised, if so, where does his duty as compulsory pilot cease? I put that point to Mr. Aspinall, and I do not think, with the greatest deference to his argument, that it was answered in any way satisfactorily, because all I could get from him in substance was that compulsory pilotage ought to cease when the vessel had passed the position in which she would be going into any wet dock in the port of Liverpool. But that, it seems to me, is not a satisfactory answer, and leaves such a serious difficulty open as to the determination of the services. It certainly does not cover the case of a vessel which is bound up to Garston. The answer to that probably is that such a vessel is within the 128th section because she is going to a wet dock which, although not belonging to the board, is within the words, "Whether belonging to the board or not." But it seems to me that, with regard to a vessel going straight up to Eastham, the only sensible conclusion is that the pilot taking charge at sea must take her on to Eastham, where her navigation in the port of Liverpool is to cease. I cannot come to any other reasonable conclusion upon the matter. I myself am not able to see how it can reasonably be argued in practice or dealt with under the sections in any other way than that. It is taking the ship to a spot in the river Mersey which is at the end of her necessary navigation in the port of Liverpool; and it does not seem to me to put any undue strain upon the sections which have been considered in this case. Then that gets rid of anything, such as was suggested in the course of the case, as to whether the compulsion is to exist in case a vessel goes to Eastham direct, or is to exist up to the time that she anchors, because assuming that there was compulsion to begin with the plaintiffs would contend, as I understand, that if the vessel is going up to an anchorage the compulsion would last till she anchored, but if she was going to Eastham direct there would not be any compulsion at all, and how is anybody to elect that when the pilot comes on board outside the bar. It is impossible to be certain in all cases whether a vessel would have to anchor or go straight on. A thick fog, for instance, might prevent her going straight on. Then, again, with regard to the argument about anchorage, it is said that if the vessel comes to an anchor she has finished her navigation so far as the river is concerned, and that therefore the pilotage ceases to be compulsory. That may be true enough if the anchorage is the final point of destination, so far as navigation at that time is concerned, but I do not see how it can be treated as coming to an end if the anchorage is only anchorage in the itinerary towards the destination which it is necessary to get to in the ordinary course of navigation. Because if that were to be held, the moment a vessel dropped her anchor in the Mersey, even though she did so compulsorily, and yet was going to a second anchorage as her final destination, according to Mr. Aspinall's argument that first anchorage would put an end to the compulsory services. This vessel came to an anchor for navigation reasons until the tide permitted her to proceed, and it seems to me that such temporary anchoring is only in the itinerary towards the destination in the river to which she is entitled to have a pilot to take her. I have already referred to the point made with regard to

this question of the wet dock, and that difficulty I do not think I need say anything more about, because the Ship Canal Act appears to have altered the position with regard to that point. It may be possible to hold that for pilotage purposes the end of the canal is still to be treated as within the port of Liverpool, and for such purposes is a wet dock, but I do not feel that it is necessary to base my decision upon it, and I feel great difficulty because of the Manchester Ship Canal Act of 1885. There is this matter to be observed with regard to outward bound vessels, that no point of departure is mentioned in any of the sections which deal with the employment of pilots on outward bound ships. It seems to me, having regard to their generality, that any vessel proceeding to sea out of the port of Liverpool would have to take a pilot, and there is no such difficulty, as suggested with regard to inward bound vessels in consequence of the terms of sect. 128, in applying compulsory pilotage to vessels proceeding to sea from Eastham. They would have to take a pilot on leaving Eastham, and it would be strange if one had to construe the Act in such a way that inward bound vessels would not have to employ a pilot right up to Eastham. There are other points which possibly require, and possibly may have at some future time, some further consideration, but at present it does not seem to me that any of the points which have been somewhat slightly touched upon affect the view which has been taken upon the general sections. There is, for instance, the 114th section of the Act of 1858, which deals with who is liable to pay pilotage. If that section had in any way restricted the recovery of pilotage as against persons who were in the port of Liverpool or against ships in the port of Liverpool, one might have felt that pilotage ought only to be applied to such ships as the rates could be recovered against and such persons as were connected with those ships in the port of Liverpool. But the section is quite general, and, although there may be difficulties about enforcing it against persons or ships not in the port of Liverpool, I cannot see myself that it affords sufficient answer to the argument which contends for the pilotage being compulsory in the way I have thought that it is. There is one other matter to consider, and that is the effect of the statute of 1899. That Act was passed in order to meet the difficulty which was pointed out in the case of *The Servia and Carinthia* (*ubi sup.*). It recites that "whereas by the Mersey Dock Acts Consolidation Act 1858 the masters of vessels inward bound for and outward bound from the port of Liverpool are, subject to the exemptions by the said Act granted, required to employ pilots." Then it deals with the difficulties raised in the case of *The Servia and Carinthia* (*ubi sup.*), and it proceeds to legislate so as to get rid of those difficulties and free the matter from the doubt which that case raised. Counsel for the plaintiffs relied upon this recital as showing that the Act of 1858 was only dealing with vessels inward bound to and outward bound from the port of Liverpool. But if one compares that recital with the terms of the Act of 1858 it cannot be said, I think, that the recital is strictly correct, because one does not find in the Act of 1858 the words "inward bound for and outward bound from" the port of Liver-

APP.] PRINCE OF WALES DRY DOCK CO. (SWANSEA) v. FOWNES FORGE, & C. CO. [APP.]

pool, but it deals with vessels "bound into and out of" the port of Liverpool. That does not seem to admit so readily, as if that recital were correct, a consideration that the Legislature was only dealing with vessels which had Liverpool for their termination *a quo* and *ad quem*. I do not think that Act has any real bearing upon the present case. Of course it may be that under sect. 5 it may deal with vessels passing from Manchester to Liverpool, or simply from Liverpool to Manchester. I am not concerned to consider that point at all. Counsel for the plaintiffs suggested, broadly speaking, that there was great difficulty in working out this matter if it was held that pilotage was compulsory. I myself see no difficulty whatever. It is a simple matter. Every vessel, if I am right, bound in from the sea, except small vessels exempted, to the port of Manchester and going into the canal at Eastham is to take a pilot; and so, though I have not to decide that, has, apparently, every vessel going out from Eastham to the sea. There is no difficulty whatever in the application of the Act. If I am right, the result is that although the fault in this case was the fault only of the pilot of the *Mercedes de Larrinaga*, the defendants' plea of compulsory pilotage, it appears to me, is established. The plaintiffs' claim will, therefore, be dismissed without costs, and the defendants' counter-claim dismissed with costs.

Solicitors for the plaintiffs, *Hill, Dickinson, and Co.*, Liverpool.

Solicitors for the defendants, *Forshaw and Hawkins*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, March 22.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

PRINCE OF WALES DRY DOCK COMPANY (SWANSEA) LIMITED v. FOWNES FORGE AND ENGINEERING COMPANY LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Damages, measure of—Sale of goods—Disclaimer of responsibility for bad workmanship—Costs of action by sub-vendee against purchaser reasonably defended.

The plaintiffs having undertaken the repairs of a steamship for the owners, employed the defendants, an engineering company, to construct a new crank shaft. The defendants agreed to do so, upon the terms of their not being responsible for failure of material or workmanship beyond the replacement of faulty work supplied by them.

In an action by the plaintiffs against the ship-owners to recover the price of the shaft which had been supplied by the defendants, the ship-owners counter-claimed for damages for breach of contract in consequence of the shaft having broken down on a voyage.

The plaintiffs, after communicating with the defendants, who thereupon repudiated all responsibility, defended the counter-claim.

The shipowners succeeded on their counter-claim, the shaft being found to have been of faulty workmanship.

In an action by the plaintiffs to recover from the defendants the costs of the shipowners' counter-claim, as damages resulting from the defendants' breach of contract:

Held, that the terms on which the defendants had supplied the shaft did not relieve them from paying these costs; and that the plaintiffs were entitled to recover the costs of the counter-claim except so far as they were increased by any issue other than the faultiness of the material or workmanship of the shaft.

APPEAL by the plaintiffs from the judgment of Kennedy, J. at the trial of the action without a jury.

The action was brought to recover from the defendants the costs which had been incurred by the plaintiffs in defending a claim made against them by the owners of the steamship *Alcester*.

In Jan. 1902 the steamship *Alcester*, being out of repair and needing a new crank shaft, was intrusted by the owners to the present plaintiffs, the Prince of Wales Dry Dock Company (Swansea) Limited, to have the necessary work carried out.

The plaintiffs, not being manufacturers of crank shafts, ordered one of the defendant company.

The defendant company agreed to supply a double throw ordinary built crank shaft for the steamship *Alcester* for the sum of 150*l.*, and their letter which constituted their acceptance of the plaintiffs' order contained in a postscript the following clause:

NOTE.—We do everything in our power to insure good material and workmanship, together with quick dispatch, but disclaim all responsibility for failure of either, beyond the replacement of faulty work as supplied by us (if practically possible to do so).

The defendants then manufactured and supplied the plaintiffs with a crank shaft, and the plaintiffs put it into the ship.

The *Alcester*, on the completion of the repairs, started on a voyage, but, in consequence of the breaking of the crank shaft, had to put into Naples for temporary repairs, and on her return to England she had to be fitted with a new crank shaft.

The owners of the ship refused to pay the plaintiffs for the crank shaft which had broken down.

The plaintiffs thereupon brought an action for the price of the shaft.

The shipowners delivered a counter-claim alleging a breach of the plaintiffs' contract in supplying a faulty shaft, the amount of damages claimed being based not only on the value of the crank shaft, but also on the detention of the ship consequential on the failure of the crank shaft.

Upon the counter-claim being delivered, the plaintiffs at once communicated with the present defendants for their opinion as to the course which should be taken.

The defendants gave the plaintiffs the most complete assurance that there was nothing faulty in the material or workmanship of the shaft, and suggested that the reason of its breaking down

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

APP.] PRINCE OF WALES DRY DOCK CO. (SWANSEA) v. FOWNES FORGE, & CO., CO. [APP.]

was the bad design, for which they were not responsible.

Under these circumstances the plaintiffs defended the counter-claim raised by the shipowners.

At the trial of that action the judge found that there was no fault in the design, and that the cause of the breakdown of the shaft was faulty material and workmanship, and he gave judgment in favour of the shipowners for 356*l.* damages and costs.

Thereupon the plaintiffs commenced the present action to recover from the defendants the costs of the counter-claim on which the shipowners had obtained judgment.

At the trial of this action without a jury, Kennedy, J. gave judgment for the defendants.

The plaintiffs appealed.

Bailhache for the plaintiffs.—The costs of the counter-claim made by the shipowners which the plaintiffs have incurred are damages which might reasonably be supposed to have been in the contemplation of the present plaintiffs and defendants, at the time of the contract between them, as the probable result of a breach of the contract; and *prima facie* the plaintiffs are entitled, therefore, to succeed in this action:

Hammond v. Bussey, 30 Q. B. Div. 79.

The postscript to the defendants' letter accepting the plaintiffs' offer does not relieve the defendants from that common law liability to pay the damages now claimed. The effect of the postscript is merely to relieve the defendants, if they should supply a new crank shaft, from the natural and direct damages arising from a breach of contract to supply a good shaft. He referred to

Agius v. Great Western Colliery Company, 80 L. T. Rep. 140; (1899) 1 Q. B. 413.

J. A. Hamilton, K.C. (*Lewis Noad* with him) for the defendants.—The defendants did not request the plaintiffs to defend the counter-claim. They repudiated all liability. They are protected by the postscript, which relieves them from the liability to pay these costs as being damages arising from their breach of contract to supply a properly made crank shaft. The object of the clause in the postscript is to relieve them from all damages in respect of a breach of the contract beyond the liability to replace faulty material or workmanship.

COLLINS, M.R.—This is an appeal from a decision of Kennedy, J., and it certainly raises a point of some nicety. It is perfectly clear law, since the decision of *Hammond v. Bussey* (*ubi sup.*) in this court, that, unless there is some special bargain between the plaintiffs and the defendants, the plaintiffs are entitled to recover these costs from the defendants, and the only point in this case is whether the terms of the contract between the plaintiffs and the defendants were such as to exclude the liability of the defendants to pay the costs in question. That depends upon the terms of the postscript to the defendants' letter, by which they said that they did everything in their power to insure good material and workmanship, but disclaimed all responsibility for failure of either beyond the replacement of faulty work if practically possible to do so. Now, it seems to me that that clause is not introduced with any reference or relation

whatsoever, either express or implied, to costs under any possible circumstances. What the clause is addressed to is the substitution for the general liability to pay general damages consequential upon the breakdown of the machinery, of an obligation to replace the shaft, but that obligation is just as much a binding obligation as was the obligation upon them, in the first instance, to furnish a good shaft. That obligation is certainly undertaken by them in their letter, but it is qualified by the postscript, with the result that an immunity is secured for them from what are called general damages—*i.e.*, loss of time and so on—incidental to and following upon the delivery of a bad shaft. They have secured that immunity and have taken upon themselves the responsibility of replacing faulty or defective work by the substitution of another shaft. But when that liability has been substituted for the other, the clause has accomplished its purpose. It was essential to the determination of the question whether or not that liability existed that it should be ascertained whether the shaft supplied was defective in material or workmanship. That point has been ascertained in the action brought by the shipowners, at the expense of the plaintiffs in the present action, and, according to the law as laid down in *Hammond v. Bussey* (*ubi sup.*), they are clearly entitled to be reimbursed by the defendants, unless the defendants have contracted themselves out of that liability. In my judgment the defendants have not limited [their liability in that way, and they stand unprotected from their common law liability. It is clear to me that the rule laid down in *Hammond v. Bussey* (*ubi sup.*) must be read, as is repeatedly stated in the judgment, with reference to the facts of that case. The court in that case held that the liability of the defendant to pay the plaintiff's costs was not a liability which attached under the first part of the rule in *Hadley v. Baxendale* (9 Ex. 341), which refers to damages arising naturally from the breach of contract. The court held that the liability came under the second branch of the rule, that the damages were such as might reasonably be supposed to have been in the contemplation of the parties, when they made the contract, as the probable result of a breach of it. That, I think, justifies me in saying that this clause does not *prima facie*, and cannot be taken *prima facie* to, relieve the defendants from an obligation to pay these costs, which do not flow directly from the original breach of contract, but arise necessarily from the conduct of the parties after the breach. The conduct of the defendants after their breach of contract was such as to make it most reasonable on the part of the plaintiffs to defend the claim made against them by the shipowners. It would even have been unreasonable for them not to do so. They trusted to the assurances given them by the defendants that the shaft had been properly constructed, and, having therefore defended the claim and thereby incurred costs, it seems to me that the liability which they then incurred is altogether outside the conditions of the clause on which the defendants rely. I think that on the true construction of the contract the parties stand with their common law rights, upon the point now in dispute, quite unimpaired. On these grounds, though I recognise the difficulty of the case, I feel bound to differ from the conclusion arrived at by

Kennedy, J., and in my judgment the appeal ought to be allowed.

ROMER, L.J.—This case depends upon the construction of a postscript to a letter written by the defendants, and the postscript is so loosely framed that I am not surprised that it has given rise to a difference of judicial opinion. It has puzzled me a good deal, and I cannot say that my doubts are wholly removed, but, on the whole, I have come to the conclusion that the appeal ought to succeed. The meaning that I attach to the postscript in question is this: The defendants contracted that, in case of the failure of the shaft that they sold, by reason of faulty material or workmanship, they were to be liable at any rate to the extent of replacing the faulty work, but were not to be liable further by way of contract; that is to say, they were not to be liable for further loss beyond the cost of replacing the shaft for the faulty work. But then what flows from the fact of there being a contract of this limited kind? Suppose that the shipowners had brought an action against the present plaintiffs in respect of the failure of the shaft, but limiting their claim to damages to the value of a new shaft; and suppose that the plaintiffs informed the present defendants that the action had been brought against them, and then, upon the assurance of the defendants that there was nothing faulty in the workmanship of the shaft, had defended the action in the interests both of themselves and of the defendants. Then at the trial of that action it is found that the workmanship is faulty, and accordingly a new shaft has to be delivered. In such a case I should say that, within the meaning of the decision in *Hammond v. Bussey* (*ubi sup.*), the costs of the defence could be said to be damages which might reasonably be supposed to have been in the contemplation of the parties at the time when they made the limited contract that I have indicated, and for that reason I think that the costs in such a case as that could be recovered by the plaintiffs from the defendants. Now, apply that to the present case. Here was an action against the plaintiffs on the ground of faulty workmanship, and the relief included a claim for damages for the price of a new shaft; in other words, for delivery of a new shaft as part of the damages resulting to the ultimate purchasers of the shaft because of its faulty construction. It is true that the action also contained a claim for further damages, but, when the defence had to be put in, the then defendants (the present plaintiffs) had to consider that, as to a great part of the action, it obviously concerned the present defendants on what I have called their limited contract, and they accordingly consulted with the defendants. The defendants then claimed the protection of this clause, and said that the shaft was not faulty in material or workmanship. Thereupon the present plaintiffs defended the action brought against them, and under the circumstances I think that their defence was reasonable and proper so far as concerns their costs in defending that part of the action in which a claim was made for a new shaft. Those costs were reasonably incurred, and the plaintiffs are entitled to say, as against the present defendants, that these costs must be taken to have been in the contemplation of the parties as damages reasonably likely to flow from

a breach by the defendants of their limited contract. Then the question arises, How are those costs to be ascertained? It appears to me that the right order to make is that the plaintiffs are entitled to the costs of the action except so far as those costs were increased by any issue other than the issue I have mentioned.

MATHEW, L.J. concurred.

J. A. Hamilton, K.C.—Will your Lordships make an order that the costs should be divided in the proportion which the plaintiffs' interests bear to the defendants' interests? The shipowners recovered 356*l.* from the present plaintiffs, and the present defendants are interested in that sum, as your Lordships hold, to the extent of only 150*l.*

COLLINS, M.R.—We think that the order suggested by my brother Romer is the right one, and the plaintiffs will have the costs of the shipowners' counter-claim, except so far as they were enhanced by other issues, if any.

Appeal allowed.

Solicitors for the plaintiffs, *Williamson, Hill, and Co.*

Solicitors for the defendants, *Farrar, Porter, and Co., for G. F. Hill and Son, Cardiff.*

Tuesday, March 22.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

SEARLE v. LUND. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Shipping—Bill of lading—Liberty to over-carry goods if discharge cannot be effected without undue detention—Discharge prevented by delay at previous port—Delay caused by negligence of shipowner's agent—Remoteness of damage—Liability of shipowner.

A bill of lading contained the following clause: "If in the opinion of the master discharge cannot be effected without undue detention, the steamer shall have liberty to over-carry the cargo to London at merchant's risk, and deliver there to consignees or their assigns."

The ship was delayed at a port of call in the course of her voyage by the negligence of the shipowner's agents, with the result that, on her arrival at the port where the goods were to be discharged, the master found that the discharge could not be effected without undue detention, and he therefore over-carried the goods to London.

In an action by the consignees to recover damages for the over-carriage of the goods:

Held, affirming the decision of Kennedy, J. (88 L. T. Rep. 863), that the damage was not so remote from the negligence of the shipowner's agents as to disentitle the consignee from succeeding in the action.

APPEAL by the defendant from the judgment of Kennedy, J. at the trial of the action without a jury.

The action was brought against the owner of the steamship *Yarrowonga* to recover damages for the breach of a contract contained in a bill of lading.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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The *Yarrowonga* was one of a line of steamers, known as the Blue Anchor Line, regularly running between Australian ports, of which Melbourne was one, and London, and calling on the way at Durban and Cape Town.

In Sept. 1901 the plaintiff shipped on the *Yarrowonga* at Melbourne forty-five cases of merchandise and 1750 bales of fodder, to be delivered at Cape Town.

The bills of lading contained an option for the consignees to require delivery at Durban, and also contained the following clause:

If in the opinion of the master discharge cannot be effected without undue detention, the steamer shall have liberty to over-carry the cargo to London at merchant's risk, and deliver there to consignees or their assigns.

On the 25th Oct. the *Yarrowonga* arrived at Durban.

On the assumption that she would leave Durban and arrive at Cape Town in due course four days later, the plaintiff secured a berth for her at Cape Town for the day when she ought to arrive there.

The ship was, however, delayed at Durban.

This delay was caused to some extent by bad weather, and by a strike of the labourers there, but chiefly by a blunder on the part of the defendant's agents, who directed the plaintiff's cargo to be discharged. The mistake was discovered and the cargo was reshipped on the *Yarrowonga*.

In consequence of this delay the ship arrived at Cape Town several days later than had been expected, and on her arrival there the berth that had been secured for her was occupied by another vessel.

The South African war was at that time being carried on, and the harbour at Cape Town was consequently in a very congested condition.

The master was honestly and reasonably of opinion that the cargo could not be discharged there without undue detention of the ship, and he decided to carry it on to London.

This he did, and the cargo had then to be brought back to Cape Town at considerable expense.

At the trial of the action before Kennedy, J. without a jury, the learned judge said it was the fact that there would have been no need for undue detention at Cape Town but for what happened at Durban, and that, but for the want of reasonable care on the part of the defendant's agents there, the vessel might have been discharged without undue delay at Cape Town. He held that the damage suffered by the plaintiff by the over-carriage of the cargo to London was not too remote from the negligence of the defendant's agents at Durban, and that the plaintiff was entitled to recover in the action.

The case is reported 88 L. T. Rep. 863.

The defendant appealed.

J. A. Hamilton, K.C. and Loehnis for the defendant.

Scrutton, K.C. and Leck for the plaintiff.

COLLINS, M.R.—This is an appeal from a decision of Kennedy, J., who gave judgment in favour of the plaintiff in an action against a ship-owner to recover damages for negligently over-carrying the plaintiff's cargo. The cargo in question was shipped on the defendant's steamship, which performed round voyages between Australia and London, calling at Durban and

Cape Town on the way. It appears from the evidence that these voyages are accomplished with great regularity, and the times of the ship's arrival at the various ports can be calculated with considerable nicety. The cargo in question was shipped in Australia for delivery at Cape Town, with an option for the consignees to require delivery at Durban. The vessel arrived at Durban on the 25th Oct., which was the exact day that she was expected there. The plaintiff did not exercise his option to require delivery there, but, by a blunder on the part of someone for whom the defendant is responsible, the cargo was discharged at Durban. The mistake was then discovered, and the cargo was reshipped. Now, on the 25th Oct., when the vessel arrived at Durban, the plaintiff made arrangements on the footing of the vessel's departure for Cape Town on the following Tuesday, and he secured a berth at Cape Town for the following Saturday where his cargo might be discharged. At Durban the ship met with some difficulties both from the weather and from labour disputes, but Kennedy, J. at the trial, after making allowance for the delay thus caused, came to the conclusion that, if the ship had not been delayed also by the blunder which resulted in the cargo in question being discharged and then reshipped, the vessel might have left Durban on the Tuesday, and have arrived at Cape Town in time to make use of the berth which the plaintiff had secured. The learned judge found that this blunder in fact caused a delay of two or three days. There were other things which caused delay, but, if it had not been for the delay caused by this blunder, the vessel would have arrived at Cape Town in time to get the benefit of the berth that had been secured. That is the finding of the learned judge, and there was ample material before him upon which he might fairly come to that conclusion. When the vessel arrived at Cape Town the berth that had been secured was no longer available. The bills of lading contained a clause providing that if in the opinion of the master discharge could not be effected without undue detention, the steamer was to have liberty to over-carry the cargo to London at merchant's risk and deliver them to the consignees or their assigns. The master, in the exercise of what was found by Kennedy, J. to be a sound judgment, was of opinion that, having regard to the congestion of shipping in the harbour at Cape Town, the discharge of the cargo could not be effected without undue detention, and he decided to carry the cargo on to London. The cargo was accordingly carried to London, and then had to be brought back to Cape Town, and these proceedings very naturally involved the plaintiff in considerable expense. The action is brought to recover the damages caused by the over-carriage of the goods. The question is whether the chain of causality between the negligence at Durban in discharging the plaintiff's cargo, which caused the vessel two or three days' delay, and the late arrival at Cape Town which resulted in the loss of the berth and the carrying on of the cargo to London has been sufficiently established. In my opinion it has, and none the less because the master in the exercise of his discretion elected to make use of the option of carrying the cargo on to London. There was no negligence or improper conduct on his part. I think that the

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damage all resulted from the negligence which occurred at Durban, and which caused the vessel to lose the berth that had been secured at Cape Town. The consequence is one that might reasonably be anticipated and regarded as following naturally on the act of negligence. That seems to me to be the legal and practical view of the matter. The ship made the voyages so regularly that the day of her arrival at Cape Town could be calculated with considerable exactness, and a berth was secured for her there in view of the voyage there from Durban being completed in the usual time. The vessel did not arrive at Cape Town as soon as she ought to have done in consequence of the blunder at Durban, and this blunder was made by someone for whom the defendant is responsible. The defendant now says that the damage is too remote, but from the correspondence it appears that he himself took the view which was afterwards taken by Kennedy, J. I think that the decision of Kennedy, J. was right, and that the appeal must be dismissed.

ROMER, L.J.—The circumstances of this case are somewhat complex, but I am not prepared to differ from Kennedy, J., who has held that the non-discharge of the plaintiff's goods at Cape Town was caused by the negligence of the defendant's agents at Durban. The damage of the plaintiff is not too remote. He is entitled to succeed in this action, and the appeal must fail.

MATHEW, L.J. concurred. *Appeal dismissed.*

Solicitors: for the plaintiff, Mellor, Smith, and May; for the defendant, Thomas Cooper and Co.

Tuesday, April 12.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

NORMAN AND BURT v. WALDER. (a)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—Review of award—Profits of trade carried on by workman—"Average amount which he is able to earn after the accident"—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), sched. 1, par. 2.

Upon an application to review an award of a weekly payment to an injured workman under the Workmen's Compensation Act 1897, the fact that since the accident the workman has started a trade or business of his own from which he is deriving profits should be taken into consideration for the purpose of deciding whether the weekly payment should be ended or diminished.

APPEAL by the employers from the decision of the late Judge Martineau at Hayward's Heath County Court refusing to make any order upon an application by them for the review of an award for a weekly payment to an injured workman under the Workmen's Compensation Act 1897.

Charles Walder had been a machinist in the employment of Messrs. Norman and Burt, who carried on business as builders and contractors.

His wages were 37s. a week.

In May 1901 he met with an accident arising out of and in the course of his employment, by which he lost the top joint of one of his fingers.

In Aug. 1901 he obtained an award under the Workmen's Compensation Act 1897 for a weekly payment of 18s. 6d.

In May 1903 the employers made an application under sched. 1, par. 12, of the Workmen's Compensation Act 1897 for a review of the weekly payment.

At the hearing of this application it appeared that soon after the accident the workman had set up a small baker's business, which he carried on with the help of his wife, his son, and his daughter, and that he was still carrying on the business and making a profit out of it.

The County Court judge delivered the following judgment:

This is an application by an insurance office asking me as arbitrator to suspend or reduce the compensation awarded to the respondent by the award. The ground of the application is that since the award was made the respondent's earnings have increased to such an extent that he is no longer entitled to any compensation. The earnings are not wage earnings, nor anything in the nature of wage earnings, but are the profits of a trade business carried on by the respondent at Dane Hill. I reserved judgment to consider whether the earnings of a trade business can be treated as "earnings" within the meaning of sched. 1, par. 2, of the Act. The word in the Act no doubt is "earnings," but I am clear that, according to the true construction of the schedule, wage-earning capacity alone is to be taken into account. I may mention here that the earnings of the business carried on by the respondent are obtained in a peculiar manner. The respondent carries on the business in question with the labour and assistance of his wife, who has the principal share in the work, his daughter who serves in the shop, and his son who goes out with the horse and cart. He himself goes out with the horse and cart and has a general control of the business. As head of the family he appropriates the labour and assistance of his wife, son, and daughter, and takes the whole of the profits and maintains them. He does not receive any wages, nor is he in the service of any employer. It would be difficult to say what proportion of the total earnings in the business ought to be attributed to the respondent's own labour. I have had some difficulty in arriving at the total earnings in the business, but I estimate them at 2l. a week. In the view that I take of the case, it is immaterial. It is to be observed that the compensation to the workman for personal injury is, in my opinion, clearly assessable with reference to weekly wages or earnings earned before the injury and weekly earnings or wages earned after the injury, and, in my opinion, trade profits in a business are no more to be taken into account than income of real estate. It may well be that the work in respect of which wages are earned after an accident need not be *ejusdem generis* with the work in respect of which wages were earned before the accident, and there is authority in the Court of Appeal for that view, but, in my opinion, earnings in trade are not earnings within the meaning of sched. 1, par. 2, of the Act. The application fails, and must be refused with costs.

Against this decision the employers appealed.

The Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides as follows:

Sched. 1, par. 1. The amount of compensation under this Act shall be . . . (b) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earn-

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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ings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.

Par. 2. In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity.

Arthur Powell, K.C. (W. Addington Willis with him) for the employers.—Under sched. 1, par. 2, the question with regard to the workman that the County Court judge had to consider was what is "the average amount which he is able to earn" after the accident. The learned County Court judge said that those words ought to be limited to mean "the average amount of wages which he is able to earn." But the words of the paragraph are quite general, and there is nothing to justify the limitation that the learned judge imposed on them. Here the workman has worked since the accident in the baker's business he has started, and in that business he has earned money. Though he is not in the employment of anyone but himself, yet he is able to earn money, and it is only fair that the amount of his earnings should be taken into consideration in assessing the compensation he is entitled to. Par. 1 (b) has reference to the earnings received by a workman as wages from an employer, because the very foundation of a claim for compensation is that the injury has been received while in the service of an employer. But the same considerations do not apply to par. 2. Under that paragraph the question is as to the general ability of the workman to earn money, whether as wages or not. The court has several times held that the earnings of a workman after the accident, which are to be considered, are not limited to wages at the same work as that on which he was employed before the accident, or even at work *ejusdem generis* :

Irons v. Davis, 80 L. T. Rep. 673; (1899) 2 Q. B. 330;

Chandler v. Smith and Son, 81 L. T. Rep. 317; (1899) 2 Q. B. 506;

Pomphrey v. Southwark Press, 83 L. T. Rep. 468; (1901) 1 Q. B. 86.

Stuart Bevan for the workman.—Par. 2 directs regard to be had between what the workman earned before the accident and what he is able to earn afterwards. That means that his wage-earning capacity before the accident is to be compared with his wage-earning capacity after the accident:

Crossfield and Sons Limited v. Tanian, 82 L. T. Rep. 813; (1900) 2 Q. B. 629.

There *Smith, L.J.* said that sched. 1, par. 12, means that in cases where a weekly payment has been ordered and the injured workman gets better in health "and earns better wages," the employer may apply for a review. If the employers are right in this case, and par. 2 applies to earnings other than wages, these applications to review will lead to the incurring of great trouble and expense. It will be open to employers to argue all sorts of points as to what course it is possible for an injured workman to pursue with the view of making money. Moreover, there will be great difficulties with regard to the medical

examination which is provided for by par. 11, as all sorts of questions as to the general capabilities of the workman will have to be gone into. The arbitrator will also have to go into discussions as to any property the workman may have, and how he could usefully employ it with a view to earning money by putting it into some trade or otherwise.

COLLINS, M.R.—This is an appeal by the employers from a decision of the late Judge Martineau. An award for a weekly payment was made under the Workmen's Compensation Act 1897, and the question is whether, upon an application under sched. 1, par. 12, to review that award, the fact that the workman was making money by means of a trade or business conducted by himself ought or ought not to be taken into consideration. The learned County Court judge held that it was not an element to be taken into consideration, and that, however prosperous the trade or business of the workman might have become, it afforded no ground for reducing the amount of the weekly payment that had been originally awarded as compensation. That conclusion was arrived at by the County Court judge on the construction of the Act. Now, par. 1 (b) of sched. 1 provides thus: [His Lordship read it.] As was pointed out in the course of the argument, that clause assumes that up to the time of the injury the workman has been earning wages from an employer. Then comes par. 2, which is the paragraph on which the question in dispute really turns. It is this: [His Lordship read it.] In the present case the workman was earning wages at 37s. a week at the time of the accident, and the compensation awarded to him was a weekly payment of 18s. 6d. Now, it appears that since the accident he has started a small business as a baker, out of which he gets a weekly return of 40s. He is helped in the business by his wife, his son, and his daughter. The County Court judge has not found with any exactness the amount of the actual profit derived from the business which can be considered as due to the workman's own exertions, because he held that that amount had nothing to do with the question that was really being discussed before him. He was of opinion that the amount, whatever it was, was not "wages" earned by the workman from one employer, and was therefore not a matter which ought to be taken into consideration. It seems to me that the County Court judge has put too narrow a construction upon the Act. The words of par. 2 do not expressly exclude any earnings other than wages received from an employer. It is true that the average weekly earnings earned before an accident mean wages earned from an employer. But the Legislature's intention was to compensate an injured workman for his loss—that is to say, his loss of earning power—and therefore, I think, the average amount which the workman is able to earn after the accident ought not to be limited in its meaning so as to exclude everything except what he receives by way of wages from an employer. The highest weekly payment that the Act allows to be awarded as compensation is half the average weekly earnings earned before the accident, which shows that compensation under the Act was not intended to be a complete compensation. If a review of the weekly payment is desired under

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par. 12, the whole situation must be looked at. The arbitrator should find out how far the workman's money-earning capacity has been altered; and, if it is as good as it was before the accident, the fact should not be ignored, even though the money made by the workman is not received by him as wages paid him by an employer. In the present case, therefore, the County Court judge should have taken into consideration the earnings of the workman in his trade or business and given them their due weight. The appeal must be allowed, and the case will go back to the County Court judge to consider it upon all its merits.

ROMER, L.J.—I am of the same opinion. It is clear upon the evidence that the workman is getting something from his baker's business. How much he himself is earning should be inquired into, and the case must therefore be sent back to the County Court judge. The words in par. 2, "the average amount which he is able to earn after the accident," are not limited in meaning to the amount which can be earned as wages paid by a master. A man may be his own master.

MATHEW, L.J.—I am of the same opinion. The workman in this case has been employing himself since the accident, and it seems to me that the money that he is earning in this way should be taken into consideration upon the application for a review.

Appeal allowed.

Solicitors for the employers, *Treadwell and Aylwin*.

Solicitors for the workman, *J. K. Nye and Treacher*, Brighton.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, Feb. 17.

(Before KEKEWICH, J.)

PLEWS v. SAMUEL. (a)

Vendor and purchaser—Specific performance—Vendors' possession—Receipt of rents due from tenants before date of contract after date for completion—Allocation of receipts.

Where a vendor remains in possession after the date fixed for completion of the purchase, the completion having been delayed by no fault on the purchaser's part, and receives interest in lieu of rents by his own choice after the date for completion but still receives the rents, he is not at liberty as against the purchaser to allocate any part of such rents so received to arrears of rents due to himself from tenants either before the date of the contract, or subsequently before the date fixed for completion of the purchase.

ACTION by the vendors for specific performance by the defendant of an agreement, dated the 24th Feb. 1902, for the sale of leasehold premises, Nos. 172, 173, and 174, Bute-street, Cardiff.

There was a counter-claim by the defendant asking for an account of rents received by the plaintiffs, or which would have been received but for their wilful default.

The 13th condition of sale, stated to be part of the "General Conditions of Sale of the Incorporated Law Society for Cardiff and District," provided that:

The rents, profits, or possession, of the property will be received, or retained, and the outgoings discharged, by the vendor up to the time appointed for completion, and as from the same time the rents and profits (if any) shall belong to the purchaser, and all outgoings shall be paid by him, but he shall not be let into the actual possession, or receipt of the rents and profits, until the completion of the purchase. All current rents and outgoings shall, for the purposes of these conditions, be apportioned between the vendor and the purchaser, and paid with or deducted from the purchase money, such apportionment in case of dispute being made by the auctioneer . . . whose decision shall be final.

The action now came before the court upon an agreed "statement of facts" between the parties in the following terms, in which the facts and questions for consideration by the court are set out:

1. By an agreement made the 24th Feb. 1902 the plaintiffs agreed to sell and the defendant agreed to purchase certain leasehold properties described in the particulars of sale therein referred to and being Nos. 172, 173, and 174, Bute-street, Cardiff, subject to the conditions of sale therein referred to so far as the same applied to a sale by private contract. The said agreement was contained in a memorandum of that date signed by the defendant.

2. The said premises Nos. 172 and 174, Bute-street were stated in the said particulars of sale to be then let at the respective rents of 11. 2s. 6d. per week and 11. 7s. 6d. per week, the landlords paying all outgoings.

3. The said conditions of sale provided, amongst other things, that the purchase should be completed on the 18th March 1902, and that, if the purchaser should not complete the purchase at the time appointed and the sale should not be annulled, he should pay interest on the unpaid purchase money after the rate of 6l. per centum per annum from that day until the same should be paid, or the vendors might, at their option, take the rents of the property for the same period.

4. Under the circumstances next hereinafter stated the defendant did not complete the purchase on the 18th March 1902. Shortly after the date of the said agreement, the defendant contended that he was entitled to a conveyance of certain other premises in addition to those comprised therein. The plaintiffs in consequence issued a summons under the Vendor and Purchaser Act 1874, and as the result it was decided that the said contention was not sustainable. Pending the decision of the said summons the plaintiffs remained in possession of the premises comprised in the said agreement.

5. At the date of the said agreement sums amounting to 311. 1s. and, at the date fixed for completion, sums amounting to 341. were owing by tenants of the said premises for arrears of rent. This the defendant did not know till long after, but he did not make any inquiries of the plaintiffs on the subject.

6. Subsequently to the date fixed for completion and while they were in such possession as aforesaid, the plaintiffs received from the said tenants the rents appearing by the apportionment account rendered by the plaintiffs.

7. The defendant has long since accepted the plaintiffs' title.

8. The plaintiffs have long since elected to receive interest on the unpaid purchase money.

9. On the 9th March 1903, when completion was about to take place, the plaintiffs rendered an apportionment account made out on the footing that they were entitled as against the defendant to apply, out of the sums received from the said tenants, the sum of 341. in payment of the said arrears. The defendant refused to acknowledge the claim, and tendered the full amount of

(a) Reported by W. P. PAIN, Esq., Barrister-at-Law.

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the purchase money on the footing that the plaintiffs were not entitled so to apply the said sum of 34l. or any part thereof.

10. On the 1st May 1903 this action was brought. The defendant by his defence pleaded that his liability to pay the 34l. aforesaid was the only question in dispute, and that he had tendered all other moneys and brought all such other moneys into court accordingly.

11. On the 16th Aug. 1903 the plaintiffs for the first time informed the defendant that 2l. 19s. of the 34l. aforesaid accrued between the 24th Feb. and the 18th March 1902.

12. To the agreement and other documents aforesaid, and to the pleadings, the parties are at liberty to refer, and the judge is to be at liberty to draw any inference of fact. The questions for the decision of the court are: (1) Whether the plaintiffs are entitled to retain out of the sums so received as aforesaid the said sum of 34l., or, alternatively, the said sum of 34l. less the said sum of 2l. 19s. (2) By whom the costs of this action ought to be paid.

This statement was signed by the agents for the solicitors for the respective parties to the action.

The plaintiffs furnished an account showing they had collected 97l. in respect of rents of the property sold.

MacSwinney for the plaintiffs. — The vendors are only constructive trustees of the rents, and, being in possession, are entitled to appropriate them to wipe off the arrears due to them before the date of the agreement according to the rule in *Clayton's case* (1 Mer. 585):

Lysaght v. Edwards, 34 L. T. Rep. 787; per Jessel, M.R., at pp. 789, 790; 2 Ch. Div. 499.

The defendant had no interest in the property before the date of the agreement for sale, and is wrong in charging the plaintiffs with wilful default before that date. The 34l. may be regarded as outgoing in respect of the property. The legal position of a vendor remaining in possession is shown in *Foster v. Deacon* (3 Madd. 394). He is not to be held liable for wilful default, as in the case of a mortgagee in possession: (per Knight Bruce, L.J. *Sherwin v. Shakspear*, 5 De G. M. & G. 517, at p. 531). In the case of a trustee, a special case ought to be made out to charge him with wilful default. Wilful default will not be presumed, and here there is no evidence that the vendors have not dealt properly with the property. Further, one case of wilful default must be proved:

Fry on Specific Performance, p. 590 *et seq.*, 4th edit.

It was, as your Lordship held, through the purchaser's default that the purchase was not completed before. There is no evidence that the rents were paid to the vendors in respect of current rents. They were only bound to pay the outgoing out of the estate, not from their own pockets. This is really a question of which of two innocent parties should suffer for the default of the tenants. The purchaser says that, the vendors being entitled to interest, rents and interest are mutually destructive. The purchaser is only entitled to so much of the 34l. as accrued between the dates of the contract and that for completion of the purchase, if he is entitled to anything.

P. Ogden Lawrence, K.C. and *Ashton Cross* for the purchaser. — The legal position of a vendor remaining in possession after the time fixed for

completion of the contract is laid down by your Lordship in *Royal Bristol Permanent Building Society v. Bomash* (57 L. T. Rep. 179; 35 Ch. Div. 390). The rule laid down by Lord Selborne, L.C. in *Phillips v. Silvester* (27 L. T. Rep. 840; L. Rep. 8 Ch. 173), where his Lordship in substance says that the vendor in possession under a contract of sale is a trustee for the purchaser, is preferable to that in *Sherwin v. Shakspear* (*ubi sup.*). Inferences of fact may be drawn under the statement in this case. The vendors admit the receipt of rents after the date fixed for completion of the agreement, and they must show that they have been paid in respect of rents accruing before the 18th March 1902. They suggest that we ought to lose the arrears of rent. That is absolutely contrary to the cases as to where a trustee is in possession of the trust estate. Lord Selborne, L.C. likens the position of the vendor to that of a trustee who has been farming the estate in such a way that the defendant will lose his money. It is for the vendors to show that these tenants could have been ejected. From the date for completion the vendors' position changed from that of a beneficiary or tenant for life to that of a trustee, and the purchaser does not carry the account further back than that date. Up to then the vendors could forego arrears of rent. On electing to take interest they became trustees of the rents and profits. They could have elected to take the rents up to the date of actual completion. From that time they became trustees of the rents and corpus of the estate.

MacSwinney in reply. — The vendors do not deny that they are trustees, but only in a modified sense:

Royal Bristol Permanent Building Society v. Bomash (*ubi sup.*);

Dart's Vendors & Purchasers, 283, 284, 6th edit.

Plaintiffs might have distrained for arrears, even if they could not eject. The vendors need not tell their purchaser that there are rents in arrear, and the 13th condition of sale gives them the right to charge them against the purchaser.

KEKEWICH, J. — The statement of facts in this case raises a nice point, and one which is certainly not covered by authority. There are some older cases touching on the question, but there are also some more modern cases laying down what is the relation of vendor and purchaser, or rather of vendor and purchaser in cases in which the vendor remains in possession of the property he has sold after the date in the contract fixed for the completion of the purchase. One of the more instructive cases is that of *Lysaght v. Edwards* (*ubi sup.*), in which the Master of the Rolls (Sir George Jessel) examines many authorities and lays down a rule of his own. There the question was whether land included in a contract for sale passed under a devise by the vendor of trust estates, and it was held that it did so pass, and that raised a further question whether a vendor might be properly called a trustee after the date of the contract. I will not really refer to the case further than to say that Sir George Jessel held that he was a trustee, and he says at p. 789: "In the same way a correlative liability applies to the vendor in possession. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the pur-

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chaser, and, more than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject, of course, to his right to be paid the purchase money and his right to enforce his security against the estate." The relation of vendor and purchaser is further illustrated by the case of *Phillips v. Silvester* (*ubi sup.*), a case of considerable importance, and there are other cases showing that a vendor may be made liable, as he there was, for neglect to take care of the property; and by cases which show that he can be charged with wilful default, a deduction which follows from *Phillips v. Silvester* (*ubi sup.*). All those cases dealt with contract of sale, the relation constituted by a contract capable of being enforced in proceedings for specific performance, and in them everything is laid down subject to the contract being eventually performed. Then, of course, if the contract is not performed by the purchaser, if the vendor was in possession, it may be for many months or years, as trustee for the purchaser, that relation is discharged between them, and nothing could be said against the vendor for neglect or misfeasance. If the vendor obtained a judgment for specific performance and that was set aside by the House of Lords, he would be and remain owner of the estate in possession free from liability. That illustrates the very peculiar position in which he stands. He is a trustee, and under obligations, in a very modified sense. The present case, however, raises a new question, and I am bound to consider his position and the relations subsisting after the expiration of the time before the day "fixed for completion" when he no longer remains in unqualified possession, but from the time from which the purchaser is entitled to the rents and profits—that is usually, according to the common form, the day fixed for the completion of the purchase—not necessarily, however, for they can fix another day. Thus in commercial contracts it is very usual to fix another day, and one even prior to the date of the contract, as when a purchaser takes a business from January which is sold in July. So, too, it might be fixed as regards lands. There is no reason why, if the parties find it convenient so to contract, they might not say the time "fixed for completion" should be an earlier day than usual, and the purchaser should be entitled to the rents and profits. Here it was the 18th March 1902 from which the purchaser was entitled to the rents and profits and liable to pay interest on unpaid purchase money. But completion did not—as happens in very many cases—take place on that day. The vendors still remained in possession. There was no default in them, or, in a legal sense, in the purchaser either. The point the purchaser raised was a proper one to take. From that date, the vendors being still in possession, they elected to receive interest in lieu of rents and profits as they were entitled to do, but they continued to receive the rents. The property was let to weekly tenants, and after that date they received the rents which they say they are entitled to appropriate or allocate to rents in arrear, and, as a result, to put into their own pockets the rents so received. And that involves a difference in the accounts of some 34l. This raises an important question. If there were nothing else in it, I should have thought that the

vendors could properly say—the tenants not having appropriated the payments made by them—"We can appropriate the rents to any part we please of the rents due to us. We appropriate them to the weeks before the 18th March." It is argued that, even if this is so, they might be liable and the purchaser entitled to recover because at the time of payment the vendors were liable for wilful default. I need not say any more about that. What the plaintiffs really say is that they may appropriate as they are only trustees in a modified sense. Their duty—I am considering nothing about wilful default—was to get in and hold the rents for the purchaser, to whom they belong, but their interest is to appropriate to the prior arrears. Beyond that they have an interest as absolute owners in case the purchaser failed to complete. Their interest is to say that the rents in question were paid them in respect of the period before the 18th March 1902. Clearly their duty lies the other way. There is a conflict between interest and duty. When there is a conflict of duty and interest as between trustee and *cestui que trust*, duty must prevail. And if duty has not prevailed in fact, the court will insist upon the duty being performed. The matter being open, I am to see that the result is as it would be if duty prevailed, if the vendors really received these rents for the purchaser to whom they belonged. They did not intend to hand them over, but they cannot set up their interest against their duty. They must account for the rents to the purchaser. The plaintiffs are entitled to the costs of the counterclaim; the purchaser to the general costs of the action.

Solicitors: Bower, Cotton, and Bower, for Stephens, David, and Co., Cardiff; Windybank, Samuel, and Lawrence, for Lewis, Morgan, and Box, Cardiff.

Wednesday, March 9.

(Before KEKEWICH, J.)

JOHNSON v. WHITAKER. (a)

Practice—Discovery—Production—Privilege—Further affidavit—Sufficiency—Omission of statement by party that documents for which protection is claimed contain nothing impeaching his own case.

In an action to enforce the right to profit made upon an alleged joint purchase and resale of land and an account, defendant had counter-claimed for specific performance of an alleged agreement between him and the plaintiff as to certain properties purchased by defendant and, as alleged, by the plaintiff and defendant jointly and payments to be made, for a sale, and the execution of a proper conveyance.

Defendant in an affidavit of documents had sworn that he objected to produce certain documents on the ground that they related only to his own case, and did not tend to prove or support the plaintiff's case.

Held, that the affidavit, according to the dicta in the case of Morris v. Edwards (63 L. T. Rep. 26; 15 App. Cas. 309) in the House of Lords, as followed by the Court of Appeal in Attorney-

(a) Reported by W. P. PAIS, Esq., Barrister-at-Law.

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General v. Mayor and Corporation of Newcastle-upon-Tyne) 81 L. T. Rep. 311; (1899) 2 Q. B. 478) was technically sufficient, although not containing the statement that the documents for which privilege was claimed contained nothing impeaching his own case.

ADJOURNED SUMMONS.

This was an application on behalf of the plaintiff, John Harral Johnson, that the defendant might be ordered within seven days after service of the order to file a further full and sufficient affidavit of documents.

Plaintiff and defendant had, prior to 1900, been engaged in several transactions consisting of the buying and selling of land at a profit on their joint account, the plaintiff doing the commercial work and the defendant, a solicitor, the legal without charge, expenses to be repaid, and net profit divided equally between them.

A property known as the Gower-street property at Leeds had been purchased about July 1900, and conveyed to plaintiff as trustee and agent for himself and defendant by deed of the 31st July 1900, expressed to be made between Richard Thomas Otley Robinson and the plaintiff. Defendant agreed to resell at a profit, and it was conveyed by plaintiff to the purchaser, Israel Morris. Defendant had, as plaintiff alleged, received the purchase money upon trust for himself and the plaintiff on their joint account, and refused to account for the balance of profits.

The plaintiff by his statement of claim claimed a declaration that he was entitled to one moiety of the net profit on the purchase and resale of the Gower-street property, an account, damages, and costs.

Defendant by his statement of defence denied that plaintiff was entitled to any part of the purchase money of the Gower-street property, and he counter-claimed for specific performance of an alleged agreement as to the proceeds of other lands conveyed to the plaintiff, and of arrangements made between the parties as to other property in which they were alleged to be jointly interested, as to some of which he required the execution of a conveyance to himself or his nominee.

Defendant in his affidavit of documents filed on the 11th Dec. 1903 admitted that he had in his possession or power documents relating to the matters in question in the action set forth in the 1st schedule, but stated that he objected to produce those set forth in the second part of that schedule, on the grounds that "they relate only to my own case, and do not in any way tend to prove or support the plaintiff's case."

The second part of the 1st schedule contained (*inter alia*): "13th Sept. 1900.—Draft conveyance J. H. Johnson to Israel Morris."

Plaintiff accordingly took out a summons for a further and better affidavit of documents.

W. H. Cozens-Hardy for the applicant.—The defendant has not sworn that the documents he objects to produce contain nothing impeaching the case or title of the defendant: (*Minet v. Morgan*, 28 L. T. Rep. 573; L. Rep. 8 Ch. 361, which followed the case of *Combe v. Corporation of London*, 1 Y. & C. C. C. 631; affirmed 10 Jur. 57). The point is most elaborately dealt with

in *Bray on Discovery*, p. 494. Coming down to *Combe v. Corporation of London* (*ubi sup.*), it may be fairly stated that only in actions of ejectment can the statement that the documents do not impeach his own case be omitted with impunity. The allegations that the documents do not support his adversary's case and do not impeach his own ought to be coupled: (*Attorney-General v. Emerson*, 48 L. T. Rep. 18; 10 Q. B. Div. 191, the case which is always quoted in discovery cases). Lindley, L.J.'s dictum in *Budden v. Wilkinson* (69 L. T. Rep. 427, at p. 429; (1893) 2 Q. B. 432) that "the words 'and do not tend to impeach the plaintiff's title' may apparently be omitted in the affidavit; but their omission does not affect the sufficiency of the affidavit" is relied on by the other side. *Attorney-General v. Mayor and Corporation of Newcastle-upon-Tyne* (81 L. T. Rep. 311; (1899) 2 Q. B. 478), where the Court of Appeal, varying the order of the Divisional Court, held that the affidavit need not state that the documents for which the claim of privilege is made do not contain anything impeaching the case of the defendant, was, like *Morris v. Edwards* (63 L. T. Rep. 26; 15 App. Cas. 309), in substance an action of ejectment (*vide* argument at p. 313, 81 L. T. Rep.). If that is so, it has no bearing on the present case, for it is admitted that in actions of ejectment and other similar cases the words in question need not be inserted. Smith, L.J., at p. 313 of 81 L. T. Rep., states that *Attorney-General v. Mayor and Corporation of Newcastle-upon-Tyne* (*ubi sup.*) was so decided in deference to the generality of the expressions of the noble and learned Lords in *Morris v. Edwards* (*ubi sup.*). It is quoted in the Annual Practice for 1904, at p. 394. Vaughan Williams, L.J. does confine his remarks in that case to such a case as that before his Lordship. After the decision in *Minet v. Morgan* (*ubi sup.*), the form of affidavit in use contained the words as to not tending to impeach the defendant's case. *Budden v. Wilkinson* (*ubi sup.*) was decided as not being a case in which the plaintiff's possession of the *locus in quo* was in dispute, and that therefore the plaintiff could not succeed by the weakness of the defendant's title. Lord Selborne, L.C. gave the form in *Minet v. Morgan* (*ubi sup.*) his sanction, and James, L.J. followed the case in *Hastings Corporation v. Ivall* (L. Rep. 8 Ch. 1017). There is nothing in the cases reported since 1842 to alter the practice of 1842 as to the necessity for inserting the words as to impeachment. Applicant asks for production, not only for a further and better affidavit. He says the Gower-street property is partly his; defendant says it is altogether his. Order XXXI., r. 19, A (2), was also referred to.

Warrington, K.C. and H. M. Humphry were not called upon on this point.

KEKEWICH, J.—There are three questions raised for decision. The first relates to whether privilege is sufficiently claimed as to documents set out in the second part of the schedule in the following language: "The grounds of my objection to produce the said documents set forth in the second part of the said first schedule are that they relate only to my own case and do not in any way tend to prove or support the plaintiff's case." It is said that that is not enough, because there are no words that these documents do not

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impeach the defendant's case. Words of that character, not varying very much in their nature, are to be found in all the text-books and in very many authorities from the time of the decision of *Knight-Bruce, V.C. in Combe v. Corporation of London (ubi sup.)*. That is unquestionable, and probably in a carefully prepared affidavit they ought not to be omitted. It is impossible to say, after what has been said this morning, that they can be safely omitted. I have Mr. Bray's book—*Digest of the Law of Discovery*—before me in which he explains in a summary brought down to the present time (at p. 40) the form of claim for protection of documents and says, "It is doubtful whether it can now be insisted upon in any case." I agree with him that it would be doubtful how the matter would be decided. But, having regard to the decision of the House of Lords in *Morris v. Edwards (ubi sup.)* and of the Court of Appeal in *Attorney-General v. Mayor and Corporation of Newcastle-upon-Tyne (ubi sup.)*, I am not at liberty to treat the question as being open. It is quite true that in that case the Attorney-General was treated as suing primarily as a plaintiff in an action of ejectment, and that the established exception only covers actions of ejectment, also that *Morris v. Edwards (ubi sup.)* was an action of ejectment, and therefore what is said there, and by the members of the Court of Appeal in *Attorney-General v. Mayor and Corporation of Newcastle-upon-Tyne (ubi sup.)*, was with reference to the cases before them. But the expressions used by Lord Halsbury, L.C. and Lord Herschell have no limit at all. They go to the whole practice and not simply as to actions of ejectment, and their Lordships express themselves in the plainest way as to the necessity of having these words. But I will not pause to quote *Morris v. Edwards (ubi sup.)* further because I have the interpretation of that decision by the Lords Justices in *Attorney-General v. Mayor and Corporation of Newcastle-upon-Tyne (ubi sup.)*. They do not say, so far as I can see, that the decision had any reference to the peculiar character of the action of ejectment. Smith, L.J. lays it down in general terms. His Lordship is reported to have said: "I well remember that when I was at the Bar the practice after the decision of the case of *Minet v. Morgan (ubi sup.)* used to be that a party to an action who claimed that documents in his possession were privileged from production had to state in his affidavit that they contained nothing tending to impeach his own case." And later (81 L. T. Rep. 313: "Now we are absolutely bound by that decision." Vaughan Williams, L.J. makes remarks to the same effect as reported. It seems impossible for me to get over the decision of the House of Lords if the Lords Justices could not. It would not be respectful in me to say that, the Lords Justices having said the decision of the House of Lords is binding on them, it is not to bind me. I am bound by the decision of the House of Lords. I cannot say, in the face of that, this affidavit, although it does not follow the common form and, notwithstanding the dictum of Lindley, L.J. in *Budden v. Wilkinson (ubi sup.)*, is not sufficient. I cannot hold that this affidavit is insufficient. I do, however, venture to express the hope that Mr. Bray will be able to say in a future edition of his book that there is no doubt that the words either must, or need not be, inserted.

Solicitors for the plaintiff, Corbin, Greener, and Cook, agents for Beaumont and Croft, Leeds.

Solicitors for the defendant, Gribble, Oddie, Sinclair, and Johnson.

Saturday, March 26.

(Before KEKEWICH, J.)

Re KINNEAR (deceased); KINNEAR v. BARNETT. (a)

Will—Construction—Gift to tenant for life with remainder to a class, their children to take by substitution—Occurrence of events not contemplated by testator.

A gift by will to a class to take effect after a life estate, with a substitutional gift to the children of deceased members of the class, expressed in words of futurity, does not let in the children of a member of the class in a case where, he having survived the tenant for life, both die after the date of the will during testator's life.

ADJOURNED SUMMONS.

By his will, dated the 10th April 1876, which was duly proved in the Principal Probate Registry, on the 5th March 1900, by Henry James Kinnear, the sole executor therein named, the testator, John James Kinnear, after certain bequests to his wife, Mary Ann Kinnear, as to the residue of his estate devised and bequeathed the same unto his wife, Mary A. Kinnear, and appointed his son Henry J. Kinnear executor and administrator thereof upon trust to permit testator's wife to have the use and enjoyment of all such parts thereof as should not yield income, and to invest the residue of such of his estate as should not have been applied in payment of his debts and funeral and testamentary expenses and legacies and pay the produce thereof and of such other parts of his estate as should yield income to his wife during the term of her natural life; and from and after her decease testator gave, devised, and bequeathed the same and every part thereof unto and among and to be equally divided between all and every his children, both sons and daughters, who should be living at the time of the decease of the testator's wife and the issue of such of them as "shall be dead" (such issue nevertheless taking only the share which their deceased parent would have been entitled to in the event of such parent surviving testator's wife) to and for their own use and benefit absolutely.

The testator died on the 7th Jan. 1900. His wife died on the 7th April 1891. They had five children—viz., William Charles Kinnear, who died on the 31st Jan. 1899, and who married the plaintiff Annie Dove in 1886, and by her had three children, the infant plaintiffs by their next friend; Henry J. Kinnear, who died on the 24th June 1902; John William Kinnear, who died on the 31st Oct. 1900; and Eleanor Mary Ann Barnett and Mary Ann Sophia Parr, the defendants.

The plaintiff Annie Dove became the wife of her present husband on the 1st May 1899.

One-fifth of testator's estate remained unadministered.

Eleanor M. A. Barnett and Mary A. S. Parr having renounced administration, the plaintiff

(a) Reported by W. P. PAIN, Esq., Barrister-at-Law.

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Annie Dove, in right of the infant plaintiffs, applied to the Probate Registry for grant of administration to the testator in order to obtain payment of this one-fifth share, which was claimed on their behalf as substituted residuary legatees in place of their father, William C. Kinnear, deceased.

The registrars of the Probate Division thereupon desired the opinion of this honourable court as to whether the three infant plaintiffs were substituted residuary legatees under testator's will, in the place of their late father.

This summons asked for a declaration accordingly.

H. Cloughton Scott, for the children of William C. Kinnear, stated the facts as above. It is a pure question of construction as to the intention of the testator to be gathered from his will. [KEKEWICH, J.—The difficulty arises from testator not having contemplated the one event which took place.] The words "shall be dead" refer to the distribution of the fund. If the children of William C. Kinnear cannot take by substitution to their father, I am afraid they cannot take at all, as it is a case of a gift to a class. *Olney v. Bates* (3 Drew, 319) at first sight is entirely against me, but at the bottom of p. 319 testator recites the decease of another daughter, Harriet. Testator had provided for that event by a codicil in favour of her issue. That would have been unnecessary if he did not intend by his will that the issue should not take: (per Kindersley, V.C., at p. 323). The facts there are analogous to those of the present case. In this case the word "then" is not found in the substitutionary gift. *Re Potter's Trust* (20 L. T. Rep. 649; L. Rep. 8 Eq. 52) is some authority for saying we may construe "dead" as dead at the period of distribution, whenever that happens. If William C. Kinnear had died at an earlier or later date he would have taken.

P. M. Walters for testator's remaining four children.—William C. Kinnear's children cannot take this fifth, as he, having died before testator, could not take under such a gift as that in the present will. [KEKEWICH, J.—Testator uses the words "would have been entitled to if he or she had survived my said wife." The gift is to the children living at the death of the wife and the issue of those then dead. It must mean then dead. He means the issue of those who died before the testator's wife. *Olney v. Bates* (*ubi sup.*) is in point. The reference to the codicil there was an afterthought of the Vice-Chancellor. This is not a case where your Lordship has to struggle to avoid an intestacy. It is analogous to cases like *Jones v. Westcombe* (1 Eq. Cas. Abr. 245, pl. 10), in which a gift during widowhood and then over has been held to extend to death as well as marriage.

KEKEWICH, J.—It is impossible not to surmise in the case of this will, if we were at liberty to surmise, that the testator, if the matter had been present to his mind, would have provided for these children, because the general intention of the will is to provide for his children and those who claim through his children. But unless I can find it stated within the four corners of the document, I have no right to surmise as to what it might have contained. I must take the will as being the last will and testament of the testator. He gave his residuary estate to his sons and

daughters who should be living at the decease of his wife. This particular child predeceased the testator, though he survived the wife. Of course his children could not have taken under sect. 33 of the Wills Act, because this has been held not to be applicable to gifts to a class. Look also at the gift to the issue. It reads: "And the issue of such of them as shall be dead (such issue nevertheless taking only the share which their deceased parent would have been entitled to in the event of such parent surviving my said wife)"—without putting in the word "then." He means at the death of the wife. The word "then" is not here, but the testator uses words of futurity. A careful draftsman might have put in the word "then." It is the issue of children who shall be then dead who are to take. I might go further; the issue are to take the share their deceased parent would have taken in the event of the parent surviving "my said wife." As a matter of fact the child did not survive the wife. I do not see how his children can come in in any way. I declare that the testator's residuary estate, including the one-fifth unadministered, passed in fourths.

Solicitors for all parties: *Marchant, Benwell, and Marchant*.

March 16 and 24.

(Before KEKEWICH, J.)

Re LONGBOTHAM AND SONS (Solicitors). (a)

Costs—Taxation—Third party liable—Mortgagee and mortgagor—Solicitors Act 1843 (6 & 7 Vict. c. 73), s. 38.

On a taxation by a mortgagor of his mortgagee's solicitor's bill of costs in respect of a suggested further advance, and a transfer of the security, the taxing master disallowed more than one-sixth of the amount of the bill, consisting of items for work done and letters written for the protection of the security without consultation with the mortgagor.

On a summons to review, the senior taxing master having certified that since the decision in Re Gray (84 L. T. Rep. 24; (1901) 1 Ch. 239) the practice had been to tax, apart from the order, as between the solicitor and the party or estate liable to pay, the court refused the application by the solicitors.

ADJOURNED SUMMONS to review taxation of costs under an order dated the 19th Aug. 1903.

Messrs. Longbotham and Sons were the solicitors for Miss Taylor, holder of a mortgage upon an interest vested in Samuel B. Crossley, the petitioner, which was subject to a second charge.

The costs were incurred by the mortgagor, who applied to Messrs. Longbotham and Sons for a further advance by Miss Taylor on the mortgaged property, but such further advance was not made as the mortgagor made arrangements by which he paid off Miss Taylor's mortgage, the bill of costs including charges in respect of the transfer of the mortgage.

As the sole question was, as appears below, whether Messrs. Longbotham and Sons' bill of costs was made out on a wrong principle, the taxing master stating that it contained but one instance of a small overcharge, no purpose would

(1) Reported by W. P. PAIN, Esq., Barrister-at-Law.

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be served by setting out the bill of costs and charges and particulars of the items taxed off, some of which were, however, afterwards allowed by the master. It may be stated, however, that the total amount of the bill, as sent in for taxation, was 12l. 9s. 8d., from which more than one-sixth—namely, 2l. 10s. 8d.—was ultimately taxed off, the items disallowed consisting of attendances not made at the request of the mortgagor, but for the convenience of the mortgagee, and unnecessary letters. The petitioner was given his costs of the taxation.

Detailed objections were carried in by the respondents to the taxation, the following grounds and reasons being alleged to the disallowance made by the taxing master: (1) That the items were properly chargeable against the mortgagee, and, if so, the mortgagor was not entitled to have any of them disallowed. (2) If any of them were not properly chargeable against the mortgagee, they were properly chargeable against the mortgagor, and therefore ought to be allowed.

The taxing master, in his answers on respondents' objections, stated that he had taxed this bill upon the principles laid down in *Re Gray* (84 L. T. Rep. 24; (1901) 1 Ch. 239), and that he thought all the points raised by the respondents were really governed by this statement, and, after dealing with the objections in detail, stated that the bill was made out on a wrong principle, the old practice being present to the minds both of the solicitor and his London agent, and consequently more than one-sixth had been disallowed. He further added that if the present practice had been followed, and the bill drawn accordingly, he was satisfied that there would have been no question raised, as the bill did not contain overcharges except in one instance, and that a small one; but it was sought to charge the mortgagor with more than he was liable to pay as between him and the mortgagee, and such bills were of very frequent occurrence.

George Lawrence for the applicant solicitors. —This summons raises a question as to whether the decision of Cozens-Hardy, J., in *Re Gray* (84 L. T. Rep. 24; (1901) 1 Ch. 239) affects the principle on which on a third party taxation of the mortgagee's solicitor's costs by the mortgagor should be carried out. According to the present practice, it appears that all items which cannot be charged as between mortgagor and mortgagee are struck out, as I submit, erroneously, according to the earlier decisions. A mortgagor has not the right to have the bills of costs of the mortgagee's solicitor taxed on a different principle from that which the mortgagee himself has (per Lord Langdale, M.R. in *Re Fyson* (9 Beav. 117, at p. 119); and in *Re Bignold* (9 Beav. 269), his Lordship lays down the principle that the mortgagor may tax as against the mortgagee's solicitor for the purpose of reducing the amount claimed. In *Re Baker* (8 L. T. Rep. 566) Lord Romilly, M.R. lays down that the mortgagor must pay the amount due to the solicitor from the mortgagee. *Re Jones* (8 Beav. 479) is to the same effect. The cases are collected in Daniell's Chancery Practice, p. 1728, 7th edit., and their result similarly stated. Cozens-Hardy, J. deals with the question of law in *Re Gray* (*ubi sup.*), which was a case between lessor and lessee, at p. 25 of 84 L. T. Rep., where his Lordship

refers to the law of mortgagor and mortgagee. The basis on which the items were there disallowed was because they would have been disallowed as between mortgagor and mortgagee, and *Re Fyson* (*ubi sup.*) is cited. His Lordship professed to follow Chitty, J.'s decision in *Re Negus* (71 L. T. Rep. 716; (1895) 1 Ch. 73), and it is stated that the third party by obtaining an order to tax does not render himself liable to pay the whole bill. The difficulty in understanding *Re Gray* (*ubi sup.*) is that the learned judge does not intend to lay down a new rule, and mentions the old cases referred to above. "On a third party taxation," it is said, "the taxing party stands in the position of the party chargeable; but this general rule does not prevent the taxing master taking into account where the third party is in fact liable." This latter remark is founded on *Re Brown* (L. Rep. 4 Eq. 464), a case of a *cestui que trust* taxing the bill of the solicitor to the trust estate. [KEKEWICH, J.—The solicitor never charges the trust estate.] In the same way that *Re Gray* (*ubi sup.*) is founded on *Re Negus* (*ubi sup.*), so *Re Negus* is founded on *Re Brown* (*ubi sup.*). There is a great difference between the case of a mortgagor and a *cestui que trust* as a third party taxing. Both, however, by obtaining the order to tax come under a certain liability:

Holliday v. Godlee, 58 L. T. Rep. 301.

Neither Cozens-Hardy, J. nor Chitty, J. intended to overrule any authority. Arguing elsewhere, it would be respectfully contended that these decisions are not law, and that the judicial expressions of opinion to be found there are, as between mortgagor and mortgagee, merely *obiter dicta*.

T. L. Wilkinson, for the petitioner, was not called on to address the court. [KEKEWICH, J. expressed the intention of consulting the taxing masters in order to ascertain what is the rule of the taxing office in third party taxations by a mortgagor.]

March 24. — KEKEWICH, J. — This summons raises a very important question under the third party clause. It was an application to review a certificate of the taxing master made on the taxation by a mortgagor of the bill of costs of the mortgagee's solicitor under sect. 38 of the Solicitors Act 1843. These cases are of frequent occurrence, and therefore, apart from the question of the proper practice, it is a matter of very considerable importance. The point was this: Counsel in support of the summons insisted that under certain authorities, of which he only cited a few, but which he said were numerous, the taxation of a bill of costs of a solicitor of a mortgagee by the mortgagor must proceed according to the rules which would govern the taxation of the same bill by the mortgagee—the taxation by a client of his solicitor's bill. That seems on the face of it to be a rather useless way of dealing with a bill of costs, because the mortgagor on repayment does not care to know what the mortgagee owes to his solicitor, but what is his own liability to the mortgagee's solicitor—that is to say, through the mortgagee to the solicitor. He wants to know what he has to pay for principal, interest, and costs, and he wants to

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ascertain what ought to be charged against him, so there is very little advantage to him in knowing what is to be charged against the mortgagee. But the cases which were decided upon the construction of the Solicitors Act 1843 (6 & 7 Vict. c. 73), s. 38, clearly went to this: that the taxation must proceed as between solicitor and client—that is to say, between the mortgagee and his solicitor—and the cases are necessarily to be found in Beavan's Reports. They are very numerous, and they establish the practice. But not long ago, Cozens-Hardy, J., as he then was, in the case of *Re Gray* (*ubi sup.*) gave a decision which, though not purporting to overrule the cases which are to be found in Beavan, certainly directed taxation on an entirely different footing, and what seems to me to be a useful footing, but whether that is the right and true construction of the Act is another question. Cozens-Hardy, J. would not say that the construction of the Act adopted by Lord Romilly, M.R. was wrong, but he certainly came to a different conclusion. But, after hearing counsel for the applicants and before hearing counsel for the petitioner, I thought that for the assistance of the Profession I would desire a certificate from the taxing masters as to what the practice is, and I therefore prepared a short case raising the point, and I gave the taxing masters an opportunity of seeing the papers to see exactly how the point arose. I have received from the senior taxing master a certificate in the following terms: "To the Honourable Mr. Justice Kekewich.—Your Lordship having desired a certificate from the masters of the Supreme Court (Taxing Office) of the practice generally in cases between the mortgagor and the solicitor of the mortgagee, I beg respectfully to report to your Lordship: That the practice followed by the masters in taxations under sect. 38 of 6 & 7 Vict. c. 73 (the Solicitors Act) up to within recent years was to tax as between the solicitor and the client (the party chargeable in the first instance), and not as between the solicitor and the party liable to pay, effect, however, being given, as far as possible, to the cases of *Re Negus* (1895) 1 Ch. 73 and *Re Abbott* (4 L. T. Rep. 576) and the observations of Cotton, L.J. in *Re Morcroft* (29 Sol. Jo. 471, C. A.). The principles, however, laid down by these cases were, in the opinion of the masters, considerably extended by the case of *Re Gray* (1901) 1 Ch. 239, and since that case the practice in the taxing office in taxations under this section has been to tax, apart from the order, as between the solicitor and the party, or estate, liable to pay.—(Signed) M. SPOFFORTH, Senior Master." So that I have the practice thus certified in that way, and I have the statement of the master in this particular case that he has taxed according to *Re Gray* (*ubi sup.*). My duty is, after that certificate, to follow the practice laid down, subject, of course, to my decision being reversed by the Court of Appeal, and to refuse the application with costs.

George Lawrence.—I suppose your Lordship will give me leave to appeal if necessary?

KEKEWICH, J.—Yes.

Solicitors for the applicant solicitors, *Bower, Cotton, and Bower.*

Solicitors for the petitioner, *Indermaur and Brown*, agents for *W. Pearce, Todmorden.*

Thursday, Feb. 4.

(Before SWINFEN EADY, J.)

Re LORD WIMBORNE AND BROWNE'S CONTRACT AND VENDOR AND PURCHASER ACT 1874. (a)

Vendor and purchaser—Settled land—Original settlement—Compound settlement—Life estate under original settlement extinguished—Charge for jointure and portions under original settlement—Sale by tenant for life under powers of original settlement—Trustees of original settlement.

A testator settled his land on his eldest son for life, with remainder to the son's sons in tail male in strict settlement, with power for each tenant for life on his marriage to create charges thereon for jointure for his wife and portions for his younger children. Land was purchased by the trustees of the will and added to the settled land, and the tenant for life married and charged the land subject to the settlement with jointure and portions. By successive deeds of resettlement, family arrangement, and appointment, to which the tenant for life and tenant in tail male were parties, the life estate given by the testator's will was extinguished and a compound settlement was created; but the charge for jointure and portions made under the powers given by the testator's will still subsisted. The tenant for life, with the concurrence of the tenant in tail, then agreed to sell part of the settled land in exercise of his power of sale under the original settlement created by the testator's will alone, the purchase money to be paid to the trustees of the will.

On a summons by the purchaser for the determination of the question whether the tenant for life could sell under the original settlement created by the will alone, or whether trustees of the compound settlement created by the will and subsequent deeds must be appointed:

Held, that, as the charge for jointure and portions made under the powers given by the will was still subsisting, the original settlement created by the will alone was still existing side by side with the compound settlement created by the will and subsequent deeds, and that the tenant for life could sell under the will alone, so that it was unnecessary to appoint trustees of the compound settlement.

Re Cornwallis-West and Munro's Contract (89 L. T. Rep. 351; (1903) 2 Ch. 150) explained.

SIR JOSIAH J. GUEST, who died on the 26th Nov. 1852, by his will, dated the 9th Sept. 1850, devised certain freehold estates to the use of his eldest son Lord Wimborne for life, with remainder to the use of his first and every other son successively according to seniority in tail male, with divers remainders over in strict settlement; and the testator empowered each tenant for life of the settled land to charge the same with a jointure for his wife and portions for his younger children and to limit terms to secure the same; and provided that any tenant for life in possession or receipt of the rents and profits of the settled land might, with the consent of the trustees, sell the same, and that the trustees should invest the purchase money in the purchase of (*inter alia*) freehold land to be settled upon the trusts to which the land sold had been subject; and the testator

(a) Reported by J. THORSTAM, Esq., Barrister-at-Law.

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directed that his trustees should stand possessed of the proceeds of the sale and conversion of his residuary personalty upon the same trusts, so far as was material in the present case, as if such proceeds had been produced by sale of the settled land, and declared that the receipt of his trustees for any money payable to them should be a sufficient discharge for the same.

On the 14th June 1865 the trustees invested certain proceeds of conversion of the testator's residuary personalty in the purchase of an estate called the Fifehead estate, which was conveyed to them upon the same trusts, so far as material, as those to which the settled land was subject.

In May 1868 Lord Wimborne, the tenant for life of the settled land, married, and by his marriage settlement charged the Fifehead estate and other settled lands with a jointure for his wife and portions for the younger children of his marriage, and limited terms therein to secure the same.

By a disentailing assurance dated the 17th Jan. 1895, and made between Lord Wimborne of the first part, the Hon. Ivor Churchill Guest, his eldest son, then tenant in tail male of the second part, and Samuel Bircham of the third part, after reciting that Lord Wimborne and the Hon. I. C. Guest were desirous of barring the entail created by the testator's will (but without prejudice to the uses and estates thereby limited prior to the estate of the first son of Lord Wimborne) and of assuring the premises in manner hereinafter mentioned without prejudice as aforesaid, except that the joint power of appointment hereinafter limited to Lord Wimborne and the Hon. I. C. Guest should overreach the estate limited by the will to Lord Wimborne and the powers annexed to that estate, the Fifehead estate with the lands settled by the testator's will was limited, subject to the charge for jointure and portions and to the incumbrances therein mentioned and to the terms for securing the same and to the uses and estates limited by the testator's will prior to the estate thereby limited to the first son of Lord Wimborne, but freed from the estate in tail male of the Hon. I. C. Guest and from all estates in remainder, to such uses as Lord Wimborne and the Hon. I. C. Guest should jointly appoint, and in default to the uses, trusts, and powers which under the testator's will were subsisting immediately before the execution of the disentailing assurance so as to restore and confirm the same.

By a deed of resettlement dated the 19th Jan. 1895, and made between Lord Wimborne of the first part, the Hon. I. C. Guest of the second part, and trustees of the third part, the Fifehead estate with other settled lands was appointed, subject to the charge for jointure and portions and to the term for securing the same, to such uses as Lord Wimborne and the Hon. I. C. Guest should by deed jointly appoint, and in default to the use that the Hon. I. C. Guest during their joint lives might receive a yearly rentcharge of 1500*l.*, and subject thereto to the use of Lord Wimborne for life in restoration and confirmation of his estate for life limited by the testator's will or subsisting under the disentailing assurance, and so as to restore all powers annexed or appendant thereto, and after his death to certain uses for raising money for payment of certain debts, duties, and costs therein mentioned, and

subject thereto to the use of the Hon. I. C. Guest for life, with divers remainders over in strict settlement.

By a deed of family arrangement dated the 20th July 1895, and made between Lord Wimborne of the first part, the Hon. I. C. Guest of the second part, and S. Bircham of the third part, Lord Wimborne as to his life estate granted the Fifehead estate with other settled lands to S. Bircham for the terms therein mentioned for securing the payment of certain charges thereon, and subject thereto to the use of the Hon. I. C. Guest, his heirs and assigns, and the Hon. I. C. Guest released the annual rentcharge of 1500*l.* granted to him by the resettlement of the 19th Jan. 1895 and covenanted to pay certain portions chargeable on the settled estates and the jointure of Lady Wimborne.

By an indenture dated the 20th March 1899, and made between Lord Wimborne of the first part, the Hon. I. C. Guest of the second part, and trustees of the third part, Lord Wimborne and the Hon. I. C. Guest, in exercise of the power of appointment created by the deed of resettlement of the 19th Jan. 1895, appointed the Fifehead estate, subject to the charge for jointure and portions and to the incumbrances thereon and the terms for securing the same, to the uses, upon the trusts, and subject to the powers which would be subsisting therein under the deed of resettlement if Lord Wimborne were then dead.

By an agreement dated the 6th Oct. 1903, and made between Lord Wimborne of the first part, the Hon. I. C. Guest of the second part, and the purchaser of the third part, Lord Wimborne, with the concurrence of the Hon. I. C. Guest, agreed to sell the Fifehead estate to the purchaser, the agreement stating that the vendor was selling and would convey the property as tenant for life or the person having the powers of the tenant for life for the purposes of the Settled Land Acts under the settlement made by the testator's will, and that the purchase money should be paid to the trustees of that settlement.

This summons was taken out by the purchaser for the determination of the question whether the vendor could sell as tenant for life of the settlement made by the will alone, or whether he could only sell as tenant for life under the compound settlement made by the will, the conveyance of the 14th June 1865, the disentailing assurance of the 17th Jan. 1895, the deed of resettlement of the 19th Jan. 1895, the deed of family arrangement of the 20th July 1895, and the deed of appointment of the 20th March 1899, or by some of those documents, so that trustees for the purposes of the Settled Land Acts must be appointed of such compound settlement.

The deed of appointment of the existing trustees of the testator's will constituted them trustees thereof for all the purposes and with all the powers for and with which the trustees nominated by the testator had been appointed trustees by his will.

Vernon Smith, K.C. and *G. J. Duncan* for the purchaser.—The vendor proposes to sell under his power of sale as tenant for life or as the person having the powers of a tenant for life under the testator's will; but after the resettlement of the 19th Jan. 1895, by which the vendor's life estate under the will and all powers annexed to that life

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estate were restored, the vendor can only sell under the compound settlement created by the will and the various deeds down to and including that resettlement:

Re Cornwallis-West and Munro's Contract, 88 L. T. Rep. 351; (1903) 2 Ch. 150.

The statutory power of sale of a tenant for life, after alienation or release of his life estate, still remains exercisable under sect. 50 of the Settled Land Act 1882:

Re Mundy and Roper's Contract, 79 L. T. Rep. 583; (1899) 1 Ch. 275.

In 1897, in the unreported case of *Re Lord Wimborne and Lee's Contract* (1897) W. N. 176), Stirling, J. held that Lord Wimborne could then sell under his power of sale as tenant for life for the purposes of the Settled Land Acts under the testator's will; and in the same year, in the case of *Barry Railway Company and Lord Wimborne and Vendor and Purchaser Act 1874* (76 L. T. Rep. 489), North, J. decided that Lord Wimborne's life estate was not merged or extinguished by the indenture of the 20th July 1895, and that he could then sell under his power of sale as tenant for life for the purposes of the Settled Land Acts under the testator's will; but both these cases were prior to the indenture of the 20th March 1899. Lord Wimborne can now sell only under the compound settlement created by the will and subsequent deeds.

J. G. Wood for Lord Wimborne.—Although there is a compound settlement created by the will and subsequent deeds, the original settlement created by the will is still in existence by reason of the charge for jointure and portions under that settlement and the term for securing the same:

Re Mundy and Roper's Contract (*ubi sup.*).

And the vendor can still exercise his power of sale under the will:

Re Du Cane and Nettlefold's Contract, 78 L. T. Rep. 458; (1898) 2 Ch. 96;

Re Lord Wimborne and Lee's Contract (*ubi sup.*);
Barry Railway Company and Lord Wimborne and Vendor and Purchaser Act 1874 (*ubi sup.*).

The case of *Re Cornwallis-West and Munro's Contract* (*ubi sup.*) did not decide that the vendor could not sell under the will if there were trustees for the purposes of the Settled Land Acts of the settlement created by the will. If the court decides in favour of the vendor, both parties desire that the present trustees of the will should be appointed trustees for the purposes of the Settled Land Acts of the settlement created by the will in respect of the Fifehead estate.

SWINFEN EADY, J. stated the facts and proceeded:—The question is, Can the vendor sell under the will alone and the trustees of the will give a good receipt for the purchase money, or can he only sell under the compound settlement created by the will and the subsequent deeds so as to necessitate the appointment of trustees of that compound settlement? It is clear from the cases of *Re Du Cane and Nettlefold's Contract* (*ubi sup.*) and *Re Mundy and Roper's Contract* (*ubi sup.*) that an original settlement and a compound settlement may be subsisting side by side, and the mere fact that the life tenant has parted with his life estate does not prevent him from exercising his statutory powers under the

original settlement. In the present case the original settlement created by the will is still subsisting, since by reason of the jointure and portions charged and remaining to be raised thereunder the land still stands for the time being limited to persons by way of succession under that instrument according to the decision of the Court of Appeal in *Re Mundy and Roper's Contract* (*ubi sup.*). If that were all, it would be clear from those cases that the vendor can sell under the original settlement created by the will, and that the trustees of the will can give a valid receipt for the purchase money. It is contended, however, that this would be contrary to the decision of Farwell, J. in *Re Cornwallis-West and Munro's Contract* (*ubi sup.*), and that where there are instruments constituting a compound settlement the tenant for life can only sell under that compound settlement, and that the trustees of that compound settlement are the only persons who can give a valid receipt for the purchase money, even although there are still subsisting limitations under the original settlement. I have the authority of Farwell, J. for stating that the true explanation of that case is that, as the old life estate created by the will had been restored, the tenant for life could not sell and confer a good title under the resettlement alone, as he proposed to do, and, as there were no trustees for the purposes of the Settled Land Acts of the settlement created by the will, the tenant for life could not, as matters then stood, sell under the will alone. The learned judge did not decide, and did not intend to decide, that the vendor could not sell and make a good title as tenant for life under the will if and when trustees of the settlement created by the will were appointed for the purposes of the Settled Land Acts. Indeed, the contrary was assumed in the argument before him. In the present case the vendor has entirely parted with his life estate in the land, but the original settlement created by the will is still subsisting, and the vendor can exercise his statutory powers thereunder. Therefore the vendor can sell under the will alone, and the trustees of the will for the purposes of the Settled Land Acts can give a valid receipt for the purchase money. As the parties are agreed that it is doubtful whether the existing trustees of the will are trustees for the purposes of the Settled Land Acts of the Fifehead estate, to obviate any doubt I appoint them as trustees of the will for those purposes in respect of that estate, and give leave to amend the summons by intitling it in the matter of the Settled Land Acts 1882 to 1890.

Solicitors: *Thrupp, Chidell, and Sharp*;
Bircham and Co.

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KING'S BENCH DIVISION.

Wednesday, March 2.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

WING (app.) v. EPSOM URBAN DISTRICT COUNCIL (resps.). (a)

Public health—Justices—Abatement of nuisance—Order made by three justices—Order signed by one justice only—Validity of order—Necessity of signature by two justices—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 96, 251—Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 14.

By sect. 251 of the Public Health Act 1875 a court of summary jurisdiction when hearing and determining an information or complaint under the Act must be constituted of two or more justices of the peace in petty sessions. A court of summary jurisdiction consisting of three justices in petty sessions made an order under sect. 96 of the Act on the owner of certain premises for the abatement of a nuisance on the premises. The order as drawn up and served on the owner was signed by one justice only.

Held, that the order must be signed by two justices, and, having been signed by one justice only, was bad.

CASE stated by the Court of Quarter Sessions for the county of Surrey.

At the midsummer quarter sessions for the county of Surrey three appeals by Walter Wing (the appellant) against three orders made by the court of summary jurisdiction sitting at Epsom were heard. Each of the orders was made by the court of summary jurisdiction on the appellant under sect. 96 of the Public Health Act 1875 as being the owner within the meaning of the Act of certain premises situated at Garden-cottages, Epsom.

The Court of Quarter Sessions dismissed the appeals, and confirmed the orders with costs, subject to this case.

The facts of the case were as follows:—

The appellant was the owner, within the meaning of the Public Health Act 1875, and lessee of certain premises situate at Nos. 1 to 20, Garden-cottages, Epsom, within the district of the respondents, of which fourteen years of the term of the appellant's lease were still unexpired.

In or about the months of March and April 1903 the respondents relaid the sewer with which the drains of the premises were connected, and the respondents served three notices upon the appellant alleging a nuisance existing in respect of the drains and requiring the same to be abated and certain works to be executed.

The appellant did not comply with the notices or any of them, and three complaints relating to the alleged nuisance were thereupon made to a justice of the peace, and such justice issued three summonses requiring the appellant to appear before the court of summary jurisdiction sitting at Epsom.

On the hearing of the summonses on the 20th April 1903, both parties being then present, the orders were made by the court of summary jurisdiction, three justices being then present and taking part in the hearing and determination of the summonses, and subsequently on the 27th

April 1903 the appellant served the respondents with notice of appeal against each of the orders as having been made by His Majesty's justices of the peace acting in and for the division of Epsom, and setting forth in each such notice, amongst other grounds of appeal, that the order appealed from was bad on the face of it, and on the same day (the 27th April 1893) the appellant duly entered into three several recognisances as required by law for the prosecution of his appeals, copies whereof were hereto annexed and were to be taken as part of this case.

The orders were on the 2nd June 1903 served on the appellant by the respondents, and each of the original orders was duly delivered to the clerk of the peace prior to the hearing of these appeals.

The following was an exact copy of one of the original orders, and was in the same terms in all respects as the order served on the appellant:

In the county of Surrey, petty sessional division of Epsom.—Before the court of summary jurisdiction sitting at Epsom the 20th day of April 1903, complaint was made on the 9th day of April 1903 by Edward Robert Capon, of Bromley Hurst, Church-street, Epsom, Inspector of Nuisances to the Epsom Urban District Council, that in or on certain premises situated at 15, 14, 13, 12, and 11, Garden-cottages, Epsom aforesaid, in the district, under the Public Health Act 1875, of the Epsom Urban District Council, the following nuisance then existed—viz., a nuisance arising from want or defective construction of structural conveniences, that is to say, arising from leaky drains, also drains not being intercepted from sewer, the discharge of sink wastes into closet pans, the absence of ventilation to drains, defective flushing cistern in each closet, and rain-water pipe connected directly with sewer, and that Walter James Wing (hereinafter called "the defendant") is the owner of the premises on which the said nuisance arises. On hearing the said complaint it is ordered that the defendant within six weeks from the service of this order, or a true copy thereof according to the said Act, do take out the existing branch drains and construct new drains with stoneware pipes, with watertight cement joints laid to proper falls in beds of cement concrete properly intercepted from sewer, provided with efficient ventilation, with cast iron pipes of a diameter not less than four inches, disconnect sink wastes from closet pans, and cause same to discharge into the open over a trapped stoneware gully which shall be connected with the sewer, so that the same shall no longer be a nuisance or injurious to health as aforesaid.—Dated the 20th day of April 1903.—(Signed) WILLIAM R. G. FARMER, Justice of the Peace for the county aforesaid.

Each of the other original orders was in exactly the same terms, and was under the hand and seal of William R. G. Farmer as the order hereinbefore set out, and each of the other orders served on the appellant was in exactly the same terms and was under the hand and seal of William R. G. Farmer as the order hereinbefore set out, save that each of the orders referred to different premises in the same street.

It was contended for the appellant that each of the orders was bad and ought to be quashed, inasmuch as each order was made under the hand and seal of one justice of the peace only.

It was contended for the respondents that each of the orders was valid.

The Court of Quarter Sessions were of opinion that each of the orders was valid, and overruled the appellant's contention, and they afterwards heard the appeals together, by consent upon the merits, and dismissed them with costs.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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If the court should be of opinion upon the facts stated that the quarter sessions were right in overruling the appellant's contention and in holding that the orders were valid, the order of quarter sessions was to stand; but if not, each of the orders was to be quashed, and each of the appeals was to be allowed with costs.

The Public Health Act 1875 (38 & 39 Vict. c. 55), provides:

Sect. 96. If the court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, the court shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose; . . . The court may by their order impose a penalty not exceeding five pounds on the person on whom the order is made, and shall also give directions as to the payment of all costs incurred up to the time of the hearing or making the order for abatement or prohibition of the nuisance.

Sect. 251. All offences under this Act, and all penalties, forfeitures, costs, and expenses under this Act directed to be recovered in a summary manner, or the recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts before a court of summary jurisdiction. The court of summary jurisdiction, when hearing and determining an information or complaint under this Act, shall be constituted of two or more justices of the peace in petty sessions, sitting at a place appointed for holding petty sessions, or of some magistrate or officer for the time being empowered by law to do alone any act authorised to be done by more than one justice of the peace sitting at some court or other place appointed for the administration of justice.

F. Low, K.C. (William Mackenzie with him) for the appellant.—It is sufficient to deal with one of the three orders. Sect. 96 of the Public Health Act 1875 is the section under which an order for the abatement of a nuisance is made by a court of summary jurisdiction. By sect. 12 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), every complaint and information "shall be heard, tried, determined, and adjudged by one or two or more justice or justices of the peace, as shall be directed by the Act of Parliament upon which such complaint or information shall be framed, or such other Act or Acts of Parliament as there may be in that behalf." There is in the present case such a direction that the matter of this information shall be heard by two justices, as sect. 251 of the Public Health Act 1875 provides that the court of summary jurisdiction, when hearing and determining a complaint under the Act, shall be constituted of two or more justices in petty sessions. Therefore there must be at least two justices sitting to hear a complaint of this kind, and that section is relied on as showing that. Then, by sect. 14 of the Summary Jurisdiction Act 1848, if the justice or justices convict or make an order against the defendant, "a minute or memorandum thereof shall then be made, for which no fee shall be paid, and shall afterwards be drawn up by the said justice or justices in proper form, under his or their hand and seal or hands and seals, and he or they shall cause the same to be lodged with the clerk of the peace to be by him filed among the records of the general quarter sessions of the peace . . ." That procedure was followed in this case; the order was first drawn up, and it was

then signed, but it was signed by one justice only of the three who sat and heard the case, and being so signed it was served on the appellant. The form of order for abatement of a nuisance under this section (sect. 96 of the Act of 1875), is form C in sched. 4 to that Act. Some orders may be made by one justice and some are to be made by two justices; and the forms which are now in use under the Summary Jurisdiction Act 1879 are the Consolidated Forms 1886, which are given in the schedule to the Summary Jurisdiction Rules 1886. Under sect. 12 of the Summary Jurisdiction Act 1848 a court of summary jurisdiction may be composed of one, two, or more justices. Then when we look at sect. 251 of the Act of 1875, the section requires two justices at least to hear this case, and to give the court jurisdiction there must be two justices at least. Then as to the form of the order it is clear that if an order is required to be made by two justices, a form that is open to the construction that the order is made by only one justice is inapplicable. It is clear upon these sections that the order as drawn up must be signed by two justices, and that this order, having been signed by one justice only, is bad upon that ground, and the quarter sessions were therefore wrong in holding that the signature of one justice to the order was sufficient. He referred to

Labalmondiere v. Frost, 1 E. & E. 527; 28 L. J. 153, M. C.

Avory, K.C. (S. G. Lushington and Swinburne-Hanham with him) for the respondents.—Two justices having sat to hear the case, the order signed by one justice is sufficient. It may be a question whether the appeal was in fact an appeal against the written document or was an appeal from the verbal order made in open court, and in that connection the form of the order ought to be looked at. The appellant's notice of appeal was against an order made by the justices of the Epsom Division, and at the time he gave that notice of appeal he had nothing to go upon except the verbal adjudication of the justices in open court. There was a perfectly good order upon the appellant made by the justices verbally in court, and it is submitted that the appellant could have been summoned for not obeying that order even if a written notice or order had not been served upon him. The order as drawn up is in fact only drawn up for the quarter sessions, and the only reason for drawing it up is that it may be sent to quarter sessions and preserved there as a record of the order which might be made at quarter sessions. That is the effect of sect. 14 of the Summary Jurisdiction Act 1848, which says that the order when drawn up is "to be lodged with the clerk of the peace, to be by him filed among the records of the general quarter sessions," as the court of summary jurisdiction is not a court of record. Under sect. 96, if the court is satisfied of the existence of a nuisance, they may make an order, and under sect. 98 if the person does not obey the order he is liable to a penalty. If there were no other order than the written order, and if this order were bad on the face of it, then the court would look at the order; but the justices can make a perfectly valid order verbally in court and say to a person that he must do a certain thing, and the person could be summoned

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for not doing that thing. If we refer to the recognisance to prosecute the appeal it recites that the order was made by two justices, so that both the notice of appeal and the recognisance recognise that the order was made by two justices. The fact that it was signed by one justice only follows the general form for all these purposes. Sect. 29 of the Summary Jurisdiction Act 1879 gave the Lord Chancellor power to make rules as to the forms to be used under the Summary Jurisdiction Acts; and sect. 12 of the Summary Jurisdiction Act 1884 provided that any rules for the time being in force under that section should be of the same effect as if they were contained in the Summary Jurisdiction Act 1848. Rules were made under the Act of 1884, and there is attached thereto a schedule of forms—the Consolidated Forms 1886—and by rule 31 those forms, or others to the like effect, may be used, and these are the forms now in use. There is a general form, form 19 (Douglas, 8th edit., p. 248), and in that form there is the signature of one justice only. [Lord ALVERSTONE, C.J.—Suppose the order had no name of a justice upon it, would the party be bound to obey it?] Yes; there would be nothing to prevent the justices making an order then and there in court for the abatement of a nuisance forthwith—as, for example, in the case of a dangerous nuisance likely to spread disease. That would be a good order, and the person might be summoned next day for not complying with it, although no written notice or written order was served on him. The effect of the signature is not the making of the order valid, but the signature is merely the verification of an order previously made in court, and it is not even necessary that that order should be put into writing. The order in the present case is quite consistent with the matter having been heard by two justices. Lastly, by sect. 262 of the Act of 1875, no order made in execution of the Act is to be quashed or set aside for want of form, and at the utmost the defect alleged in this case is a mere want of form. There is no case on the point, but upon the statutes the quarter sessions were clearly right.

Low, K.C. was not called on to reply.

Lord ALVERSTONE, C.J.—I confess I should have been glad if I could have seen my way to have prevented this appeal from succeeding, because I do not think that there are any merits whatever in the appeal. I have no doubt that the appellant knew that the order was made by two justices and that he appealed on the merits and failed. But a more important principle is involved in this appeal, and therefore we must decide the case in accordance with what our view of the law is. I have always understood that orders were drawn up, and sometimes courts have been ordered to draw them up, in order that if there is any objection to be taken to them, it may be raised by an appeal. Upon the appeal being heard by the quarter sessions a formal objection was taken on behalf of the present appellant that the original order of the 20th April, which was served upon the appellant, was bad upon the face of it, because it had only got the signature of one justice. If counsel, who has argued the case before us for the respondents, could have satisfied me that the object of the record, or the object of the signature of the justice, was merely for verifica-

tion, or if he could have satisfied me that it was not contemplated that the order should be drawn up and served before ulterior proceedings could be taken, I should have been able to come to the conclusion that there was not the necessity for an order, good upon the face of it, being served. But I think the words of the statute are too strong, and I must say that there is this very important principle before proceedings can be launched against a person which may ultimately result in subsequent proceedings against him for penalties, and may put him to costs, that the order made upon him should be definitely certain, and should in accordance with the well-known principle, be good upon the face of it. Sect. 96 of the Public Health Act 1875 says: "If the court is satisfied that the alleged nuisance exists, . . . the court shall make an order on such person requiring him . . . to abate the nuisance within a time specified in the order." I do not want to lay too much stress on the words "specified in the order," but they occurred to me as rather indicating something to be in writing, and not merely "stated in court"; but it is possible that that is consistent with what I may call the verbal order. Then the court may by their order impose a penalty not exceeding 5*l.* on the person on whom the order is made. Then I ought to notice, though it is not disputed, but it is admitted, that two or more justices ought to have heard and did in fact hear these proceedings, as provided by sect. 251 of the Act which says: "The Court of Summary Jurisdiction when hearing and determining an information or complaint under this Act shall be constituted of two or more justices." Then the form of order for the abatement of the nuisance which is to be used, is form C in sched. 4 to the Act of 1875, and that form does recite the whole proceedings, the sitting of the court, the date within which the work is to be done from the service of the order or a true copy thereof, and it indicates that it is to be signed by two justices. The only thing that enables counsel for the respondents to contend that that order so drawn up must not be an order and need not be an order, signed by two justices, is the argument he founded on sect. 14 of the Summary Jurisdiction Act 1848, that "if he or they convict or make an order against the defendant, a minute or memorandum thereof shall then be made, for which no fee shall be paid, and the conviction or order shall afterwards be drawn up by the said justice or justices in proper form under his or their hand and seal or hands and seals, and he or they shall cause the same to be lodged with the clerk of the peace, to be by him filed among the records of the general quarter sessions of the peace." It occurs to me that in a case where we had to consider this section, and where something of the same sort was referred to, I pointed out at the time, and I should like to repeat it now, that the fact that the order is to be drawn up, and that no fee is to be paid for the order or a copy of the order on being given out, would rather look as though it were intended that the person should know what were the real terms of the order made against him. The order in question in this case of the 20th April, when served, was, upon the face of it, an order made only by one justice. It is obvious that the order may be made in cases where the person has not

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appeared. It may be made under circumstances where it is essential, before a person can know what he has got to do, that the order shall be given to him, and shall specify what he has to do. It seems to me, therefore, that it is an objection to these proceedings that the order which was served on the appellant in this instance, was an order which, upon the face of it, did not comply with the statute, and the fact that the present appellant to these proceedings had knowledge that two justices did sit to hear the complaint is not, in my opinion, a sufficient answer to the objection which is taken that the record of the proceedings, which must be supposed to be a truthful record, does not show, on the face of it, that the order is good. Although I am sorry to be obliged to come to this conclusion, because I do not think that there are any merits in the case yet, in my opinion, for the reasons I have given, this appeal should be allowed.

WILLS, J.—I have come to the same conclusion. I think when form C. in sched. 4, which is appended to the Public Health Act 1875, is looked at, it is clear that such an order as this is intended to be served, and, if served, it must be drawn up and must be in writing. I do not feel at all pressed with Mr. Ivory's argument that an order may have to be made which may have to be obeyed *instantly*, or within a very short time, because orders of this kind, although they look as if they would take a formidable time to work out, are all printed, and any magistrates clerk has forms and has nothing to do but to fill in a few blanks; and therefore, when an order is required to be immediately acted upon, there can be no real or serious difficulty in making it out and probably serving it at once. If an order is to be drawn up and is to be in writing, then I cannot help thinking that it ought to show on the face of it that it is a good order. I cannot think that the signature of a justice to an order of this kind is meant merely to verify the record, as it were. In my opinion it is intended to be part of the record itself, and to indicate who has made the order and how it has been made. The schedules to the Act are by sect. 317 to be read and have effect as parts of the Act, and the form of order is to be varied as circumstances may require, and as so varied they are to be sufficient for all purposes. But then counsel for the respondents argues that because under the Summary Jurisdiction Act of 1884, the forms which are to be drawn up by the Lord Chancellor and are to be laid on the table of both Houses of Parliament, are substituted for the forms which were originally appended to the Summary Jurisdiction Act of 1848, we must look to them to see what form would be sufficient in the present case, and he says, as the only form that is given as applicable to such a case as this, is a general form which is applicable to a great many kinds of orders which would have to be varied or supplemented by written matter in order to make them complete in each particular case, therefore, inasmuch as the form which is there given, contains the signature of only one justice, that the signature of one justice is sufficient. But I think that that overlooks the fact that in rule 31 of the Summary Jurisdiction Rules 1886 it is said that the forms in the schedule to those rules are to be used with such variations as circumstances may require. Where the circumstances require that an

order must be made by two justices, surely that is one of the instances in which the regulations or rules themselves direct that the necessary alterations should be made. Therefore I do not think that the mere fact that the signature of only one justice is provided in a general form is sufficient to qualify or abrogate the necessity of letting the order appear good on the face of it. Thinking, as I do, that the signatures of the justices or magistrates who made the order, are not merely for verification, but are for the purpose of ensuring that the record shall be a complete memorandum of the order which has been made, and the persons who made it, I therefore am of opinion that if two justices must make the order, two justices must sign it.

KENNEDY, J.—I agree; and, as my brothers have so fully expressed their reasons, I have nothing to add.

Appeal allowed, but without costs of this appeal.

Solicitors for the appellant, *Spencer, Gibson, and Son.*

Solicitors for the respondents, *Lyell and Betenson, for Edmund G. Wilson, Epsom.*

Monday, April 18.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

HENNAN AND CO. LIMITED v. DUCKWORTH. (a)

Dentistry—Unregistered person—Supply of false teeth—Fitting set in patient's mouth—Right to recover fee—"Dental operation, dental attendance or advice"—Dentists Act 1878 (41 & 42 Vict. c. 33), s. 5.

A person who was carrying on the practice of a dentist, but who was not registered under the Dentists Act 1878, made by the defendant and fitted to the defendant's mouth a set of false teeth which were taken for the defendant and kept and used by him. The defendant having refused to pay for the same:

Held, that sect. 5 of the Dentists Act 1878, which prevented an unregistered person from recovering any fee or charge for "the performance of any dental operation, or for any dental attendance or advice," did not prevent the unregistered person from recovering the price of the set of teeth so supplied, as distinguished from the fitting of the same.

APPEAL by the defendant from the County Court of Lancashire, held at Blackburn.

The plaintiffs, J. B. Hennan and Co. Limited, were a registered company with a registered office at Blackburn, who carried on the practice of dentists by means of unregistered managers who were not duly qualified to act as dentists under the Dentists Act 1878, and they brought the present action to recover the sum of 5*l.*, the price agreed to be paid by the defendant for a set of artificial teeth and fillings.

The particulars of the plaintiffs' claim were as follows:

To upper and lower sets of artificial teeth and fillings, 5*l.*

John B. Hennan said that he was the managing director of the plaintiff company, that he was not

(a) Reported by W. W. OKE, Esq., Barrister-at-Law.

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in the register, but that he was apprenticed to a dentist for seven years; that the defendant called on him on the 23rd April last, when he (the defendant) was wearing a set of teeth with which he was not satisfied; and the witness said that he would make a set of teeth and do some filling for 5*l.*; that the defendant visited him four times, and that on the 27th April the set was fitted in; that a Mr. Aynley fitted them in; that he (the defendant) took them away, and that he had a conversation with the defendant about not being qualified; that the defendant came and complained, and the witness offered to remedy the set.

Mr. Aynley said that the price was fixed for the teeth; that he fitted them in the defendant's mouth about the 27th April; and that the teeth were in his opinion a good fit; that the day before the action was entered he offered to alter them, but that the defendant said he could not spare them.

The defendant said that the set was bad; when he had worn them a week he went and complained, and he saw Mr. Hennan, who did something to them and told him to keep them in for some weeks; he again saw Mr. Hennan in August and said they were wrong, and that he would come in and see him at a later time; he went in September, when Mr. Hennan wanted them for the purpose of altering them, but the defendant could not spare them then. Ultimately this action was brought.

For the defendant it was objected that the plaintiffs could not recover on the ground that the action was brought to recover fees or charges for the performance of a dental operation or for dental attendance or advice, and came within the provisions of sect. 5 of the Dentists Act 1878 (41 & 42 Vict. c. 33).

The learned County Court judge held that the claim, so far as it was for making the set of teeth, as distinguished from the fitting of the same and the fillings, was not within the Act, and he assessed the amount to be recovered in respect of such making at the sum of 4*l.* 4*s.* for which amount he gave judgment, with leave to appeal, as he considered the matter of public interest.

The defendant appealed upon the grounds that the judge was wrong in law in not holding that the Dentists Act 1878, s. 5, was a defence to the action, and in not entering judgment for the defendant or non-suiting the plaintiffs; and that there was no evidence on which the judge could arrive at the decision he did.

Sect. 5 of the Dentists Act 1878 (41 & 42 Vict. c. 33) provides:

A person registered under this Act shall be entitled to practise dentistry and dental surgery in any part of Her Majesty's dominions, and from and after the first day of August one thousand eight hundred and seventy-nine, a person shall not be entitled to recover any fee or charge, in any court, for the performance of any dental operation, or for any dental attendance or advice, unless he is registered under this Act, or is a legally qualified medical practitioner.

R. W. Turner for the defendant. — [Lord ALVERSTONE, C.J.—The defendant kept the teeth, and for the purpose of the present case we must assume that he kept them.] Yes; the learned judge gave judgment for the whole amount, less 16*s.*, which he assessed as the costs of the fillings and the fitting. He was wrong in

allowing the plaintiffs to recover any part of the claim. The point is whether under the Dentists Act the plaintiffs can charge for the bare cost of the materials, in which case there ought to have been some evidence offered as to the cost of the materials. If a person went into a dentist's shop and simply bought a set of artificial teeth, without any attendance or advice being given, then that would be a case of goods sold and delivered, and the Act would not apply to prevent the person from recovering the price. That case is totally different from the present. With regard to a person who does dental work and carries on a dental practice, it is not the value of the materials supplied for which the charge is made; the materials are merely incidental to the work, which is the skilled work of a dentist. [Lord ALVERSTONE, C.J.—The judge has not given anything for "dental attendance" or "dental advice"; he has not allowed the plaintiffs anything for fitting nor for the fillings; and we must take it that what he has given is the cost of making a frame and teeth, and that he has assessed, whether rightly or wrongly, 4*l.* 4*s.* for the gold and the teeth.] Yes, for the cost of the materials. What a dentist charges for is his dental skill in preparing the teeth for the plate, in taking the impression, and in actually fitting the teeth to the mouth; but the section does not mean to hit persons who merely make frames and who make teeth which are sold to dentists. The fitting in of the gold and the teeth on the frame is a dental operation, and it is dental advice, and the giving of the teeth is merely ancillary to the advice, and therefore not recoverable. The judge had no power to split the claim, and assess so much for goods sold and delivered, and so much for dental operations. The real claim here is a claim for work done as a dentist, for dental advice, attendance, and for a dental operation, and that is the very thing the section was intended to prevent; and to allow an unregistered person to bring an action for the materials supplied in such a case would be to encourage a class of actions which it was the object of the statute to prevent. There is no hardship in not allowing such persons to recover for the materials supplied, as they can protect themselves by requiring payment before they part with the materials. There is a corresponding section (sect. 32) in the Medical Act 1858, which provides that no unregistered person shall be entitled to recover any charge "for any medical or surgical advice, attendance, or for the performance of any operation." Under that section an unregistered person who had performed a surgical operation could not recover a charge for the sutures or other things, such as splints or tubes which he had used. The reason why the Legislature in that section added the words "or for any medicine which he shall have both prescribed and supplied" was that at that time there was the Pharmaceutical Society of Chemists, a body which supplied medicines. They may not prescribe them, but they may supply them. The section is a defence to the whole claim.

J. R. Randolph for the plaintiffs.—The learned judge took a proper view of the section. It is admitted for the purpose of this argument that the figures are correct; and, assuming them to be correct, the judge disallowed everything for fitting these teeth and so on, and he only gave

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the plaintiffs judgment for the balance for that which they could supply. The supply of a set of false teeth is really goods sold and delivered, and not work and labour done. In the case of *Lee v. Griffin* (4 L. T. Rep. 546; 1 B. & S. 272) a person who had ordered a set of false teeth died before they were delivered, and there being no memorandum under the Statute of Frauds, her representative would not pay for them. The point turned on the question whether the dentist was right in suing for goods sold and delivered, in which case he was beaten by the Statute of Frauds, or whether he was right in suing for work and labour done, in which case the statute would not apply; and the court held that it was goods sold and delivered. The court there drew the distinction between the two causes of action for goods sold and delivered and for work and labour done, and they came to the conclusion that a set of teeth, to be made for the person and fitted to the mouth and then paid for, was goods sold and delivered. That is a decision to show that the sale of a set of false teeth to be fitted to the mouth of the patient is the sale of a chattel. [He was stopped.]

LORD ALVERSTONE, C.J.—I must say that I have a strong feeling that it would be very desirable that the Dentists Act of 1878 should be amended, if it is thought by persons who are acquainted with dental matters that it is desirable that only registered and qualified persons should supply false teeth to go into person's mouths. I can well imagine that although, in one sense, it is quite a different thing to perform an operation on the teeth, the mouth, the gums, or the jaw, yet at the same time it may be an extremely uncomfortable and unsuitable thing, and I dare say, perhaps in rare cases, a dangerous thing to have improperly fitted teeth; but, I think that, taking the language of sect. 5 of the Dentists Act 1878, it does not go far enough to include such a case as this, and we must take it that, at any rate in 1878, the common use of false teeth was perfectly well known. The language used in sect. 5 is that the unregistered person shall not be entitled to recover any fee or charge "for the performance of any dental operation, or for any dental attendance or advice." In my opinion, *prima facie* certainly, the words in that section "dental operation" mean operation upon the person—on the mouth of the patient; "dental attendance" would mean advising in respect of the condition of the mouth, or as to what should be done, and "advice" would, of course, mean something of the same character. If it had been intended by the Legislature that the section should go on and say: "And nothing supplied by the dentist in pursuance or in consequence of such advice shall be charged for"; I think we should expect to find those words there. And I myself am a little pressed by the fact that, in the corresponding section in the Medical Act, which was passed in 1858, the Legislature did add the words: "For any medicine which he shall have both prescribed and supplied"; whereas in the Dentists Act they did not add: "For any teeth prescribed or supplied." The reason given by counsel for the appellant—namely, that those words were inserted in the Medical Act because chemists then existed who supplied medicines without prescribing—does not seem to me quite a sufficient answer.

This Act, being an Act which prevents an unregistered person from being entitled to recover charges and fees, must be construed strictly; and while I should be glad if it should be thought desirable that the Act should be amended in the direction I have indicated, it would, in my opinion, be going too far to hold that the learned judge, who has expressly excluded any charge for fitting and advice and so on, was wrong in the view he took. Whether he has given the plaintiffs too much is a point we cannot deal with. He has assessed the amount recoverable on a right principle, unless the Act makes the supply of the false teeth part of the "dental operation," the "dental attendance" or "advice," which I do not think it does. I was for the moment pressed by counsel's suggestion that the non-registered person could protect himself by requiring payment beforehand, and by saying "You shall not take the thing away until you have paid your money for it"; but we have here to deal with a statute which prevents a person from having the ordinary rights of being paid for articles which he has supplied, and I think that the language of the section is not sufficient to bring such a case as the present within its terms. We must hold, therefore, that the County Court judge was right, and that this appeal must be dismissed.

WILLS, J.—I come, with some reluctance, to the same conclusion. I say "with some reluctance," because, probably, there is no part of a dentist's work which requires more care and very often more skill than the preparation and the manufacture of false teeth, and it might very well have been that the words would have covered such a case as this. But I do not think that it is possible to say that making the teeth can come under "dental attendance or advice." Therefore we are really driven to the question whether the words "dental operation" are sufficiently large to include such work as this. It seems to me that a dental operation—an operation in respect of the teeth—really means an operation in a surgical sense, something that is to be done, not upon the false teeth, but upon the living person, and that what really is charged for here is that which was not done upon the person, but was done upon the incomplete set of false teeth, in order to make them fit the person; and I do not think that "dental operation" can reasonably be construed to cover such a state of things as that.

KENNEDY, J.—I concur, and have nothing to add.

Appeal dismissed.

Solicitors for the plaintiffs, *Busk, Mellor, and Norris*, for T. J. and H. Backhouse, Blackburn.

Solicitors for the defendant, *Bowman and Curtis Hayward*, for H. Duckworth, Blackburn.

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PROBATE, DIVORCE, AND ADMIRALTY
DIVISION.

ADMIRALTY BUSINESS.

March 17 and 18.

(Before BARNES, J. and TRINITY MASTERS.)

THE SUSSEX. (a)

Collision—Failure to stand by and give name—Compulsory pilotage—Limits of port of Liverpool—8 Anne, c. 8—Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. 92)—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), ss. 422, 586, 603, 633.

The fact of a vessel after collision with another vessel not standing by and giving her name, as required by sect. 422 of the Merchant Shipping Act 1894, does not render her owners liable, if at the time she was compulsorily in charge of a pilot.

The Queen (20 L. T. Rep. 855; 3 Mar. Law Cas. O. S. 242; L. Rep. 2 A. & E. 354) followed.

A collision occurred in the estuary of the river Mersey between the steamships G. and S.

By sect. 127 of the Mersey Dock Acts Consolidation Act 1858, "every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot such vessel so far to the westward as the . . . Fairway Buoy of the Queen's Channel."

Since the date of the Act the buoy has been removed, and for the purposes of pilotage the Bar Lightship, which occupies a position outside of that occupied by the buoy, is treated as the westward limit.

The G. at the time of the collision was at anchor between the Bar Lightship and the place where the buoy used to be.

The defendants pleaded that the S. was at the time of the collision compulsorily in charge of a pilot.

Held, that, the Fairway Buoy having been removed, the Bar Lightship occupied the same place relatively for the purposes of sect. 127 of the Act of 1858, and that pilotage was therefore compulsory.

ACTION for damage by collision brought by the owners of the steamship *Gladestry* against the owners of the steamship *Sussex*.

The collision occurred about 12.45 a.m. on the 20th Dec. 1903, about one mile S. & E. of the Mersey Bar Lightship.

The *Gladestry* was a steamship of 2360 tons gross register, and at the time was on a voyage from Savannah to Manchester with a cargo of cotton and phosphate rock, and manned by a crew of twenty-four hands all told.

At the time of the collision she had a Liverpool pilot on board, and was at anchor, heading about S.S.E., and exhibiting the regulation anchor lights.

The *Sussex* was a steamship of 5474 tons gross register, and was on a voyage from Liverpool to London with a general cargo, and manned by a crew of fifty-nine hands all told. She was at the time of the collision in charge of a duly licensed Liverpool pilot.

The defendants admitted that the collision was caused by the negligent navigation of the *Sussex*, but alleged that it was occasioned solely by the

fault of the pilot in charge, and that the collision took place within a district in which pilotage is compulsory by law.

Barnes, J. came to the conclusion on the facts that the collision was solely caused by the negligence of the pilot in charge of the *Sussex*.

It appeared from the evidence of the pilot of the *Gladestry* that the Fairway Buoy, which marked the entrance to the Queen's Channel in 1858, was about three-quarters of a mile nearer in than the position of the present Bar Lightship.

A lightship was first placed near the bar in 1873, and the lightship and Fairway Buoy co-existed until 1875, when the latter was removed and nothing put in its place.

In 1884 the Bar Lightship was moved to its present position.

It was also alleged by the plaintiffs that those in charge of the *Sussex* after the collision failed, without reasonable cause, to stand by and give the name of their vessel, and to comply with the provisions of sect. 422 of the Merchant Shipping Act 1894.

Sect. 422 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) is as follows:

(1) In every case of collision between two vessels, it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew, and passengers (if any), (a) to render to the other vessel, her master, crew, and passengers (if any), such assistance as may be practicable, and may be necessary to save them from any danger caused by the collision, and to stay by the other vessel until he has ascertained that she has no need of further assistance; and also (b) to give to the master or person in charge of the other vessel the name of his own vessel and of the port to which she belongs, and also the names of the ports from which she comes and to which she is bound. (2) If the master or person in charge of a vessel fails to comply with this section, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

The plaintiffs contended that at the time of the collision the *Sussex* was not compulsorily in charge of her pilot as she was outside the district in which pilotage is compulsory.

By sect. 3 of 8 Anne, c. 8—an Act for making a convenient dock or basin at Liverpool for the security of all ships trading to and from the said port of Liverpool—the limits of the ports are defined as:

The limits and extent whereof are as far as a certain place in Hoyle-Lake called the Redstones, and from thence all over the river Mersey to Warrington and Frodsham Bridges.

The material sections of the Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. 92) are as follows:

Sect. 121. The board may examine any person, being of the age of eighteen years and upwards, who shall have served as an apprentice in any of the Liverpool pilot boats for not less than three years . . . and every such apprentice or other person who upon any such examination shall be found to be qualified to act as a pilot, and shall be approved of by the board, shall receive a licence in writing, signed by the secretary of the board, certifying that he is duly qualified to act as a pilot for the port of Liverpool. . . .

Sect. 123 provides for a penalty on persons acting as pilots without a licence.

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

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Sect. 124 provides that pilots misbehaving themselves are to have their licences recalled.

Sect. 127. Every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot such vessel, if sailing out of the port of Liverpool, through the Queen's Channel, so far to the westward as the buoy commonly called or known by the name of the Formby North-West Buoy, or Fairway Buoy of the Queen's Channel; and, if sailing through the Rock Channel, pilot the same so far to the westward as the North-West Buoy of Hoyle; and any pilot who shall in any such case refuse to pilot such vessel to such distance as aforesaid shall forfeit his right to receive any sum of money for piloting such vessel, and may also, at the discretion of the board, be deprived of his licence.

Sect. 133. The board may from time to time determine, vary and alter and fix rates of pilotage to be paid to pilots for piloting vessels, such rates to be according to the draught of water of such vessels, and to be within the limit: that is to say, (a) as to British vessels: For piloting a vessel from the distance of the Great Orme's Head or the coast of Wales to the port of Liverpool, not less than five shillings nor more than eight shillings per foot; for piloting a vessel any greater distance to the port of Liverpool, not less than six shillings nor more than nine shillings per foot: for piloting a vessel out of the port of Liverpool, not less than three shillings and not more than four shillings per foot; for piloting a coasting vessel, including therein vessels trading with Ireland, the islands of Faro or Ferro, Guernsey, Jersey, Alderney, Sark, and Man, either into or out of the port of Liverpool, one half only of the above rates respectively.

Sect. 139. In case the master of any vessel, being outward bound, and not being a coasting vessel in ballast, or under the burthen of 100 tons, for which provision is otherwise made, shall proceed to sea, and shall refuse to take on board or to employ a pilot, he shall pay to the pilot who shall first offer himself to pilot the same the full pilotage rate that would have been payable for such vessel if such pilot had actually piloted the same into or out, as the case may be, of the said port of Liverpool, together with all expenses incurred in recovering the same.

By sects. 586, 603, and 633 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) it is provided as follows:

Sect. 586 (1). A pilot shall be deemed a qualified pilot for the purposes of this Act if duly licensed by any pilotage authority to conduct ships to which he does not belong. (2) Every qualified pilot, on his appointment, shall receive a licence containing his name and usual place of abode, a description of his person, and a specification of the limits within which he is qualified to act. (4) Every qualified pilot acting beyond the limits for which he is qualified by his licence shall be considered an unqualified pilot.

Sect. 603 (1). Subject to any alteration to be made by the Board of Trade or by any pilotage authority in pursuance of the powers hereinbefore contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement of this Act, but all exemptions from compulsory pilotage shall continue to be in force. (2) If within a district where pilotage is compulsory the master of an unexempted ship after a qualified pilot has offered to take charge of the ship, or has made a signal for the purpose, pilots his ship himself without holding the necessary certificate, he shall be liable for each offence to a fine of double the amount of the pilotage dues that could be demanded for the conduct of the ship.

Sect. 633. An owner or master of a ship shall not be answerable to any person whatever for any loss or

damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law.

The pilotage certificate which had been given to the pilot of the *Sussex* was as follows:

Pilot of the first class.—Pilot boat No. 3.—Licence No. 104.—The Mersey Docks and Harbour Board Pilotage Department.—To all whom it may concern, be it known that George F. Parkinson, aged sixty-five years, being 5ft. 8in. in stature, having a fair complexion, and whose place of abode is 20, Sandown-road, Seaforth, having in pursuance of the provisions of the Mersey Dock Acts Consolidation Act 1858 been duly examined and found to be qualified to conduct any vessel into or out of Liverpool, Holyhead, Beaumaris, Chester, Fleetwood, Pile of Foudre, and the Isle of Man, is by this certificate duly licensed to act as a pilot of the first class for the port of Liverpool, from the date thereof until the 1st day of June 1904, provided that he shall comply with the provisions of the said Act, and of all other Acts binding upon him in relation to pilotage, and with every order or by-law made by the said board, and shall conduct himself with propriety and prudence.—Given by the said board.—MILES K. BURTON, Secretary.

Pickford, K.C. and Balloch for the plaintiffs.—The *Sussex* must be found to blame as she failed to stand by and give her name after the collision, as required by sect. 422 of the Merchant Shipping Act 1894. It may be that, if it is shown that the collision was solely the fault of the pilot, then there is proof to the contrary within the meaning of the section:

The Queen, 20 L. T. Rep. 855; 3 Mar. Law Cas. O. S. 242; L. Rep. 2 A. & E. 354.

[BARNES, J.—I think that, assuming the pilot was compulsorily in charge at the time of the collision, the fault for not standing by was his.] The *Sussex* at the time was not compulsorily in charge. She was going out through the Queen's Channel, and the collision happened outside the place where the Fairway Buoy used to be—that is to say, outside the limits fixed by sect. 127 of the Act of 1858. It is true that the rate charged by the Mersey Docks and Harbour Board is to the Bar Lightship, but the board have no power to extend the limits fixed by the Act. If the Dock Board see fit to remove the landmarks, it may make it more difficult to tell when the vessel is outside the district in which pilotage is compulsory, but that does not alter the liabilities of the parties. The fact of the pilot remaining on board after the spot where the buoy used to be is immaterial. The cases of *General Steam Navigation Company v. British and Colonial Steam Navigation Company* (20 L. T. Rep. 581; 3 Mar. Law Cas. O. S. 237; L. Rep. 4 Ex. 238) and *The Charlton* (73 L. T. Rep. 49; 8 Asp. Mar. Law Cas. 29) are not in point. In those cases the collision took place in a district in which the pilot was licensed to act, and he was paid a rate fixed for the whole district. In the present case he was licensed to take vessels into and out of the port of Liverpool. The question must be determined at some time or another whether the pilot is compulsorily in charge or not. If it is said that the fact of his being on board and in charge is sufficient, where is one to stop? The contention would be just as good a one for a vessel during her voyage across the full breadth of the Atlantic as for a few miles. Under sect. 133 the Mersey Docks and Harbour Board only have statutory power to levy rates for

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the pilotage of vessels into and out of the port of Liverpool. It may be said that if you take a pilot you pay him for piloting your vessel to the Bar Lightship, and therefore he is never your servant, but that would apply equally to a provision for piloting vessels to Holyhead, or any other place outside the port of Liverpool. It is to be noticed that the terms of the licence are for the port of Liverpool only.

Aspinall, K.C. and Noad, for the defendants, *contra*.—The real test is whether the owner has a choice and is allowed to say whether or not he will take a pilot, or whether he is obliged to take one, whether he will or not. As Lord Esher, M.R. says in *The Charlton* (73 L. T. Rep., at p. 51; 8 Asp. Mar. Law Cas., at p. 30): "When therefore he took this pilot on board, he must have taken him in the ordinary way by giving notice at the pilotage station at Bristol that his ship was going out from Bristol, and would require a pilot. He does not select a pilot; he is not allowed to; he is obliged to take the pilot whom he does not select, and that, in itself, makes that pilot compulsory." It will be seen from the licence that the pilot had knowledge of various ports. What the authorities were dealing with was the requirements of their own port. It was necessary that the pilot should have knowledge of the neighbouring ports. There is here an obligation to take a pilot into and out of the port of Liverpool, and Parliament has seen fit to give the Mersey Docks and Harbour Board powers to license pilots to act far outside their own port. In 1858 the conditions were such that it was well known where the Fairway Buoy was. They have since altered, and the Harbour Board have adapted their regulations to the change of circumstances. It is submitted that there is nothing in the Act that prevents the Harbour Board from varying the limits of the pilotage district.

Pickford, K.C. in reply.—The argument of the defendants comes to this: If the shipowner treats the pilot as compulsorily in charge because he has been compelled to take him originally, then he is not liable for his negligence. There is no authority, no principle of law to support such a proposition. It does not matter whether you mean to make a man your servant or not; you must show that you were obliged to employ him and put him in charge; and, unless you are compelled to do so, you are liable. If the pilot's licence does not extend beyond the place mentioned in sect. 127 of the Act of 1858, then he becomes an unqualified pilot as soon as that place has been reached. See

Sect. 586, sub-sect. 4 of the Merchant Shipping Act 1894.

There is nothing in sect. 133 which gives the Dock Board the power contended for. This is clearly shown by the words, "such rates to be according to the draught of water of such vessels, and to be within the limits following, &c."

BARNES, J.—This is a case of collision which took place on the 20th Dec. last, at a little before one o'clock in the morning, between the steamship *Gladestry* and the steamship *Sussex*, about one mile S. $\frac{1}{2}$ E. of the Mersey Bar Lightship. The *Gladestry* is a screw steamer belonging to the port of West Hartlepool, of 2360 tons gross register, and, whilst on a voyage from Savannah to Manchester with a cargo of cotton and phos-

phate rock, had anchored at the spot where the collision took place. I understand she had a Liverpool pilot on board, but nothing turns on the question of what was done on board her. Her regulation lights were burning—that is to say, the regulation lights for a vessel over 150ft. in length, at anchor, according to the rules which govern the river Mersey. Whilst in that position, at anchor, she was run into by the *Sussex*. The stem of the *Sussex* struck the port side of the *Gladestry* forward of the fore rigging. The *Gladestry* at the time was heading about S.S.E., and the tide was about ebb, running about a knot. The defendants' vessel, the *Sussex*, is a screw steamer of 5474 tons gross register, and was bound out from Liverpool to London. She was—I am using the term in the neutral sense at present—in charge of a duly licensed Liverpool pilot, who had, I presume, been obtained in the usual way; because the master of the defendants' ship, in answer to this question: "Had they (the brokers in Liverpool) notified the pilotage authorities that you would require a pilot?" said "I instructed them to" and "A pilot came on board." The question in this case is whether the owners of the defendant vessel are responsible for the damage which was thus occasioned to the plaintiffs' ship. The defendants' ship, according to the captain's evidence, suffered no damage at all. The charges that are made by the plaintiffs in the statement of claim impute negligent navigation to those on the *Sussex*, and they also impute a breach of the 422nd section of the Merchant Shipping Act 1894. The defendants in their defence say as follows: "The defendants admit that the plaintiffs have suffered damage by a collision between their steamship *Gladestry* and the steamship *Sussex*, belonging to the defendants, and that such collision was solely caused by the negligent navigation of the *Sussex*. They deny that such negligent navigation was by themselves or their servants or by any person for whose acts they are responsible at law." Then they plead in the second paragraph the usual plea of compulsory pilotage and allege that the damage was occasioned by the fault or incapacity of the pilot in charge of the *Sussex*. They say that the pilot, "though the lights of the *Gladestry* were reported to him when the *Sussex* was more than a mile distant from the *Gladestry*, so navigated the *Sussex* that she ran into the *Gladestry*, which was lying at anchor." That is the state of the pleadings. The plaintiffs' vessel being at anchor, with proper lights showing—there is no dispute as to that—and the defendants' vessel having navigated into her in weather that was quite clear enough for the moving vessel to keep clear of the one at anchor without the slightest difficulty, it is quite obvious that the defendants' vessel is to blame for this collision, and that the defendants would be liable for this collision unless they are exempted by reason of the vessel being in charge of a compulsory pilot at the time. I think it will appear when I come to deal with the case before Sir Robert Phillimore that that question of compulsion, or non-compulsion, determines both questions in the case—namely, the responsibility for the navigation of the *Sussex* and the point raised under the 422nd section of the Merchant Shipping Act 1894. The first point to determine is one which I have already given my view about—namely, whether the pilot was alone to

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blame. There is not, to my mind, the slightest doubt about that. [His Lordship then dealt with the evidence as to this, and as to whether there had been a breach of the provisions of sect. 422 of the Merchant Shipping Act 1894.] The pilot, who was called here, was not asked any question about this part of the case at all, and so I have nothing but the evidence about it to which I have already referred. Now, I do not think, after considering the evidence, that the master of the defendants' ship intentionally wished to run away or keep his name dark. It would not have been the slightest use trying that, because there was a pilot on board, who had been taken on board in the usual way, and they must have known all about it afterwards. But what I think is the explanation is that which he gives himself. He said he was excited and worried. But the question is whether a master in charge of a large vessel like this is entitled to be excited and worried, and not stand by simply for that reason. In my judgment, there was in fact a failure to stand by and give the name, under sect. 422, and the question that then comes to be considered is whether a reasonable cause for such failure has been shown. Both I and the Elder Brethren, who are much better judges about this than myself, think that no reasonable cause has been shown for this failure. If we were to allow cause to be shown on such facts as these, every shipmaster would be able to show cause. In my judgment there has been no reasonable cause shown for failure to comply with some part of sect. 422, at all events. That brings me to the law applicable to the case. The position was this: There was, from what I have shown, in my opinion negligence on the part of the pilot alone which caused the collision. There was failure to comply with sect. 422, and there has not been sufficient cause shown for that failure. But as the pilot was in charge in fact, then, if he were compulsorily in charge the negligence of the pilot alone would not render the owners responsible for the navigation of the vessel, and the failure to comply with sect. 422 would, in my judgment, according to Sir Robert Phillimore's decision in the case of *The Queen* (*ubi sup.*), not make the collision one deemed to have been caused by the master or any other servant of the shipowners. Sub-sect. 2, it will be remembered, says that if the master or person in charge of a vessel fails to comply with this section, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act or default. Now, Sir Robert Phillimore, in dealing with the corresponding section of the older Act (25 & 26 Vict. c. 63, s. 33), in which the words are "person in charge," said (20 L. T. Rep., at p. 855; 3 Mar. Law Cas. O. S., at p. 242; L. Rep. 2 A. & E., at p. 355): "It has been argued on behalf of the *Lord John Russell*"—one of the ships in that case—"that the *Queen* is not entitled to claim this exemption upon two grounds. First, upon the construction of sect. 33 of 25 & 26 Vict. c. 63. And this upon two grounds. First, it is said that the 'person in charge' intended by that section must, having reference to the context, be deemed to be the master, and with this part of the argument I agree. Secondly, it is contended that whereas the master has been guilty, as in this instance, of a violation of his

duty in offering no assistance to the other vessel which came into collision, he is, by the words of the statute, to be deemed alone to blame for the collision, and that it follows by necessary implication that the pilot-exemption, so to speak, is taken away. With this portion of the argument I am quite unable to agree. There is no doubt, on the assumption, of course, that the pilot is alone to blame for the collision, that his liability and the exemption of the master attached when that fact took place; and if it was intended by the statute to say that the subsequent misconduct of the master would remove the exemption and fix the liability of the collision upon the master, the language, in order to produce this result, ought to have been much clearer and plainer than I now read it to be." Even assuming that the failure was to be treated as that of the master—I am not concerned for the moment in considering whether it is or is not because the effect of the decision that the pilot is solely responsible is that proof to the contrary has been shown, and it clears the master and other servants of the shipowners. Because the wording of the subsection is: "The collision shall, in the absence of proof to the contrary, be deemed to be caused by his wrongful act or default." The master and other servants of the shipowner are not responsible, and the collision cannot be deemed to have been caused by their wrongful act or default. Now that, I think, both counsel have agreed, in this case leaves the question to be determined, which governs both points, Was the pilot in this case compulsory or not? The pilot was, in fact, navigating, and the question is reduced to this: Was he compulsorily in charge? Or, perhaps, having regard to the defendants' argument, I might say, Was he in charge in such circumstances that the owners are not liable for his acts? That covers the various points taken by Mr. Aspinall in connection with the various cases cited. This question turns upon a certain curious state of facts, and also upon the Mersey Dock Acts Consolidation Act of 1858, some of the sections of which were recently considered in this court. Now, that Act makes pilotage compulsory for outward bound ships. I need not go into the question here of inward bound ships. We have had that discussed already. The sections which apply to this subject are sects. 121, 123, 124, in particular sect. 127, and sects. 133 and 139. The general effect of those sections—I am only summarising them—is that, so far as outward bound ships are concerned, the pilotage is compulsory, and a pilot must be employed to pilot the vessel out of the port of Liverpool. The port of Liverpool is defined by the old statute of 8 Anne, c. 8, in these words: [His Lordship then read the section.] The vessel is under pilotage out of that port. Now, the collision in this case, I think there can be no doubt, took place outside the port of Liverpool. The spot which I have already stated as being the place of the collision is to the westward, considerably, of the place called the Redstone. The particular section under which the present difficulty arises is the 127th section, which provides that every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot the said vessel, if sailing out of the port of Liverpool, through the Queen's Channel, as far as the buoy commonly called or known as the Formby N.W.

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Buoy, and as the buoy commonly called or known by the name of Fairway Buoy in the Queen's Channel, &c., and that every pilot who shall in any such case refuse to pilot such vessel shall forfeit his right to receive the pilotage rates and at the discretion of the board be deprived of his licence. At the time that the Act of 1858 was passed it appears to be the fact that there was a buoy called the Fairway Buoy, and it seems to have been placed on the charts by the name of the Bell Beacon, at the outside end of the Queen's Channel, which appears to be that part of the Crosby Channel to the westward, the Formby Channel going more to the N. or N.W. That Bell Beacon is shown on the oldest chart that has been furnished to me, corrected up to May 1870, and it is shown as a little outside the five fathom line. It is shown well clear of the bar, as it then existed, and it has been agreed in the course of the argument that that is about, or I may take it that is about, the position of the Bell Beacon or Fairway Buoy in 1858. I do not suppose it is precisely the same, because changes of a slight character may have been made from time to time; but at any rate it is sufficiently near for the purposes of the present case. Now, that position has been transferred by the Elder Brethren, for me, on to the latest chart I have been furnished with—namely, one published on the 21st Dec. 1903; and it will be found that that position puts the old site of the Fairway Buoy a little to the eastward of what is marked on the present chart as QB 2 gas light fixed and black buoy on the northern side of the channel, and a little to the S. and W. of Q 3, and almost on top of a very shallow sounding on the banks. The state of things at the present time is that that buoy has been removed and has been removed for some considerable time, as I understand, and in recent years the bar has extended itself further and further out to sea, as far as one can judge from these charts; and in still more recent years the channel has been dredged somewhat to the westward of the old site of the Fairway Buoy, and is now marked on the chart as "dredged cut"; and there are four gas buoys marking that dredged cut, and they are marked as Q 2 and Q 1 on the northern side and B 1 and B 2 on the southern side. Those buoys are all inside the five fathom line. Now, the place of the collision, which has also been marked for me on the chart, is shown on the chart which I am referring to as about half to three-quarters of an inch below the centre of the word Bidstone, just between the two figures 5 and 5½. There is now, and has been for a long time—I think it has been said since 1884—the Bar Lightship, which is shown on the 1903 chart to the westward a little of the five fathom line and the northern exit of the Queen's Channel. So that if you run on past these gas buoys Q 2 and Q 1 and completely cross the bar, and then pass over the five fathom line, in a very short distance you come upon the Bar Lightship. So that the place of the collision is outside the old position of the Fairway Buoy and inside the position of the Bar Lightship. The point is now made that under sect. 127 of the Act the pilot's duties ceased, and compulsory pilotage ceased, as soon as the vessel passed the position in which the old Fairway Buoy was when the Act of 1858 was passed. There is one point, before dealing with that main

point in the case, which I will dispose of shortly. Mr. Aspinall contended that sect. 133 gave the Dock Board power to extend the limits to which ships had to be taken. That section states that the board may from time to time vary and fix the rates to be paid for pilotage, and his contention was that as the board had done something—namely, treat the Bar Lightship as the place to which the pilots had to go—they had extended the distance to which ships have to be taken, by virtue of the 133rd section. I do not myself regard that section as having any such effect as contended for by Mr. Aspinall. Pilotage is compulsory on vessels outward bound, as I have already said, except in the case of certain small vessels, and I regard this section as a section which only deals with the rates which, within certain limits, the board may fix. I do not think that section has any application to the present case. Now, so far as the Dock Board is concerned, what has been done with regard to this matter appears to be that they have taken away the old beacon, they have placed the Bar Lightship in the position which I have described, they have placed the gas buoys which I have referred to, they have deepened the channel, and they have fixed pilotage rates. The sheet before me gives the compulsory pilotage rates outward: Liverpool to Bar Lightship, or Horse Channel Fairway Buoy. So far as the present case is concerned the rate is Liverpool to Bar Lightship. The evidence shows that the pilot in this case was taken to pilot the ship to the Bar Lightship. The master said in his evidence that the pilot wanted to be engaged to take the ship to Point Lynas, but that he had replied that he wanted him to take the ship to the Bar Lightship—that he had another man. Some pilotage cards were put in—one dealing with pilotage to the bar and the other with pilotage from the Bar Light-vessel—and it seems clear that the Bar Lightship is at present treated as the place where vessels are to be taken to. The matter, therefore, as far as the facts are concerned, I have dealt with, and the question comes to be, What is to be the law applicable to the case? At present I do not regard this case as on all fours with the two cases which Mr. Aspinall relied upon. The first of those two cases is that of *General Steam Navigation Company v. British and Colonial Steam Navigation Company* (*ubi sup.*). Shortly stated, it is the case of a ship coming up the Channel to London and taking a pilot on board at Dungeness. Before reaching Gravesend, whilst the vessel was still under the control of the pilot, she came into collision with another ship through the pilot's negligence. The defendants' ship belonged to the port of London, and there was a question as to where the port of London extended. But the substance of the case was this, that she was in a district in which she was bound to take a pilot to Gravesend, when she took him on board, and to pay him to Gravesend; that when she got to a certain distance she was within the exemption of vessels navigating within their own port; and that so, as soon as she passed across a certain imaginary line, she was not, in the strict sense, under compulsory pilotage. But it was held that, there having been an obligation to take a pilot on board to begin with, and to pay him up to the end, and he remaining in charge as pilot, the shipowner was not responsible for the

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collision which took place. It is shortly put by Byles, J., who delivered the judgment of the court, as follows: "If the master of the defendants' ship wanted to go to Gravesend, or beyond, he could not take a pilot for a shorter distance. It was compulsory on him to take a pilot for that distance at least. The pilot could insist on being paid all the way to Gravesend, and could insist on being carried to Gravesend. There had been in effect a contract between the captain and the pilot that the pilot should go to Gravesend, should be paid to Gravesend, and should act as pilot to Gravesend." Then he says: "Suppose a storm, a fog, or other emergency to have arisen, endangering the life not only of the crew, but of the pilot himself, surely the pilot could have insisted not only on being carried to Gravesend, but on piloting the vessel thither according to his contract. It is plain that during the first portion of the transit between the Downs and Gravesend the relation of master and servant did not exist between the owner of the defendants' vessel and the pilot; and we cannot see any indication of a fresh contract as to the latter portion of that transit." The other case is that of *The Charlton* (*ubi sup.*). I summarise the facts as they strike me. The defendants' pilot was employed to take the ship out of Bristol, and I think she was going to Cardiff. The pilotage was compulsory in the port of Bristol, which did not extend as far as the place of the collision. But the Bristol Channel District extended to further than the place of collision, and the pilot had a licence which covered the port of Bristol and the Bristol Channel District. So the collision took place in a district in which the man was licensed to act; he had been originally taken on board under compulsion; he was paid, as I understand, a rate fixed for the whole district; and practically that case appears to me to be on all fours with the case of the General Steam Navigation Company. I do not think it is put in quite the same way in the judgment, though there are some passages which would seem to do so. But even if it is not so put, there is a distinction between that case and the point raised in the present case. Because the Master of the Rolls (Lord Esher), in the course of his judgment (73 L. T. Rep., at p. 51; 8 Asp. Mar. Law Cas., at p. 30), said: "Then, looking at this statute, and the order of 1891, when the vessel had passed out of the port of Bristol, when she had gone through the port and was outside the port, I have no doubt myself that he was no longer a compulsory pilot. Therefore, when the accident happened, he no longer was a compulsory pilot. But when he was taken on board this ship and put in charge he was a compulsory pilot, and, although he had passed out of the limits where he was a compulsory pilot, he still was in charge as pilot, and in charge without any alteration of the relations between himself and the master of the ship. He was still the pilot. He was in charge of the ship, for they had not gone to such a place that he was no longer a licensed pilot. He was in the district where he was a licensed pilot, and although he had gone beyond the port where he was a compulsory pilot, it is under such circumstances that the master could not properly be called upon to determine whether the compulsion had ceased or not. Then the necessities of the case require that you should not make him

a servant of the owners when they had no real opportunity of determining whether he was or was not their servant. They were compelled to take him without his being their servant, and they had no real opportunity of seeing that that relationship which had been put upon them had ceased." Apart from the question of payment, there is this, that the pilot was still a pilot acting within a district for which he was licensed, and the court held in the circumstances that the case came within the section of the Merchant Shipping Act which exonerates the shipowner. There is a considerable distinction, I think, at the outset, between that case and this particular case, because the pilot here was duly licensed to act as a pilot of the first class for the port of Liverpool. Now, if one reads those words in their restrictive meaning, that would be only in the port of Liverpool. But, having regard to the Act of 1858, it does not seem to me possible to read those words in such a restrictive meaning, because the pilot has to take the ship out of the port of Liverpool to a point outside it; and on coming in, for instance, the master of a ship is bound to employ a pilot from the pilot stations fixed by by-laws, and I think, if I remember rightly, one of those is right out at Great Orme's Head, and another is Point Lynas. So, to take a vessel in or out, the pilot must act partly outside the port. Therefore his licence means to do those duties which are necessary for the purpose of navigating a vessel into and out of the port of Liverpool. But that is all. Then, going out, the pilot has to take the ship to a certain distance, and there his duties cease, and he does not become a pilot licensed for a district at that point at all. He is licensed to a point in a certain place, and this Act is not like those Acts which refer to Bristol and London, where I think it will be found that persons navigating the districts must be qualified. So those cases do not seem to me to be precisely in point in the present case. That still leaves a very important question to be determined—namely, whether this pilot was still acting compulsorily in charge of the ship because of the state of things which exist at the present day. I do not think it necessary to decide this case upon the point which the plaintiffs raised. The reason I have come to my conclusion is this: I do not think that the strict construction which the defendants endeavoured to put upon the 127th section of this Act can be maintained. If it is construed strictly, the limit to which a pilot has to go is the Fairway Buoy of the Queen's Channel—in other words, a spot where the Fairway Buoy rested in the year 1858. To my mind that construction would be unreasonable, and not within the fair contemplation of those who must have framed this section, and not within that which is necessary for the purpose of working out the subject with which we are dealing and the employment of pilots. My reasons are these: Construed strictly—and if you once construe it strictly you must do it entirely strictly—the Fairway Buoy of the Queen's Channel would be that which was then there. Of course that cannot be. The buoy has been removed. But if construed strictly it must mean the identical spot when the Act received the Royal Assent. That cannot be so, because we are dealing with a port which has a well-known estuary where there are banks of sand, which, I suppose, from time immemorial have been existing and shifting in a great

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variety of ways, and probably, from the nature of the locality, extending and silting up the port and rendering necessary what has been done—namely, the dredging of a deep cut out to the bar. It seems clear to my mind that the bar has gradually extended itself. Take the case that must be presented on a strict construction, and assume that a Fairway Buoy is left to mark the Queen's Channel. That Fairway Buoy means a buoy which shows you are well out of the channel and clear of danger. If the bar extends from time to time, and I am still dealing only with the Fairway Buoy, that must inevitably be moved by those who have charge of the entrance of the port, to suit the state of the channel. What, then, is the legitimate conclusion to draw? I think it is that, although that buoy has been moved, something has taken its place—namely, the Bar Lightship—which, although not a buoy in the strict sense, is the substitute, to my mind, for the buoy. It is remarkable to find, and I hope I have made it clear in stating its position, that it is placed, having regard to the state of the bar, in almost the same position as the Fairway Buoy occupied with regard to the channel which it was intended to guard. That is the explanation, I have not the least doubt, why the lightship is now treated as being the boundary to which the pilots have to go, why the rates are stated in the pilot sheet to be Liverpool to the Bar Lightship, and why the contract is made in such a form as to be a contract to take the ship out to the Bar Lightship. I think, myself, that is the reasonable interpretation to place upon this Act, having regard to the necessary shifting of the place and the nature of the exigencies which have to be dealt with; and it is shown by those conversant with the locality that that is the manner in which the matter is acted upon. To my mind the evidence of the pilot really tends to establish that position. The result therefore, to my mind, is that in this case the pilot was still compulsorily in charge at the time when the collision took place, and that answers the whole of the questions raised in this case. I have given the best consideration I can to the case, and I hope I have made clear the points which I think material and upon which this case is to be decided. The result must be, in my judgment, that the defendants succeed in this case.

Solicitors for the plaintiffs, *Botterell and Roche*.

Solicitors for the defendants, *W. A. Crump and Son*.

CROWN CASES RESERVED.

March 12 and 30.

(Before Lord ALVERSTONE, C.J., GRANTHAM, BRUCE, DARLING, and CHANNELL, JJ.)

REX v. HUMPHRIS. (a)

Criminal law—Bankruptcy—Fraudulent debtor—Absconding with property—Debtor's property—Deed of assignment—Revocable deed—Debtors Act 1869 (32 & 33 Vict. c. 42), s. 12.

Property of an assignor does not become the property of the trustee under a deed of assignment for the benefit of creditors until it has come into the possession of the trustee.

(a) Reported by A. A. BATHURST, Esq., Barrister-at-Law.

J. H. executed a deed of assignment whereby he assigned all his property to W. B. as trustee for his creditors. The deed was duly registered as a deed of assignment, but was not disclosed to the creditors. Immediately after the execution of the deed J. H., having, without the knowledge of the trustee, collected certain debts due to him, absconded with part of the proceeds of his collection, and left England. He was thereupon adjudicated a bankrupt, and subsequently indicted, under sect. 12 of the Debtors Act 1869, for having quitted England and taken with him part of his property which should have been divided amongst his creditors.

Held, that the money with which J. H. absconded, having never come into the possession of the trustee, was not the property of the trustee, but remained the property of J. H., and that J. H. was therefore properly convicted under sect. 12 of the Debtors Act 1869.

Reg. v. Cresso (29 L. T. Rep. 897; 12 Cox C. C. 539; L. Rep. 2 C. C. R. 105) considered and distinguished.

In this case, stated by the Recorder of Banbury, the facts were as follows:—

The prisoner was tried on an indictment charging him with a felony under sect. 12 of the Debtors Act 1869 for having, within four months next before the presentation of a bankruptcy petition against him, quitted England and taken with him a part of his property to the amount of 20*l.* and upwards—that is to say, a sum of 120*l.*—which ought to have been divided amongst his creditors.

The prisoner, Joseph Humphris, who carried on business at Banbury, being in a pecuniary difficulty, on the 24th April 1903 executed a deed by which he assigned all his property to William Booth as trustee for the benefit of his creditors.

The deed was executed by the prisoner and by William Booth, the trustee, on the 24th April, but was never executed by any creditor, nor was the name of any creditor or the amount of any debt ever inserted in the schedule thereto.

On the 24th April 1903, before and at the time when prisoner executed the deed, he had in his possession the sum of 161*l.* in cash, being moneys due to him which he had collected from various debtors, the whole of which sum he retained instead of handing the same over to the trustee. William Booth, as trustee, on the 25th April 1903 took possession of the prisoner's business premises, stock, and effects, and continued the business until the appointment of the official receiver under the bankruptcy consequent on the petition which was subsequently presented. The deed was registered under the Deeds of Arrangement Act 1887 on the 27th April 1903.

On the 28th April 1903 the prisoner absconded from and quitted England and went to Canada, taking with him the sum of 120*l.*, part and parcel of the sum of 161*l.* of which he was possessed on the 24th April 1903.

On the 30th April 1903 a bankruptcy petition was presented against the prisoner; a receiving order was thereupon made on the 15th May 1903, and on the 18th May 1903 the prisoner was adjudicated a bankrupt. No evidence was adduced at the trial that any creditor knew of the prisoner's intention to execute the deed, or that any creditor had ever in any way assented thereto,

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or that any creditor ever knew of its existence, or that the trustee had done anything under the deed beyond taking possession of the prisoner's property and effects and carrying on his business.

At the close of the prosecution it was submitted on behalf of the prisoner that there was no case to go to the jury, because on the evidence the sum of 120*l.* so taken away by the prisoner on his quitting England as aforesaid was under and by virtue of the deed the property of the trustee and not the property of the prisoner at all, and therefore, on the authority of *Reg. v. Creese* (29 L. T. Rep. 897; 12 Cox C. C. 539; L. Rep. 2 C. C. R. 105), the case was not within sect. 12 of the Debtors Act 1869.

The recorder declined, however, to withdraw the case from the jury, but consented to reserve the point.

The jury returned a verdict of guilty, and the prisoner was sentenced to six months' imprisonment in the second division and was released on bail pending the decision of the court.

The question for the opinion of the court was whether the sum of 120*l.* so taken away by the prisoner when he quitted England was "his" (the prisoner) property within the meaning of sect. 12 of the Debtors Act 1869 (32 & 33 Vict. c. 62).

Vachell for the prisoner.—The case is concluded by *Reg. v. Creese*. The whole point is whether the property was the property of the prisoner or the property of the trustee, and here the prisoner had parted with all his property to the trustee. He might possibly have been convicted of larceny of the trustee's property, but he cannot be convicted under sect. 12 of the Debtors Act 1869. This deed was irrevocable. It had not been communicated to the creditors, and might therefore be revocable so far as they were concerned (*Siggers v. Evan*, 5 E. & B. 367), but the trustee had incurred expense under it, and it was therefore irrevocable in respect of him.

Sutton for the Crown.—The facts in this case are different from the facts in *Reg. v. Creese*. In that case the fact of the execution of the deed had been communicated to the creditors, and the debtor's money and other property had actually come into the possession of the trustee. Here, however, the trustee never had the money which the prisoner misappropriated; the prisoner was merely liable to account. The deed was revocable. No creditor had expressed his assent to it:

Acton v. Woodgate, 2 My. & K. 492;

Johns v. James, 39 L. T. Rep. 54; 8 Ch. Div., at p. 748, per James, L.J. discussing *Garrett v. Lord Lauderdale*, 2 Russ. & My. 451; 3 Sim. 1.

Further, the effect of the prisoner's retaining the 16*l.* was to revoke the deed *pro tanto*.

Vachell in reply.

Cur. adv. vult.

The judgments of Lord Alverstone, C.J., Grantham, Darling, and Channell, JJ. was delivered by

LORD ALVERSTONE, C.J.—This was a case stated by the Recorder of Banbury on the conviction before him of the prisoner on a charge, under the 12th section of the Debtors Act 1869, of having within four months next before the presentation of a bankruptcy petition against him quitted England and taken with him a part of his property to the amount of 20*l.* and upwards—

that is to say, a sum of 120*l.*—which ought by law to be divided amongst his creditors. The prisoner was proved to have so quitted England taking with him 120*l.*, but he had, shortly before going, executed a deed of assignment of all his estate to a trustee for the benefit of his creditors, and it was contended on his behalf, on the authority of the case of *Reg. v. Creese* (*ubi sup.*), that the 120*l.* was not "part of his property" within the meaning of the section. That case is undoubtedly somewhat similar to the present, and we have to consider whether it is distinguishable. There the charge was preferred under sub-sect. 5 of sect. 11 of the Debtors Act 1869 as to fraudulently receiving "any part of his property," and it is impossible, we think, to put a different meaning on the words "any part of his property" in the 12th section to that which they bear in the 11th section, sub-sect. 5. But for the doubts created by the decision in *Reg. v. Creese*, we should certainly have held that "his property" which ought to be divided amongst his creditors," in the section in question, included property which had been his, which remained in his possession, and the title to which, so far as parted with at all, had only been parted with by him in such a way as to leave it still divisible amongst his creditors in the event of bankruptcy. The concluding words of the section, "unless the jury are satisfied there was no intention to defraud," would be sufficient to protect the accused where he had acted innocently and not in contemplation of bankruptcy. We have, however, to see whether, if we so held, it would be contrary to anything really decided in *Reg. v. Creese*, and for that purpose we have to consider the facts of that case and this. In *Reg. v. Creese* the assignment of the 21st Dec. 1872 had been acted upon, and was undoubtedly a genuine transaction; further advances had been made upon it. Creese entered the service of Lakin and White, the trustees under the deed pursuant to the terms of it, and for several months continued to act as the agent and bailiff of the trustees. The bankruptcy of Creese did not take place until the 17th Oct. 1873, nearly a year after the date of the deed, and the removal, which was the alleged offence under sub-sect. 5, of sect. 11, took place on the 14th or 16th Oct. 1873. The only ground on which the title of the trustees of the deed failed was that the deed of Dec. 1872 had not been registered as a bill of sale. It seems to us, therefore, that the court was right in holding that at the date of the alleged fraud the property really belonged to the trustees and not to Creese. We agree, therefore, that *Reg. v. Creese* was rightly decided, the facts of that case being as stated; but if the reasoning of the court lays down any general rule which would exempt the defendant in this case from responsibility, we do not agree with it. The facts in this case appear to be different. Except by the trustee taking possession of the stock and effects, the deed does not appear to have ever been acted on. The 120*l.* with which the prisoner absconded was no doubt money which the trustee under the deed might have claimed from him by virtue of the assignment, but he never did get it as the trustees of the deed in Creese's case got the stock which Creese misappropriated, and, at most, the trustee here had a mere paper title. Nothing took place which would make this money

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which the defendant was obviously keeping back from his creditors, and which he had in his actual possession and was not holding for the trustee, in any real sense the property of the trustee under the deed executed three days before the absconding. We do not adopt the view that the deed was revocable so far as regards the property of which the trustee under it got possession, for the trustee had an interest in it. *James, L.J.* in *Johns v. James* (8 Ch. Div., at p. 751) says: "You cannot revoke the deed and get the property out of the hands of the trustee until, at all events, you have satisfied all the charges and expenses he has incurred, and any right he has acquired in the property. It is not a revocation of the deed; it is a revocation of the directions given by the deed to the assignee as to what he should do with the property." The deed therefore was not revocable, but as to the money of which the trustee never got possession, no irrevocable trust appears to have been created. We think that the recorder was right in leaving the case to the jury, and that on the facts the 120*l.* was when taken away by the prisoner his property which ought by law to be divided amongst his creditors, and that any claim which the trustee under the deed might have to have the money handed over to him is not sufficient to prevent the operation of sect. 12 of the Debtors Act 1869. The conviction must be affirmed, and the defendant be ordered to serve the remainder of the sentence.

BRUCE, J.—I agree that the conviction must be affirmed. But I wish to add that I think the facts in *Reg. v. Creese* were very different from the facts in the present case. In this case the deed of assignment was a voluntary deed executed by the debtor for the benefit of his creditors and was not communicated to them, and so was revocable by him except in so far as the trustee had acquired an interest in the property assigned. But, so long as there were proceeds to meet the claim of the trustee for his expenses in acting under the direction of the deed, the debtor was at liberty to revoke the mandate contained in the deed so far as it related to the residue of his property. I think there was no evidence whatever to show that the trustee had acquired any interest in the sum of 120*l.* in question. When on the 28th April the debtor appropriated the sum of 120*l.* which had never been in the possession of the trustee, I think he revoked the mandate to the trustee contained in the deed so far as it related to the 120*l.* In the case of *Reg. v. Creese* the deed was not a voluntary deed, for part of the consideration of the deed was a sum of 350*l.* paid by one of the trustees to the debtor. The deed, therefore, in that case was not a revocable deed, and the money which the prisoner appropriated he had received as the servant or bailiff of the trustees, and the money was clearly the money of the trustees. *Conviction affirmed.*

Solicitor for the Crown, *Solicitor to the Treasury.*

Solicitor for the prisoner, *Crowther Davies, Leamington.*

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 26, 27, 28, 29, and March 15.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

JOSEPH CROSFIELD AND SONS LIMITED v. MANCHESTER SHIP CANAL COMPANY. (a)

APPEAL FROM THE CHANCERY DIVISION.

Arbitration—Ouster of jurisdiction of the court—Deficiency in pleading—Waiver of right to object—Manchester Ship Canal Act 1885 (48 & 49 Vict. c. lxxviii.), s. 88, sub-se. 14, 22, s. 202—Manchester Ship Canal Act 1896 (59 & 60 Vict. c. clxxii.), s. 43, schedule.

Where by private Acts of Parliament and a scheduled agreement regulating the rights and duties of the co-plaintiffs (traders and manufacturers at W. and the corporation of W.) and the defendants, it was in effect provided that any difference arising between the parties as to the statutes and agreement should be determined by arbitration, an action brought by the co-plaintiffs against the defendants in respect of a certain dispute between them arising under the statutes was ordered to be dismissed as between the corporation of W. and the defendants, and stayed until the determination by arbitration of the dispute as between the traders and manufacturers at W. and the defendants, the jurisdiction of the court being ousted, and no deficiency in pleading and no waiver by the parties could give such jurisdiction.

So held by Vaughan Williams and Stirling, L.JJ. (dissentiente Cozens-Hardy, L.J.), reversing the decision of Byrne, J.

APPEAL by the defendants from a decision of Byrne, J. The only point which calls for a report is with reference to a preliminary objection raised on behalf of the defendants that the court had no jurisdiction to decide the questions in dispute, but that they must be referred to arbitration.

The facts of the case sufficiently appear from the judgments.

The material sections of the private Acts of Parliament read in the course of the judgments were as follows:

Manchester Ship Canal Act 1885:

Sect. 88. For the protection of the corporation of Warrington, and of traders, manufacturers, and others carrying on business at or near Warrington, the following provisions, unless otherwise agreed on between the corporation and the company, shall have effect—viz. (*inter alia*), sub-sect. 14: The company shall, before the canal be opened for traffic, at their own cost dredge the bed and banks of the river Mersey and for ever after maintain the same dredged, so that at all times there shall be a depth of 8ft. of water at low-water of spring tides between the western boundary of the works of Monks, Hall, and Co., at or near Bank Quay and the eastern boundary of the borough of Warrington near the commencement of the Latchford Canal. Sub-sect. 22. If any difference shall arise between the company and the corporation as to the true intent and meaning of this section or as to anything to be done thereunder, such difference shall be determined by an engineer to be ap-

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-law.

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pointed (unless otherwise agreed on) on the application of the company or the corporation by the Board of Trade, whose decision shall be final and binding on both parties, and the costs of the reference shall be borne as he shall direct.

Sect. 202. If any question arise between the company and any person touching anything to be done or not to be done, or any money to be paid under the provisions of this Act, then, unless by this Act otherwise expressly provided, such question shall be determined by arbitration in manner provided by the Railways Clauses Consolidation Act 1845.

Manchester Ship Canal Act 1896 :

Sect. 43. The terms of agreement set forth in the schedule to this Act are hereby confirmed and made binding upon the mayor, aldermen, and burgesses of the borough of Warrington and the company as if the same were contained in an agreement duly entered into by those parties and confirmed by Act of Parliament and the agreement dated the ninth day of April one thousand eight hundred and ninety-six and made between the same parties is hereby declared to be null and void so far only as the same differs from the terms of agreement hereby confirmed.

The scheduled agreement referred to in sect. 43 of the Act of 1896 contained (*inter alia*) the following provisions :

Clause 6. If and whenever the company shall fail to maintain the channel referred to in the first clause of these presents and navigation is thereby obstructed, then and in each such case the traders and manufacturers carrying on business at Warrington shall have the right of navigation in respect of vessels passing through the Walton Lock of the portion of the Manchester Ship Canal extending from Eastham to the Walton Lock, of the Walton Lock and of the portion of the river Mersey within the limits described in clause 1 (a) of this agreement, free of all tolls and dues, until the aforesaid channel shall have been made and completed to the reasonable satisfaction of the surveyor for the time being of the corporation, provided always that no such trader or manufacturer, as aforesaid, shall be entitled to the right of navigation referred to in this clause, if the company immediately on the receipt of a written notice from the surveyor for the time being of the corporation, certifying the fact of such obstruction and its position and extent, commence to dredge, and continue to dredge, the aforesaid channel to the reasonable satisfaction of the surveyor for the time being of the corporation.

Clause 9. Save as hereinbefore expressly mentioned nothing in this agreement contained, shall affect, lessen, or take away any rights, powers, and privileges enjoyed by, or conferred upon, the corporation and the manufacturers and traders of Warrington, under or by virtue of any Acts relating to the company or otherwise, and save as aforesaid such rights, powers, and privileges are hereby reserved accordingly.

Clause 10. If any difference shall arise between the company and the corporation as to the true intent and meaning of this agreement, or as to anything to be done or not to be done thereunder, such difference shall be determined by an engineer to be appointed (unless otherwise agreed on) on the application of the company or the corporation by the president for the time being of the Institution of Civil Engineers, whose decision shall be final and binding on both parties, and the cost of the reference shall be borne as he shall direct.

The action came on for trial before Byrne, J. on the 16th Jan. 1903, when the following preliminary judgment was delivered :—

BYRNE, J.—In this case an important point has been raised by way of preliminary objection. Now, the action is brought by “Messrs. Joseph

Crosfield and Sons, James Fairclough and Sons, and Monks, Hall, and Co., on behalf of themselves and all others the traders, manufacturers, and others carrying on business at or near Warrington, and the mayor, aldermen, and burgesses of the borough of Warrington.” To prevent the possibility of ambiguity I have been asked to amend the statement of claim by making the firms sue also in their own respective rights. That seems to me to be a reasonable application, having regard to the nature of the case, and I propose to treat the statement of claim as amended in that respect, and also in respect of the slight amendments introduced to accord with that in the praying part of the statement of claim. Taking the case upon that footing, I now consider what is the nature of the case sought to be made. The co-plaintiffs are the mayor, aldermen, and burgesses of the borough of Warrington. The named plaintiffs are traders and manufacturers carrying on business at or near Warrington. Under the Manchester Ship Canal Act 1885 there were certain provisions introduced in this way: By sect. 88 it was provided that: [His Lordship read the preamble to that section, and continued:] Then follow a series of provisions for the benefit of the corporation and of the traders in question. Subsequently to the date of this Act an agreement was entered into—it was dated the 9th April 1896—between the corporation and the Manchester Ship Canal Company, and, putting it quite shortly, certain provisions were introduced, and there was an alteration of rights purporting to be made by means of that agreement. Then the Manchester Ship Canal Act 1896 was passed, and sect. 43 is as follows: [His Lordship read that section, and continued:] Of course, some difficulty arises upon the form of that section; but the result of it is that the terms of agreement are made binding as if the same were contained in the agreement subsequently confirmed by Act of Parliament. Now, obligations were imposed by the Act of 1885 and by the Act of 1896, and the terms of agreement thereby confirmed, whereby—again putting it quite shortly—the canal company was to keep a certain channel, and certain privileges were conferred upon the class of traders referred to in the event of nonfulfilment of the obligations of the canal company. It is alleged by the plaintiffs that the canal company has not fulfilled its obligations in certain respects, and that a right arose, and still exists, of certain free navigation. In fact, the canal company has insisted upon charging tolls—certain rates—and has declined to allow free navigation; and the moneys have been paid under protest in respect of the demands of the canal company in that respect. Thereupon this action was brought asking, first of all, for a declaration, the general effect of which is to establish a right to a certain depth of water in the channel of a portion of the river Mersey. In terms it follows the exact words of part of a clause of the confirmed agreement. But the substance of the matter is that there is a dispute between the parties as to the true meaning of the obligation, the one party saying that there must always be a depth of 8ft. of water at low water of spring tides in the channel, meaning, in fact, a depth of 8ft. of water. It is contended, on the other hand, that that is not the true meaning; that there

need not necessarily be, as I understand it, actually 8ft. of water because the bed of the channel has altered; and that what has to be done is to look at the circumstances as at the time when the obligation was imposed, and to take a certain other datum line from which to calculate the 8ft. I think I have with sufficient fairness stated the nature of the dispute between the parties. I do not need to define what it is—there is a dispute as to what the true meaning is. Secondly, the plaintiffs ask for a declaration that for the period for which the canal company has failed, and so long as it shall continue to fail to fulfil its obligations, the traders of Warrington, on whose behalf the plaintiffs sue, will possess the right of navigation, which they say was conferred upon them in the events which have happened. Shortly, the plaintiff firms in their individual capacities asked for the repayment of dues and tolls paid by them since April 1896, in respect of navigation between certain limits, and, if necessary, for accounts and inquiries to ascertain the amount. Then they also ask in their individual capacity for payment of damages for breach by the canal company of the obligations cast upon it by the agreement, and the statutes. Then there is a claim for an injunction in what is called “general terms.” What the injunction is to be I do not know, and it is not for me, and I am not going to pretend, how to define exactly what relief I think the plaintiffs may or will be entitled to. But what I have to consider is the preliminary objection taken which I think is fairly expressed in this way: First, that having regard to the arbitration provisions contained as well in the original Act of Parliament, as in the terms of the agreement confirmed by the subsequent Act of Parliament, the jurisdiction of the court to entertain the action is ousted in the full sense—that is to say, the court cannot entertain the action, even with the consent of all parties to it. Or, secondly, that even assuming the action is one which the court could deal with if the canal company waived its right to insist on arbitration it has not waived such right, and it is now at the trial entitled to insist upon arbitration to the exclusion of the exercise of jurisdiction by the court. I think that fairly seems to be the way in which the objection is put forward. It will be convenient to consider the objection first as between the corporation of Warrington and the canal company, and to keep that matter entirely distinct from the question as between the other plaintiffs and the canal company. It is common ground, and in fact could not be disputed, that an Act of Parliament may be so framed as to entirely oust the jurisdiction and to compel the court to refuse to hear the action, even although all parties asked to have it heard. I regard the case of *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company* (L. Rep. 2 Sco. App. 347) as a case of that nature, and I cannot do better than read what Farwell, J. says about it in the recent case of *Manchester Ship Canal Company v. Manchester Racecourse Company* (83 L. T. Rep. 274; (1900) 2 Ch. 352). The case which I have mentioned of *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company* (*ubi sup.*) had been cited, and the learned judge says (at p. 361 of (1900) 2 Ch.): “A great deal of argument was founded upon *Caledonian Railway Company*

v. Greenock and Wemyss Bay Railway Company (*ubi sup.*). But the problem before the court in that case and subsequent cases of the same nature was absolutely different to anything I have to solve. The question was not whether the parties were or were not bound by the contract into which they had entered. No such question arose. The question was whether the courts were bound or not by a substantive statutory enactment, presumably in the interests of the public, that the agreement which was confirmed between the parties should be implemented and made effective by the parties. Of course, if the Legislature says to the parties, ‘Not only do we declare the agreement valid between you, but you shall perform it,’ then there is a statutory enactment over and above the agreement validated between the parties, which enactment the Attorney-General could probably enforce, or to which, at any rate, the remedy by *mandamus* would apply. The parties might waive the agreement between themselves for their own benefit. They could not waive the statutory duty imposed upon them, if it were a duty imposed for the benefit of the public at large.” Now, referring to the case itself of *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company* (*ubi sup.*), I find first that there a certain agreement had been entered into between the provisional directors of the railway companies as to the construction and maintenance of certain railways and works. And the Act of Parliament, after reciting that fact, goes on (at p. 349 of L. Rep. 2 Sco. App.) thus: “And it is expedient that the said agreement should be sanctioned. The said agreement shall be and the same is hereby sanctioned and confirmed, and shall be as valid and obligatory upon the company and the Caledonian Railway Company respectively as if those companies had been authorised by this Act to enter into the said agreement, and as if the same had been duly executed by them after the passing of this Act.” That phraseology to a great extent resembles the phraseology in sect. 43 of the second Act in the present case; it is not exactly the same, but similar to it. Lord Cairns pauses there and then says: “Up to this point, the enactment does no more than give statutory validity to the agreement; but the clause proceeds in these words, ‘And it shall be lawful for the company (that is, the Greenock and Wemyss Bay Railway Company) and the Caledonian Railway Company respectively, and they are hereby required, to implement and fulfil all the provisions and stipulations in the said agreement contained.’” And upon that portion of the clause the Lord Chancellor expresses his view that there is more than a statutory validity given to the agreement. There is a substantial statutory enactment to the effect that the obligations imposed shall be fulfilled having this result, inasmuch as there was in the agreement a clause to the effect that “All differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall, from time to time, so often as any such questions or differences shall arise, be referred to arbitration in terms of the Railways Clauses Consolidation (Scotland) Act 1845 (8 & 9 Vict. c. 33, s. 119).” I have read the view which Farwell, J. has expressed with reference to the true meaning of that case, and I may say that I

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absolutely and entirely agree with what that learned judge said in respect to it. On the other hand, in the case which has been cited to me of *London, Chatham, and Dover Railway Company v. South-Eastern Railway Company* (60 L. T. Rep. 370; 40 Ch. Div. 100) the question was as to the effect of an agreement having legislative confirmation without any express statutory enactment in an Act of Parliament, but having certain clauses in the Act of Parliament which were referred to in the agreement. In that case there had been an agreement to submit matters in dispute to arbitration. "The court," it was held, "is not deprived of its jurisdiction to determine the matters in dispute if neither party insists on an arbitration. And in a case where the defendant had in his pleadings insisted on his right to arbitration, but had failed to raise the point at the hearing, and had gone into evidence on the merits, the Court of Appeal refused to allow the point to be raised on the appeal." Now, that agreement was an agreement to refer to arbitration under an Act of Parliament. The Act of Parliament which was referred to in the agreement contained certain provisions, and amongst others sect. 26: "Full effect shall be given by all the superior courts of law and equity in the United Kingdom, according to their respective jurisdiction, and by the companies respectively . . . to all agreements, references, arbitrations, and awards in accordance with this Act." The learned judges there pointed out that the legislation which was, so to speak, incorporated in the agreement, was legislation which places it in the power of railway companies to insist upon that contractual right as against each other, if they choose to make a bargain to that effect, and to fall far short of legislation which debars the courts of this country from deciding disputes between railway companies if the railway companies themselves do not choose to insist upon the arbitration clause in their agreement." I have read that passage from the judgment of Bowen, L.J. in that case (at p. 108 of 40 Ch. Div.). So that that case really stands upon a different footing from the class of cases represented by *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company* (*ubi sup.*). In the case of *London and North-Western Railway Company v. Donellan and Billington* (78 L. T. Rep. 575; (1898) 2 Q. B. 7) there are observations—though I cannot say that the point was decided—tending directly in the same direction as the decision in *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company* (*ubi sup.*). That was not a case of an agreement confirmed by an Act of Parliament; it was a case of legislative enactment by means of a provisional order and subsequent statute, and Chitty, L.J. at the commencement of his judgment (at p. 17 of (1898) 2 Q.B.) says: "The question really is one of construction of that which has the force of an Act of Parliament." It is exactly the same case. There had been no provisional order, but there had been an Act of Parliament in so many words enacting the provision in question. I need not dwell upon other points of distinction between *London and North-Western Railway Company v. Donellan and Billington* (*ubi sup.*) and the present case that have been referred to, but it appears to me that there are two distinct classes

of cases. There is, first of all, the class of case where there is a direct statutory enactment which says that matters shall be referred to arbitration, which has the effect of preventing the courts from entertaining jurisdiction. There is the second class of case, where there is an agreement with statutory confirmation, in which case the parties may waive their right to insist upon having an arbitration. Now, the present case does not stand on precisely the same footing as any of those cited, and again it is convenient to consider the effect of the Act first, and still as alone between the corporation and the canal company. I go back now to the statute. I have read the introductory words showing for whose protection sect. 88 was passed: "The following provisions unless otherwise agreed on between the corporation and the company shall have effect." Then there is sub-sect. 22, which is important. [His Lordship read that section and continued:] Now, that provision is entirely governed by the introductory words which I have read: "Unless otherwise agreed on between the corporation and the company." Therefore although there is, but for the words that I have last read, what would be a direct statutory enactment probably ousting the jurisdiction of the court altogether, as between the corporation and the canal company in respect of these matters, it appears to me that the words "unless otherwise agreed on between the corporation and the company" show that it was within the competence of the parties, notwithstanding the statutory enactment, to alter by agreement, or to waive the right to insist upon that, and to appeal to the ordinary tribunals of law. So that there is that clear distinction at the outset. Now, striking out those words "unless otherwise agreed on," &c., the case of *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company* (*ubi sup.*), and the opinion in *London and North-Western Railway Company v. Donellan and Billington* (*ubi sup.*) would seem to apply. It is true that the express enactment would not appear to be an enactment introduced for the benefit of the whole of the public, but an express enactment introduced for a class or section of the public. With reference to the variation by agreement, it is to be observed that it does not say "unless otherwise agreed on" in writing, or in any specific way. I mention that because I find that there are other sections in this Act of Parliament where it is specifically enacted that the agreement must be in writing, or says in what form or manner the alteration is to take place. Now, it appears to me that if the matter stood on the original Act alone, it would be competent for the agreement to be effected between the parties in reference to going to a court of law by the one party bringing the action and the other party waiving the right to insist upon arbitration. Then the next question is, has there been a waiver? I think the true answer is "yes," unless the objection to the action has been taken, as Bowen, L.J. expresses it in the case to which I have referred, from the first. I am clear that this objection was not taken by the defence. It has been pointed out that under the rules of practice it is not necessary to raise points of law, and it has also been pointed out that in this defence there are some general words referring to all rights and remedies arising under the Act

which might possibly be held to cover what is meant. With reference to the express words in the defence, I said that it was clear that the point was not raised in any true sense, and I have not heard it suggested that it was, in fact, intended to be raised by those words. It is true you need not plead points of law, or plead the evidence on which they are founded. But you may give notice of points of law; and it appears to me that it is of the greatest importance in considering whether the objection has been taken from the first to see whether the first reasonable opportunity has been taken of raising the objection, being an objection to jurisdiction, if it is intended to insist upon it. Having come to that conclusion that the objection was not taken by the defence, and it not having been taken at the earliest possible stage, it is perhaps unnecessary to express an opinion with reference to the provisions of sect. 4 of the Arbitration Act 1889 as to raising these points and as to moving for a stay of proceedings when there is an arbitration clause, and for a reference to arbitration. But, as at present advised, it strikes me that that section precisely points out the method in which an objection to jurisdiction may be taken from the first. And I am by no means prepared to say that if a party having the right so to apply elects not to do it, but put in his defence—even if on his defence he gave notice that he meant to raise the objection—it might not be held to be too late when he came to the trial, he not having taken that proceeding which appears to me to have been expressly designed, amongst other things, to enable the parties to take the objection at the very earliest opportunity. I do not think, there being opposition, that I ought to permit an amendment by allowing the introduction of this objection into the defence, for the reason that it is an objection going to jurisdiction, and one which ought to have been taken at the earliest available opportunity. Then, still as between the corporation and the canal company, I come to the second Act and the agreement, and reading sect. 43, I find that the terms of the agreement—not the agreement, but the terms of the agreement—set forth in the schedule to this Act are hereby confirmed and made binding on the corporation and the company as if the same were contained in the agreement duly entered into by these parties and confirmed by Act of Parliament, and the agreement of the 9th April is hereby declared to be null and void so far only as the same differs from the terms of the agreement hereby confirmed. Now, suppose the agreement had been first made, and had then been simply confirmed by Act of Parliament, the case would appear to have fallen within the class of cases like *London, Chatham, and Dover Railway Company v. South-Eastern Railway Company* (*ubi sup.*), and what was said by the Lord Chancellor in *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company* (*ubi sup.*) as to the true effect and meaning of a confirmation of an agreement, apart from the express statutory enactment that the parties were to implement and carry out the agreement. It is really an *a fortiori* case so far as waiver is concerned, to the case depending—if it depended alone—on the provisions of the earlier Act. Therefore, I come to the conclusion that there was power in the parties to waive, and that there has been a

waiver of the right to insist upon the matter being referred to arbitration. Taking the view which I have expressed as to this preliminary point as between the corporation and the canal company the case would have to proceed, and I might say I should simply take the evidence and give relief to one or both of the plaintiffs. It would only be a case of misjoinder and perhaps some additional evidence. But, I think, in view of the arguments that have been addressed to me, and also because it might save taking some portion of the evidence should I entertain a particular view, I ought to deal shortly with this question also. The first Act in question enables the corporation to vary or alter the rights of traders. But, nevertheless, and subject to alteration, I think that they have—that this class of traders have—direct rights conferred, in respect of which the class may be representative—again in respect of class rights—and individuals may have, in respect of individual rights, direct relief in some respects. There is this: that in fact these traders have paid moneys which they say the canal company was not entitled to levy, and they ask to have the money back again. Now it appears to me that if they have rights conferred upon them in the way that the rights have been conferred by the original and by the subsequent statute, and the statutory confirmation of the second agreement varying the terms of the first, they have a right to come and ask to have that money returned to them individually, which they have wrongfully paid, and that they are not, in any way, bound to wait until the corporation shall have had an arbitration with the canal company before taking such proceedings. I think that they could have sued under the first Act, and so far as they are concerned their rights are not lost, but varied by means of the second Act and agreement. With reference to their right to sue as a class I am not prepared to say that they cannot establish a right to a declaration which would be common to all of them, assuming that they proved right upon the facts that they have a free right of navigation in accordance with the provisions of the Act of Parliament. I have expressed my opinion on what I recognise as a difficult and important point—and both parties have represented it to me as an extremely important point—and I understand that the probability is that the objection will be insisted upon elsewhere. Should the canal company be successful on an appeal, and particularly in reference to the first form of the objection which has been taken that the jurisdiction of the court is entirely ousted, I can only point out that the expenditure which will be occasioned by what I understand must, necessarily, in its nature, be a long case, and the taking of evidence, will be thrown away, and if the plaintiffs prove wrong the burden of that expense will entirely fall upon them. At the same time, having decided as I have, I think that the plaintiffs are entitled to ask that the case may now proceed. I should have thought myself, assuming that it is intended—I understand it is—to seek for an opinion on this point elsewhere, that by far the more convenient course to follow, would be to take the opinion of the Court of Appeal first upon this preliminary point; and I should think, having regard to the nature of the case, it is extremely likely that the Court of Appeal would see its way to advance such an appeal as that, and

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that the rest of the case should be allowed to stand over in order to see whether the evidence should be taken at all.

Moulton, K.C.—I was about to apply to your Lordship for that purpose. The defendants do wish to take the opinion of the Court of Appeal on that subject of waiver.

BYRNE, J.—I think I have expressed an opinion about this that I think it rests with the plaintiffs. I think that they are entitled to go on now. They have got my judgment, and by what I have said about its being an important and difficult point it must not be understood that I have any doubt myself as to the view I have expressed. I think that the plaintiffs have a right to say: "Let the case proceed. The court has jurisdiction, and we have come here properly and will proceed."

Hughes, K.C.—We have considered the matter very carefully with our clients, and it is so important to us that the matter should be promptly disposed of that we would necessarily press your Lordship to go on. If there is to be an appeal to the Court of Appeal and, possibly, to the House of Lords on this preliminary point, it would take a very long time, and then would have to come back and start afresh. We will take all risks. We quite appreciate all the risks we take.

The trial of the action proceeded accordingly, and the hearing of the evidence occupied several days. At the conclusion of the arguments his Lordship reserved judgment.

On the 7th April 1903 the following written judgment was delivered by

BYRNE, J.—The constitution of the action is as follows: Three limited companies sue in a representative capacity on behalf of themselves and all others—the traders, manufacturers, and others carrying on business at or near Warrington. Each company also sues in its individual capacity, and the corporation of Warrington is the remaining plaintiff. The defendants are the Manchester Ship Canal Company. The relief claimed by the corporation and by their co-plaintiffs in their representative capacity is for declarations to establish alleged rights, and that claimed by the plaintiff traders individually is for repayment of tolls paid by them under protest which they alleged to have been wrongfully enacted from them, and, as a separate matter, damages for delay occasioned by neglect to preserve a channel in a certain portion of the river Mersey in accordance with statutory obligations imposed on the defendants. The case raises important questions of construction arising out of two Acts of Parliament and the terms of an agreement scheduled to the later of such Acts. The defendants, the Manchester Ship Canal Company, are under certain obligations in respect of a portion of the river Mersey, situate between the western boundary of Monks, Hall, and Co. Limited at or near Bank Quay and Howley Lock, including the portion of the old bed of the Mersey between the westerly end of the river diversion and Walton Lock. The nature and extent of their obligations so far as necessary to be considered in the present case are defined by the Manchester Ship Canal Act 1885, s. 88, and by the Manchester Ship Canal Act 1896, s. 43, and the terms of agreement by the last-mentioned section confirmed. The Acts of 1885 and 1896 are local

and personal Acts as distinguished from general Acts and private Acts. Undoubtedly such an Act may be so framed as to amount to more than a statutory confirmation of an agreement *inter partes*, but unless the Act be so framed I think that the principles of construction to be applied are to be found clearly laid down in *D. Davis and Sons Limited v. Taff Vale Railway Company* (72 L. T. Rep. 632; (1895) A. C. 542). I will refer to the remarks of the Lord Chancellor, which are to be found at p. 549 of (1895) A.C., where he says: "That brings me to the question whether the Act does in truth constitute a contract between the two companies giving no right except to each other, and therefore not justifying the trader in refusing to pay the amount demanded. Now, it seems to me that there is a very obvious answer to the argument that the 23rd section of the Act constitutes merely a contract between the companies. It is not a contract; it is not, to my mind, even like a contract; it bears no analogy to a contract. It is an express enactment which imposes an obligation on the Taff Vale Railway Company to charge certain rates; it is immaterial what the terms are upon which these rates are to be charged; we are now construing the statutory obligation; and if the Taff Vale Railway Company has done the thing which the Legislature has contemplated they might do, and which, if I am right in what I have said before, they have done, then their right to charge more than the lowest rate, which for the time being they have charge for like traffic to or from the docks at Cardiff, Penarth, or Barry has ceased, and the Legislature has prohibited them from doing it. It would be strange indeed if this be true, that a trader sued for the higher charge should not be able to set up the unlawful character of the excess." And Lord Watson (at p. 552 of the same report) says: "In cases where the provisions of a local and personal Act directly impose mutual obligations upon two persons or companies, such provisions may, in my opinion, be fairly considered as having this analogy to contract, that they must, as between those parties, be construed in precisely the same way as if they had been matter, not of enactment, but of private agreement. It was in that sense that in *Countess of Rothes v. Kirkcaldy Waterworks Commissioners* (7 App. Cas. 694, at p. 707) I ventured to observe that 'such statutory provisions as those of sect. 43 occurring in a local and personal Act must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the Legislature.' For all purposes of construction, I thought that the provisions which the House had to interpret might be legitimately viewed in that light. But it did not occur to me then, nor am I now of opinion, that the analogy of contract, for it is nothing more, could, in an English case especially, be carried further. The provisions of a railway Act, even when they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and their force, not from the agreement of parties, but from the will of the Legislature. And when provisions of that kind are not limited to the interests of the of the parties mutually obliged, but impose upon one or other or both of them an obligation in favour of third parties, who are sufficiently desig-

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nated, I am of opinion that the obligation so imposed must operate as a direct enactment of the Legislature in favour of these parties, and cannot be regarded as a mere stipulation *inter alios*, which they may have an interest but have no title to enforce." [His Lordship read and commented upon sect. 88 of the Act of 1885, and continued:] I will only say that if rights directly enforceable by traders and manufacturers are given by the section, it does not appear to me that the clause is applicable to such rights as for the time being existing under the original Act or as altered by agreement at all. I have shortly analysed the whole section of the Act, with the result that I am quite clear that some of the sub-sections—as, for instance, 8 to 11—confer rights upon the corporation only, and others—such as 2 and 5—upon traders and manufacturers, and others carrying on business at or near Warrington directly. Omitting the words at the beginning of the section, "unless otherwise agreed on between the corporation and the company," it appears to me from the whole scope of the section that certain of the sub-sections, not in terms confined to the corporation, or to traders, imposed obligations on the company towards all those for whose protection the section is expressed to be enacted, and to confer direct rights upon all or any of those in whose favour it is so enacted, and notably I consider that sub-sect. 14, which is the most important one for the purpose of the present case, confers a direct right upon, and gives a right of action to, all or any of the persons mentioned as those for whose protection the section was introduced. To what extent the words in the introductory part of the section, "unless otherwise agreed on between the corporation and the company," confer a right upon the corporation—acting, of course, in good faith—to vary the rights of all or any of the classes of persons interested under the sub-sections, or of members of those classes, is not, in the view I take of the effect of the Act of 1896, material to consider. And it is sufficient to say that I can see ground for fair argument that the agreement subsequently entered into between the corporation and the company exceeded the powers of the corporation to apply the legislative sanction which it received by the Act of 1896. I am guarding myself; I am not in the least saying that it was in excess, but I can see fair ground for arguing that it was so. [His Lordship then dealt with the merits of the case, and came to the conclusion that the plaintiffs were entitled to succeed in their action.]

From that decision the defendants now appealed.

Upon the opening of the appeal the defendants took the preliminary objection which had been raised by them in the court below.

Cripps, K.C. (Moulton, K.C., Pickford, K.C., O. Leigh Clare, and Aubrey T. Lawrence with him) for the appellants.—The preliminary question raised by this appeal is whether the matter in dispute between the parties should be determined by arbitration instead of by the court. Sect. 88, sub-sect. 22, of the Act of 1885 raises in one form, although not in a complete form, the question of jurisdiction. I say that thereby there is a statutory substitution of an engineer for the court. Byrne, J. was entirely in favour of the

defendants upon this point, except on the question of waiver. His Lordship decided that the defendants had waived their right to object to the jurisdiction of the court, and that such jurisdiction arose. Upon this point I would also refer to sect. 202 of the same Act, which is likewise an arbitration clause, and is a very wide arbitration clause, and one that covers the substance of the present dispute. [VAUGHAN WILLIAMS, L.J.—The agreement being embodied in the statute, it is a statutory condition precedent and goes to jurisdiction.] Suppose that it is not a question of jurisdiction, but only a matter *inter partes*, the court would interfere by way of a stay of proceedings. I submit that the learned judge in the court below has made a mistake on the point whether it is necessary to plead to the jurisdiction. He thought that because the defendants had not specifically pleaded to the jurisdiction they had waived their right to do so. But parties cannot waive the jurisdiction. If it is ousted by legislative enactment, the parties cannot waive it. As between the parties they can waive; but if it is a statutory provision they cannot. The provisions of the Act of 1885 are to apply unless the parties otherwise agree. Byrne, J. thought that as the defendants had not pleaded the want of jurisdiction they had otherwise agreed. But it cannot be "otherwise agreed" simply because the pleader has adopted a particular form of pleading. [VAUGHAN WILLIAMS, L.J.—If the jurisdiction of the court is ousted, it is not in accordance with the practice to go to the court to ask for a stay of proceedings, because in such a case the jurisdiction of the court does not exist.] You go to the court to ask for an exercise of its discretion. [VAUGHAN WILLIAMS, L.J.—Can the manufacturers and traders sue here? They are not parties to the agreement. That was made between the canal company and the corporation: (see *Ellis v. Duke of Bedford*, 70 L. T. Rep. 332; (1899) 1 Ch. 494.) Persons having joint interests can sue. [VAUGHAN WILLIAMS, L.J.—Is there any statutory provision as to a stay in the Common Law Procedure Act 1854 or the Arbitration Act 1889? I am aware that there is a practice as to that, but is there any statutory provision?] Sect. 4 of the Arbitration Act 1889 provides that: "If any party to a submission . . . commences any legal proceedings in any court against any other party to the submission . . . in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court . . . if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings." He referred also to

Mayor, &c., of London v. Cox, L. Rep. 2 E. & I. App. 239, at p. 261.

Bousfield, K.C. and Hughes, K.C. (with them Frederic Thompson) for the respondents.—It was not urged before that no jurisdiction existed, and that the matter ought to go to arbitration. No

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suggestion was made that arbitration was the proper tribunal. We agree that if the court has no jurisdiction it is not necessary to refer to that fact in the pleadings. All that has to be shown to the court is that it has no jurisdiction. There are four classes of cases which may arise relating to the present question: First, where the court only has jurisdiction; secondly, where the court has no jurisdiction, and some other tribunal possesses it. Between those two classes of cases there are two other instances: (a) Where a party to proceedings comes *sub modo* and says that he is entitled to have arbitration. The court is bound to give effect to that application and to stay the proceedings. (b) The court has power to stay where it has a discretion to exercise, originally under the Common Law Procedure Act 1854 and now under the Arbitration Act 1889. The following cases were relied upon by the defendants in the court below:

Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company, L. Rep. 2 Sco. App. 347;

London, Chatham, and Dover Railway Company v. South-Eastern Railway Company, 60 L. T. Rep. 370; 40 Ch. Div. 100;

London and North-Western Railway Company v. Donellan and Billington, 78 L. T. Rep. 575; (1898) 2 Q. B. 7; on appeal 79 L. T. Rep. 503; (1899) A. C. 79;

Manchester Ship Canal Company v. Manchester Racecourse Company, 83 L. T. Rep. 274; (1900) 2 Ch. 352, at p. 361.

But neither *London and North-Western Railway Company v. Donellan* (*ubi sup.*) nor *London and North-Western Railway Company v. Billington* (*ubi sup.*) supports the appellants' contention, while the latter case supports ours. In *Midland Railway Company v. Loseby and Carnley* (80 L. T. Rep. 93; (1899) A. C. 133) the decision of the Court of Appeal in *London and North-Western Railway Company v. Donellan* (*ubi sup.*) was approved by the House of Lords. There must be something more than a simple common form arbitration clause in an Act of Parliament to deprive the court of its jurisdiction. It may give the parties the right to go to arbitration, but it does not oust the jurisdiction of the court if they prefer to go to the court. The effect of such a section is not to exclude the jurisdiction of the court so that the parties cannot waive, but must go to arbitration. The Arbitration Act 1889 contemplates references under statutory powers, for by the 24th section it is provided that: "This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorised or recognised by that Act." In the *Countess of Rothes v. Kirkcaldy Waterworks Commissioners* (7 App. Cas. 694) there was a clause precisely similar to that in the present case. As to the question of waiver of the right to object to the jurisdiction of the court, Byrne, J. went fully into that question. So far we have dealt with the matter as if the arbitration clause were in common form. But it is not in common form. The clause is not directed to excluding the jurisdiction of the court, but to providing a special tribunal if the parties wish to resort to it. It is

the provision of a tribunal, not the exclusion of the jurisdiction, that is aimed at. It was for the benefit of the parties that such a tribunal should be set up, but not to their benefit that the jurisdiction should be excluded. And, unless there are some express words to exclude it, it cannot be treated as excluded. The appellants must show that the purpose of this clause is exclusion to enable them to succeed. It is not enacted that all differences shall go to arbitration, but three specified things. The jurisdiction of the court is not ousted unless one of the parties insists that arbitration shall be the tribunal. We have so far argued as if there were not the words at the beginning of sect. 88. That section is prefaced by the words "unless otherwise agreed on between the corporation and the company." Those are an integral part of the enactment, and dominate the whole matter. You cannot have the jurisdiction of the court determined by the will of the parties unless in the case already mentioned. If the sections only give the parties the right to arbitration that is enough for the plaintiffs. Then arises the question of waiver, and sect. 4 of the Arbitration Act 1889 becomes very material. As to what is a "step in the proceedings," within the meaning of that section, see

Ford's Hotel Company Limited v. Bartlett, 73 L. T. Rep. 665; (1896) A. C. 1, at p. 4.

The authorities show that if it is intended to go to arbitration, the party desirous of doing so must decide to do so earlier than at the stage at which the appellants did in the present case. Dealing with the matter as between the company and the corporation, the question is whether the provisions of the Acts are sufficient to oust the jurisdiction of the court. The appellants contend that no amount of waiver will do, and that the court has no jurisdiction. But in a private Act it is not intended to oust the jurisdiction of the court. Although in a public Act it might be provided that persons should go to arbitration. That, however, does not apply to the present case, and the intention ought not to be imputed to the Legislature that the parties should never resort to the court, but should go to arbitration. In a public Act for the protection of the public, it might be a matter of policy that arbitration should be the tribunal—*e.g.*, for the purpose of saving expense. But that is not so when it is a matter of agreement. There is no case which shows that the jurisdiction of the court is ousted in such circumstances as these. The case of *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company* (*ubi sup.*) is an authority for exactly the opposite proposition for which the appellants cited it in the court below. *Countess of Rothes v. Kirkcaldy* (*ubi sup.*) was certainly not a case of the jurisdiction of the court being ousted. In *London and North-Western Railway Company v. Donellan and Billington* (*ubi sup.*) the whole discussion was not upon the question whether the court had jurisdiction, but whether the arbitrator had jurisdiction to deal with a certain part of the case. And when the court came to consider that case in *Midland Railway Company v. Loseby and Carnley* (*ubi sup.*) that point was made clear. The case of *London, Chatham, and Dover Railway Company v. South-Eastern Railway Company* (*ubi sup.*) shows that where two companies have agreed that

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all differences between them shall be submitted to arbitration, the parties may waive the arbitration and go to the court. Why should it be supposed that the Legislature intended the plaintiffs here to go to arbitration if they preferred to go to the court. And when some nice questions of law are involved, it is most desirable that they should have the right to go to the court, for where questions of law are raised arbitration is the most unsatisfactory tribunal, and public policy cannot require that they should go to arbitration whatever it may in the case of a public Act. With regard to the question of the right of the traders and manufacturers to sue, sub-sect. 22 of sect. 88 of the Act of 1885 as to arbitration has nothing to do with any dispute between them and the company. Supposing that they have no right to bring this action, the municipal corporation has the power. But the traders and manufacturers are greatly affected, and if the provisions of the Act of 1885 are carried out the canal is much to their advantage. It was for that reason that various provisions were inserted in that Act to preserve the river and to protect the traders and manufacturers. That gives them a direct right to enforce the provisions of sect. 88:

Herron and others v. Rathmines and Rathgar Improvement Commissioners, 67 L. T. Rep. 658; (1892) A. C. 498, at p. 553.

That was a very similar case to the present, and there the action was brought by three persons as representing a class. [VAUGHAN WILLIAMS, L.J.—The question is whether the traders and manufacturers were intended by the Legislature to have any voice in the matter. The words at the beginning of sect. 88, "unless otherwise agreed on between the corporation and the company," seem to make the corporation and the company the masters of the situation.] They are masters of the situation to this extent and no more, that they can agree to a modification of the provisions of the statute. [STIRLING, L.J.—Why is this point not governed by *Ellis v. Duke of Bedford* (*ubi sup.*) as to whether a representative action may be brought?] It is rather more than that—namely, whether persons who are represented have a right of action. We say that the traders and manufacturers themselves have the right to enforce this agreement which was for their protection, and that without the aid of the corporation. This is in the nature of a contract between the company and the traders and manufacturers, as Lord Halsbury said in *Herron v. Rathmines and Rathgar Improvement Commissioners* (*ubi sup.*). If that is so, they have by virtue of contract the rights of the corporation. There is an alternative proposition: Suppose it is an agreement between the corporation and the company and incorporated in an Act, even a member of the public who can show damage—and *à fortiori* a trader—is entitled to sue to enforce the obligation. The clearest authority on that proposition is

D. Davis and Sons Limited v. Taff Vale Railway Company, 72 L. T. Rep. 632; (1895) A. C. 542.

Cripps, K.C. in reply.—Two other cases which show that the rights of the traders and manufacturers are put much too high are

Atkinson v. Newcastle and Gateshead Waterworks Company, 36 L. T. Rep. 761; 2 Ex. Div. 441, at p. 448;

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Johnston and others v. Consumers' Gas Company of Toronto, 78 L. T. Rep. 270; (1898) A. C. 447, at p. 454.

[VAUGHAN WILLIAMS, L.J.—The proposition which you are dealing with was discussed very fully in this court subsequently to the year 1897 in *Groves v. Lord Wimborne* (79 L. T. Rep. 284; (1898) 2 Q. B. 402, at p. 416). His Lordship referred also to the decisions as to arbitration under the Building Societies Acts; and, in particular, cited *Crisp v. Bunbury* (8 Bing. 394). *Cur. adv. vult.*

March 15.—The following written judgments were delivered:—

VAUGHAN WILLIAMS, L.J.—This is an appeal by the defendants, the Manchester Ship Canal Company, in an action brought against them in which the plaintiffs are the corporation of Warrington and certain traders of Warrington as representing the traders of Warrington generally, and also in their individual capacities. The object of the action is to enforce rights which they claim respectively to have against the Ship Canal Company under a clause of an Act of Parliament, or under that clause as modified by an agreement affirmed by a subsequent Act of Parliament or under that agreement. The trader plaintiffs, in their individual capacities, although they include a claim for damages for the breach by the Ship Canal Company of dredging obligations cast on them by the statute or by the agreement, in substance, claim the return of tolls, which were paid by the traders on the demand of the Ship Canal Company for the user of the canal, which user was necessitated by failure of the canal company to perform duties alleged by the plaintiffs to have been cast on the canal company, in respect of maintaining the channel of the river Mersey at a certain depth. The failure by the canal company to perform these duties would entitle the traders under the 6th section of the agreement scheduled to the Act of 1896, to navigate a portion of the canal, free of all tolls and dues, during such time as the said channel should be obstructed. The plaintiffs generally ask for declarations of rights. When the case came on for hearing the defendant company took a preliminary objection, which was this: that having regard to the arbitration provisions contained as well in the original Act of Parliament as in the agreement affirmed by the subsequent Act, the jurisdiction of the court is absolutely ousted in the sense that the court could not, even with the assent of all parties, entertain the action or dispose of a particular matter in difference essential to the maintenance of the action. I will observe here that the action really embodies three actions, and that it may be that the ousting of the jurisdiction may be effective as to one or more of the claims although not effective as to all three actions or all the claims. This, however, would seem an unfortunate result, for it is obvious that it is desirable that all these cases relating to the same obligations of the canal company should be disposed of by the same tribunal. The preliminary objection so far as it is based on the original Act of the Manchester Ship Canal—1885—depends primarily on sect. 88 of that Act. The section begins with these words: [His Lordship read them and continued:] Then follow numerous provisions, the 14th of which

deals with the obligation of the canal company in respect of the dredging of the channel of the river Mersey, and the maintenance of the dredging, so that at all times there should be a depth of 8ft. of water at low water of spring tides between a certain point, and the eastern boundary of the borough of Warrington, the object of this provision being, of course, the maintenance of the channel of the Mersey, which might be affected by the construction of the canal, and its maintenance in such a condition that the channel of the Mersey might continue a navigable way convenient to the borough of Warrington and its traders. Then provision 22 says this: [His Lordship read that provision, and continued:] The words "unless otherwise agreed on" refer, I assume, simply to the appointment of the arbitrator, who may be an agreed arbitrator or one appointed by the Board of Trade. Thus far I have only dealt with the statute of 1885, but subsequently, in 1896, the company and the corporation in the exercise of the power conferred by the words in the preface of sect. 88, "Unless otherwise agreed on between the corporation and the company," agreed to modify the provisions of sect. 88. I should here observe that in my opinion, the power of agreement thus given in the prefatory clause of sect. 88 is only a power to alter the provisions in that section, and has no bearing whatever on the power of the corporation or the company to waive the provision contained in sub-sect. 22. Now, the agreement thus made in 1896 between the corporation and the company, slightly modified, was confirmed by sect. 43 of the Manchester Ship Canal Act 1896, which runs thus: [His Lordship read that section and continued:] The agreement in the schedule recites the prefatory words in sect. 88 of the Act of 1885 and sub-sect. 14 of that section and then recites an agreement of 1893 between the corporation and the company whereby, in consideration of the corporation not opposing the opening of the canal, although incomplete, the company agree, subject to penalties, to complete at their own cost on or before the 1st July 1894 the dredging authorised by sect. 88, sub-sect. 14, of the Act of 1885, reserving all powers, rights, and privileges of the corporation and the manufacturers and traders of Warrington, under the Acts relating to the company or otherwise. The recital of this agreement of 1893 is followed by a recital that, by the same agreement the company agreed that during the time fixed for completion by that agreement, the corporation, traders and manufacturers at Warrington should have the right to carry, by means of their barges, goods from the Mersey to the Mersey along the Manchester Ship Canal free of rates or tolls. Then follows a recital of disputes and differences having arisen between the company and the corporation, and that the company and the corporation have agreed to settle those disputes by that agreement, the corporation, traders and manufacturers at Warrington should have the right to carry, by means of their barges, goods from the Mersey to the Mersey along the Manchester Ship Canal free of rates or tolls. Then follows a recital of disputes and differences having arisen between the company and the corporation, and that the company and the corporation have agreed to settle those disputes by that agreement, the corporation, traders and manufacturers at Warrington should have the right to carry, by means of their barges, goods from the Mersey to the Mersey along the Manchester Ship Canal free of rates or tolls. This recital of the agreement between the corporation and the company is followed by a rather remarkable recital relating to the traders. It runs thus: "And whereas the traders, manufacturers, and all other persons now or hereafter carrying on business at or near Warrington are entitled to use portions of the canal and river Mersey and the lock and works at Walton, on the terms and conditions defined in

sub-sect. 2 of sect. 88, and the corporation and the company have agreed to alter those terms and conditions as hereinafter mentioned." It will be observed that although it is rights of the traders and others carrying on business which are affected, it is the corporation and company who make the agreement, and this may be very important when one comes to consider whether, upon a breach of this agreement confirmed by statute affecting the rights of traders and others, an action based on the breach may be brought by the injured person, as is the case when an individual is injured by the breach of a statute passed for his benefit, provided such a remedy comes within the purview of the Legislature in the particular statute which it is especially likely to do in a case in which the Act is not an Act of public and general policy, but is rather in the nature of a private legislative bargain between certain persons likely to be affected by the work authorised by a special Act, and a body of undertakers as to the manner in which they will keep up certain public works. The scheduled agreement by clause 1 provides that "Sub-sect. 14 of sect. 88 shall, for the purpose of this agreement" (I am not sure what these last words mean, but I think practically nothing) "be read and have effect as if the same were in the words following." Then follow some give-and-take clauses as to the dredging and two clauses (d) and (e) which deal with wharves and the rights and liabilities of the company and the wharf owners respectively in relation thereto. These clauses are remarkable because they embody a bargain with considerations passing to and from the company and the wharf owners. Then follows sect. 2, which provides for a modification of sub-sect. 2 of sect. 88 of the Act of 1885, the sub-section which dealt with the rights of the traders of Warrington in certain circumstances to use the canal on the payment of certain fixed tolls. Then comes clause 4, whereby the company bind themselves to execute the dredging and works prescribed by the agreement. Then clause 6, which gives the traders a right of navigation on a certain part of the canal free of charge. It provides as follows: [His Lordship read it and continued:] It will be observed that it is the surveyor of the corporation who has to give this notice. Clause 7 provides for the revival of sect. 88 as it originally stood after notice and default, but this clause is unimportant, as no such notice was ever given. Clause 8 enables the corporation in case of neglect or default of the company in maintaining the channel to remove the obstruction at the cost of the company. Then come clause 9, which saves all the rights of the traders, and clause 10 which is the arbitration clause. Those two clauses run thus: [His Lordship read them, and continued:] It will be observed that the latter clause differs very little from sub-sect. 22 of sect. 88 except that the engineer arbitrator is to be named by a different authority. Clause 12 says that the corporation shall have all rights and privileges under and shall be deemed to be traders within the meaning of this agreement. I think I have now called attention to all the material parts of the statutory agreement. It will be observed that the right to recover the tolls can only arise under the statutory agreement, although other damages could be recovered by traders and manufacturers for breaches of the provisions of sect. 88 affecting

them if indeed traders individually have a right of action within the purview of the Act of 1885. The right of the traders collectively to a declaration of rights, whether under the Act of 1885 or under the statutory agreement of 1896, I will consider presently. I think that the only other matter which I have to call attention to before considering the preliminary point, based on an alleged ouster of jurisdiction of the court, is sect. 202 of the Act of 1885, which runs thus: [His Lordship read it, and continued:] I may as well at once dismiss the consideration of sect. 202. In my judgment, it is quite unnecessary to resort to the arbitration clause contained in the section, even in the case of general damages or return of tolls claimed by the traders individually, for whether such claims are based on the Act of 1885 or on the scheduled agreement the claimants cannot succeed unless the company are in default, and the company cannot be proved to be in default unless and until their liability or obligation has been fixed, and if that liability or obligation can only be fixed by arbitration, the claim for damages or return of money paid for tolls must fail until the obligation or liability has been so fixed, and the same proposition is true of an action for declaration of obligation or liability. I will now proceed to deal with the question whether the effect of sub-sect. 22 of sect. 88 is to oust the jurisdiction of the court in the fullest sense of the word, that is to say, in the sense that jurisdiction cannot be given to the court to determine a question the determination of which has to be relegated by Act of Parliament, even by the consent of the parties to the litigation in court. That a statute may thus bar a plaintiff from maintaining an action in a court of law and compel him to pursue the course laid down by the statute cannot be doubted: (see *Crisp v. Bunbury*, 8 Bing. 394; and also the provisions in the Building Societies Acts). In that case it is to be observed that although there was a trial at Nisi Prius and a verdict for the plaintiff, the objection to the tribunal was allowed to prevail without any plea to the jurisdiction on a mere objection taken at Nisi Prius and reserved to be disposed of by the court in Banc. The same case shows that it is not necessary that the jurisdiction of the court should be barred by express words; it is sufficient if the jurisdiction is barred by necessary implication. A great deal of argument was addressed to us as to when and under what circumstances a statutory arbitration clause will in the full sense of the word oust the jurisdiction of the courts. Byrne, J., on the authority of *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company* (L. Rep. 2 Sco. App. 347), and the judgments of Smith and Chitty, L.JJ. in *London and North-Western Railway v. Donellan and Billington* (78 L. T. Rep. 575; (1898) 2 Q. B. 7), which were approved by the House of Lords in *Midland Railway Company v. Loseby and Carnley* (80 L. T. Rep. 93; (1899) A. C. 133), held that in the present case if the matter had stood on the original Act independently of the words "unless otherwise agreed on," the jurisdiction of the courts would have been ousted by an arbitration enactment raising a statutory duty which could not be waived. Thus far I agree with Byrne, J. But the learned judge went on to hold the words in the prefatory clause of

sect. 88, "unless otherwise agreed on," rendered it competent, in case an action was brought, for one of the parties by his conduct to agree to waive the right to insist on arbitration. I cannot agree. I think, as I have already stated, that these words only refer to a modification of the provisions of sect. 88. As to the ouster of jurisdiction, it was argued by Mr. Bousfield and Mr. Hughes that Byrne, J. had misunderstood the decision of the House of Lords in the *Caledonian Railway* case (*ubi sup.*), and that the opinion of Sir Archibald Smith and Chitty, L.JJ. in the *London and North-Western* case (*ubi sup.*) had not been affirmed by the House of Lords on the appeal in *London and North-Western Railway Company v. Donellan and Billington* (*ubi sup.*) or *Midland Railway Company v. Loseby and Carnley* (*ubi sup.*). I cannot agree. The suggestion that the judgment of Lord Cairns in the *Caledonian Railway* case (*ubi sup.*) had been misunderstood was largely based on observations by Cotton and Bowen, L.JJ. in *London, Chatham, and Dover Railway Company v. South-Eastern Railway Company* (60 L. T. Rep. 370; 40 Ch. Div. 100) by which those Lords Justices expressed doubts whether Lord Cairns meant to decide or meant to indicate his own opinion to the effect that the jurisdiction of the courts was ousted. With deference to those Lords Justices, I think that a careful examination of the *Caledonian Railway* case as reported in the Law Reports, in connection with the facts and pleadings as stated in the Court of Session decisions (3rd series, vol. 10, p. 892) shows that Lord Cairns did mean to decide and indicate that the jurisdiction of the court was ousted in respect of the particular matter in question. The matter stands thus: The plaintiffs brought their action claiming payment under certain clauses, 8, 9, and 14, of an agreement between the two companies—of one-fourth part of the balance of certain gross receipts after making certain deductions. The defendants pleaded to the whole action art. 18 of the agreement, whereby it was provided that: "All differences which may arise between the parties hereto, respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall from time to time, so often as any such questions or differences shall arise, be referred to arbitration in terms of the Railway Clauses Consolidation (Scotland) Act 1845, and the provision with regard to the settlement of disputes by arbitration in such Act, shall be held to be incorporated with this agreement, and pleaded that the action was excluded by the said art. 18." The Lord Ordinary sustained the plea in law, and dismissed the action. Against this decision there was an appeal which was argued twice—once before four judges and once before seven. The first decision on appeal was simply to reverse the decision of the Lord Ordinary on the ground that the action was a simple action for money debt, raising on the face of it no question falling under clause 18, and it was pointed out that the judge might still send a special point to an arbitrator if any question arose in the course of the cause which fell within the obligation to refer to arbitrators. By the second decision in the Court of Appeal, it was further decided that the question raised by the defenders' second plea, that is to say, that the defenders "ought to be assoilsied

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in respect that in none of the half years in question did any balance of revenue remain after meeting the requisite charges, and that thus there was no sum divisible between the pursuers' and the defenders' shareholders in terms of the 9th article of the said agreement" involved a difference between the parties respecting the true meaning or effect of the agreement, for what the Wemyss Bay Railway Company maintained was that according to "the true meaning and effect of the agreement" the Caledonian Railway Company had a right to one-fourth of the profits only when the remaining three-fourths was sufficient to meet the interest on the debt, and Lord Kinloch, in advising the opinion of the court, said: "I am of opinion that the question thus raised is, in the sound sense of the agreement, a 'difference arising between the parties respecting the true meaning or effect of the agreement.'" And it was ordered, therefore, to supersede the consideration of the cause until the said question should be settled by arbitration in the manner prescribed. It was against this judgment that the Caledonian Railway Company appealed to the House of Lords, and the Lord Chancellor (Lord Cairns), having regard to the words of the Act to which the agreement between the railway companies had been scheduled "and it shall be lawful for the company (that is, the Greenock and Wemyss Bay Railway Company) and the Caledonian Railway Company respectively, and they are hereby required to implement and fulfil all the provisions and stipulations in the said agreement contained," held that the arbitration clause had become a statutory obligation, and that the Act of Parliament excluded the jurisdiction of the court to decide this question which had arisen in the course of this action, forcing the parties to have it settled not by the ordinary tribunals of this country, but by arbitration. The case of *London, Chatham, and Dover Railway Company v. South-Eastern Railway Company* (*ubi sup.*) was very different, because in that case the arbitration clause was contained in a voluntary agreement which the railway companies were authorised to enter into by the Railway Companies Arbitration Act 1859, and which although entered into under such authority was nevertheless simply a voluntary agreement imposing no statutory obligation to arbitrate. With regard to the contention that the judgments of Smith and Chitty, L.J.J. in *London and North-Western Railway Company v. Donellan and Billington* (*ubi sup.*) were not approved by the House of Lords in *Midland Railway Company v. Loseby and Carnley* (*ubi sup.*), and that the opinion of the Law Lords in *London and North-Western and Great Western Joint Railway Companies v. Billington* (79 L. T. Rep. 503; (1899) A. C. 79) show this, I cannot agree. The last-mentioned case only decided that the jurisdiction was not ousted because there had been no difference existing between the parties before action, which is certainly not the fact in the present case. Assuming then, as in my opinion you must, that the jurisdiction of the court may be ousted by statutory provisions which have no express words to that effect, let us see what are the modes by which jurisdiction may be ousted. Sometimes the statute constitutes arbitration, the only tribunal in which disputes between certain parties can be determined,

and thus ousts the jurisdiction. Sometimes the jurisdiction is ousted because the statute has plainly said that some matter essential to be proved in a particular action should only be determined by arbitration. The *Caledonian Railway* case (*ubi sup.*) seems to me to be an instance. In either case if the arbitration provision thus enacted is for the public good and not for the benefit of individuals, no deficiency in pleading and no waiver by litigants can give the court jurisdiction. In my judgment the intention of the Legislature as expressed in sub-sect. 22 is that, in regard to anything to be done or not to be done under sect. 88, the engineer to be appointed by the Board of Trade, is intended to be the only tribunal for the determination of what is the true intent and meaning of the section, just as under sub-sect. 21, the same engineer is to have sole and exclusive jurisdiction to determine details as to sub-sects. 13, 15, and 16, so under sub-sect. 22, that arbitrator has sole and exclusive jurisdiction to determine the obligations of the company under sect. 14. Sect. 88 in spite of its preface cannot be regarded as merely embodying an agreement come to by the promoters of the Bill and the corporation of Warrington in the course of the promotion. It provides for the protection of those who were parties to no agreement—traders, manufacturers, and others carrying on business at or near Warrington—because the Legislature thought it right that this section of the public should be so protected, and I cannot see that the fact that the preface authorises the corporation and the company to agree on other provisions alters the character of the section. It is still a section passed in the public interest and not merely the embodiment of private agreement. The corporation of Warrington are obviously deemed to be sufficient guardians of public interests, to intrust them with such modification of the provisions as receives the approval of the corporation and the company. It is perhaps a convenient place to mention, although taking the view which I do of this case it is not very important that this power of the corporation goes rather to show that the Legislature did not intend traders to have any direct remedy in this part, either in an action by someone on behalf of others or in actions by individuals. I will now pass to the scheduled agreement. The agreement is, by sect. 43 of the Act of 1896, confirmed and made binding on the corporation and the company. The corporation and the company are the only parties to it, and it seems to me to follow that it is impossible for the traders to sue upon the agreement *quâ* agreement and the rights of the traders seem to me to fall exactly within the words of Lord Watson in *D. Davis and Sons Limited v. Taff Vale Railway Company* (72 L. T. Rep. 632; (1895) A. C. 542), where after pointing out that in cases where the provisions of a local and personal Act directly impose mutual obligations upon persons or companies, such provisions may be fairly considered as having this analogy to contract, and they must, as between those parties, be construed in precisely the same way as if they had been matter not of enactment but of private agreement. And he goes on to say that it was in the sense that he observed in *Countess of Rothes v. Kirkcaldy Waterworks Commissioners* (7 App. Cas. 694), that such statutory

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provisions must be regarded as a contract between the parties whether made by their mutual agreement or forced upon them by the Legislature. And he says that for all purposes of construction these observations apply, but not further. Then follow the words of Lord Watson, which seem to me to apply exactly to this case (at p. 552 of (1895) A. C.): "The provisions of a railway Act, even when they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and their force, not from the agreement of parties, but from the will of the Legislature. And when provisions of that kind are not limited to the interests of the parties mutually obliged, but impose upon one or other or both of them an obligation in favour of third parties, who are sufficiently designated, I am of opinion that the obligation so imposed must operate as a direct enactment of the Legislature in favour of these parties, and cannot be regarded as a mere stipulation *inter alios*, in which they may have an interest but no title to enforce. These observations are not meant to apply to any case where a private contract made between two companies is scheduled to and confirmed by the Act, because, in such a case, the very form of the enactment indicates that it is to operate as a contract, and not otherwise." It seems to me, therefore, that in the present case, if we are to regard the scheduled contract as a mere contract between the parties to it, the traders cannot sue upon such a contract, and if, on the other hand, we are to regard the Act of 1896, or the Act of 1885 as operating as a direct enactment of the Legislature in favour of the traders, neither the traders nor the company can get rid of such direct enactment by waiver or otherwise, unless upon a true construction of the Act the enactments appear to have been passed merely for the benefit of such persons and not in the interests of the public. The outcome of these considerations is that, in my opinion, the preliminary objection ought to be allowed in respect of the whole action. First as to the statute, and the effect of sub-sect. 22 of sect. 88. It seems to me that alike in respect to the claims of the corporation and the traders, collectively and individually, the action is based on default by the canal company in the performance of their obligation after dredging the bed and banks of the river Mersey, to "for ever after maintain the same dredged, so that," &c., or if one treats sub-sect. 14 of sect. 88 as modified by clause 1 of the scheduled agreement, then for ever to maintain the channel dredged, in accordance with the provisions of sub-sect. 14, as modified by that agreement, and it matters not whether one takes the arbitration clause in sub-sect. 22 of sect. 88, or takes the arbitration clause in sub-sect. 22, as modified by clause 10 of the scheduled agreement—in neither case can it be proved that there is a default in maintainance, if the parties differ as to the true intent and meaning of the words of the statute as in force, with relation to the obligation to maintain, until that difference has been settled in the manner provided by the statute. Now, that there had been for a long time before the date of this action a difference between the corporation and the canal company as to the true meaning and intent of the provisions regulating the obligation to maintain I cannot doubt, and it follows that the determination of this difference must go to arbitration before

any action, based on the statutes, can be brought. Then as to an action by the corporation based on the agreement, as an agreement, in my opinion, the confirmed agreement, having regard to its frame, and in particular to its modification under the statutory powers given by sect. 88, and to the sub-sections to that section, cannot be relied upon by the corporation as a mere agreement containing provisions, which can be waived by the consent of the parties. I think, therefore, that no action can be brought by the corporation based on the agreement *quid* agreement. The action of the traders collectively claiming declaration of right fails for the same reasons which I have given in regard to the action of the corporation making similar claims. The claim of the individual traders for return of tolls paid fails, because it is essential to the maintenance of this claim that default by the canal company should be proved, but this cannot be done till the standard of duty has been determined by the statutory arbitrator, which has not yet been done. I think that the arbitration clause in sect. 88 of the Act of 1885, and clause 10 of the agreement, prevent the traders in their individual capacity proving any default in fact by the canal company; but even if this were not so, I should be inclined to hold that, as regards individual traders, jurisdiction is ousted by sect. 202 of the Act of 1885. If, however, their action fails merely because something essential to their cause of action fails to be decided by arbitration, I think the action might be stayed and not dismissed. With regard to the pleading, I agree with the contention that although according to the old rules of pleading it was not necessary to plead the jurisdiction, modern practice has been so to plead ouster of jurisdiction: (see *Mayor, &c., of Folkestone v. Brooks and Ladd*, 69 L. T. Rep. 403; (1893) 3 Ch. 22). But assuming the pleading of the defendant company is faulty in this respect, I am clearly of opinion that the pleading ought to be treated as amended. No one was placed in any difficulty by the omission to plead, and the case, in my opinion, bears no analogy to those cases in which there is a refusal to stay after a step has been taken by the defendant in actions brought in contravention of an arbitration clause contained in a voluntary agreement. In my judgment, this appeal ought to be allowed. I will deal with the costs later.

STIRLING, L.J.—This is an action by certain traders and manufacturers carrying on business at or near Warrington on behalf of themselves and all others, the traders, manufacturers, and others carrying on business at or near Warrington, and also in their own respective rights and the corporation of Warrington as plaintiffs against the Manchester Ship Canal Company. The plaintiffs complain that the defendants have failed to perform certain obligations imposed on them by Act of Parliament and that damage has thereby been occasioned to the plaintiffs who are traders and manufacturers in their individual capacity. They also allege that, in the events which have happened, the traders, manufacturers, and others near Warrington became entitled to a right of navigation over portions of the defendants' canal and the river Mersey, free of tolls; but that the defendants have insisted on payment of toll. In these cir-

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cumstances the plaintiffs claim declarations as to their rights; repayment to the traders and manufacturers, plaintiffs in their own rights, of the tolls which they have been compelled to pay; payment of damages to the same plaintiffs for defendants' breach of their statutory obligations; and an injunction at the trial before Byrne, J. a preliminary objection was taken to the jurisdiction of the court as to the matters in dispute was ousted, and the questions between the parties must be determined by arbitration; but this objection was overruled by the learned judge. Upon this appeal the same objection has been taken and argued, and we have now to dispose of it. Sect. 88 of the Manchester Ship Canal Act 1885 commences thus: [His Lordship read the preamble to that section, and continued:] There follow twenty-two sub-sections, some of which contain provisions which seem to be mainly for the protection of the corporation (as, for example, sub-sects. 8, 9, 10, which relate to the sewage, gas, and other works of the corporation). Others contain provisions which seem to be mainly, if not exclusively, for the protection of the traders and others carrying on business at or near Warrington (as, for example, sub-sect. 2, which confers on those traders and others the right to use certain portions of the canal entrances, locks and lock entrances, and also part of the river Mersey, upon payment of tolls); while other sub-sections contain provisions apparently for the benefit of both (as, for example, sub-sect. 13). Sub-sect. 14 appears to me to fall under the last clause, a view which is confirmed by the way in which the sub-section is dealt with in the agreement of the 9th April 1896: (see clause 1, sub-clause (d)). The enactment at the commencement of sect. 88 contains the usual qualifications that the provisions there referred to are to take effect "unless otherwise agreed on between the corporation and the company." These words read in their ordinary meaning seem to authorise the corporation and the company to vary the provisions of sect. 88 by entering into an agreement to that effect. This power was exercised by an agreement between the corporation and the company bearing date 9th April 1896, and that agreement was with some modification confirmed and made binding on both parties by sect. 43 of the Manchester Ship Canal Act 1896, which is as follows: [His Lordship read that section and continued:] This section does not expressly give the force of a legislative enactment to the terms of the agreement thus confirmed, although two sub-sections of sect. 88 of the Act of 1885 are expressed to be thereby varied. There is no dispute that either by action or by recourse to arbitration the Corporation of Warrington is entitled to enforce the provisions for its protection contained both in sect. 88 of the Act of 1885 and of the agreement confirmed by the Act of 1896. The first question to be considered is whether the traders and others carrying on business at or near Warrington are entitled to enforce such of the provisions of sect. 88 of the Act of 1885 as are intended for their benefit. These provisions are found in the form of legislative enactment and do not arise merely out of a contract which has received statutory confirmation: and they are expressed to be for the protection of such traders and others. I think the decision in *D. Davis and Sons Limited v. Toff Vale Railway Company*

(72 L. T. Rep. 632; (1895) A. C. 542) applies, and that the traders are entitled to enforce the provisions of the section. Next, can they enforce the similar provisions of the agreement confirmed by sect. 43 of the Act of 1896? Those provisions do not take the form of legislative enactment, yet seeing that by the terms of sect. 88 of the Act of 1896 they are an authorised substitute for legislative enactment, it seems to me that the same right of enforcing them must exist. If, however, I rightly understand the way in which the plaintiffs in the present action shape their case, it may not be absolutely necessary to decide this point, for they base their claim on the provisions of sect. 88 of the Act of 1885, but do not desire to enforce them to an extent beyond those contained in the agreement of 1896, which are less favourable to them. I now come to the main question to be decided on the present occasion, namely, whether the corporation and traders, or either of them, can enforce their claims by action, it being contended on behalf of the defendants, that the provisions as to arbitration found in the Act of 1885, and the confirmed agreement of 1896, are such as to oust the jurisdiction of the courts. In support of this contention, reliance is first and principally placed on sect. 88, sub-sect. 22, of the Act of 1885. It is not really disputed that this enactment does impose on the company and the corporation an obligation to refer to arbitration any difference arising between them "as to the true intent and meaning of sect. 88," or as to anything to be done or not to be done thereunder; but there is a question as to the nature of the obligation; namely, whether it is such as, in the language of Lord Cairns (see *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company*, L. Rep. 2 Sco. App. 347, 350), to force the parties to have their disputes settled, not by the ordinary tribunals of the country, but by a reference to arbitration, or whether it is only such as to render it the duty of the court to enforce the section when either party insists on a reference to arbitration: (see *London, Chatham, and Dover Railway Company v. South-Eastern Railway Company*, 60 L. T. Rep. 370; 40 Ch. Div. 100). This is important, for if the latter be the correct view, then it may be that as a fact Byrne, J. has held the defendants were too late in claiming a reference to arbitration, whereas, if the former be that which is the true meaning, the objection is, in fact, that the court has no jurisdiction to entertain the action, and it may properly be raised at any time. Now the corporation of Warrington does not claim damages. The question between it and the defendant company are: (1) What is the true intent and meaning of sub-sect. 14 of sect. 88 of the Act of 1885 as varied by the agreement and statute of 1896. (2) Whether the company has or has not duly dredged and maintained the bed and banks of the river Mersey. In my judgment both these are questions which fall to be decided by arbitration in accordance with sub-sect. 22. That being so, and the obligation as to arbitration being imperative, and imposed by statute, it seems to me that the case falls within the terms used by Lord Cairns in advising the House of Lords in *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company* (*ubi sup.*). And it is to be observed of Lord Chelmsford, Lord Hatherley, and Lord

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Selborne, that they expressed their unqualified concurrence with what Lord Cairns said on that occasion. It is true that in the case just mentioned the circumstances were such that the same conclusion might have been arrived at, even if the true nature of the obligation imposed on the parties to that litigation had been such as was held by the Court of Appeal to exist in the subsequent case of *London, Chatham, and Dover Railway Company v. South-Eastern Railway Company* (*ubi sup.*). It is also true that in that case Cotton and Bowen, L.JJ. (the former of whom had been counsel in the Scotch case) expressed doubts as to whether Lord Cairns really meant to decide or express an opinion that the jurisdiction of the courts was ousted. And those doubts on the point of so high authorities, have caused me very great difficulty. But the decision in *London, Chatham, and Dover Railway Company v. South-Eastern Railway Company* (*ubi sup.*)—by which, of course, I am bound—is not precisely in point, and on the whole it seems to me that the better course is that this court should follow the language of Lord Cairns, assented to by the other noble Lords, and that any mistake as to its meaning—if such there be—should be set right by a higher tribunal. I agree with Vaughan Williams, L.J. in thinking that the obligation to refer is not altered by the words “unless otherwise agreed on” which occur at the beginning of sect. 88, and I do not desire to add anything to what he has said on that point. Assuming, then, that the jurisdiction of the court is ousted in the case of difference as between the corporation and the company, within sect. 88, sub-sect. 22, of the Act of 1885, I have to inquire whether this is also true as to the difference between the traders and the corporation. Now, it is obvious that sub-sect. 22 does not in terms extend to such differences: nor can I see that it makes the settlement of differences between the corporation and the company, a condition precedent to the bringing of an action by the trader against the company. Many of the provisions of sect. 88—as, for example, those in sub-sect. 2—are of the highest importance to traders, but might affect the interests of the corporation very slightly. In the case of differences arising between a trader and the company as to these provisions, the corporation might reasonably be desirous to avoid controversy, and the Act, so far as I see, provides no means by which the corporation could be compelled to embark, on what might prove to be an expensive contest before an arbitrator. Even where the corporation has an interest in the matter in dispute, the trader might be differently affected, and serious injustice might be done if he were to be held bound by arbitration proceedings, between the corporation and the company, to which he could not be directly a party. It is lastly contended that the present case falls within the terms of sect. 202 of the Act of 1885—namely: [His Lordship read that section, and continued:] The reference is to the provisions in sects. 126 to 137 of the Act. This sect. 202 is found in part 10 of the Act, under the heading “Miscellaneous.” To ascertain its effect I think it is desirable to look back to the earlier portions of the Act and see what express provision has there been made on the subject of arbitration. The earliest section in which such a provision occurs appears to be

sect. 63, which is one for the protection of the owners for the time being of the Hooton Overport and Netherport estate in the county of Chester. This section is followed by a long series of sections (sects. 64 to 126 inclusive) for the protection of other owners, persons, corporations and companies, some of which do, while others do not, contain provisions for arbitration. The general nature of the provisions of the sections which contain arbitration clauses does not as far as I can see, materially differ from those of the section which do contain such clauses. Further, the arbitration clauses actually inserted vary considerably in their terms. In some (as sects. 71 and 118), all differences under the section are to be so determined; in others only matters more or less specific, for example, sect. 63 as to anything to be done or not to be done under the particular section or (sect. 88) as to the true intent or meaning of the section or as to anything to be done or not to be done thereunder or (sect. 99) as to any plans or mode of executing any work under the section. Again, the modes of arbitration prescribed are very various: as, for example (sect. 63), an engineer to be appointed (unless otherwise agreed) by the Board of Trade; or (sect. 64) under the Railway Companies Arbitration Act 1859; or (as in sect. 84) “in manner provided by this Act”; or (sect. 113) in accordance with the Common Law Procedure Act. It would seem that as regards these arbitration provisions the Legislature was desirous of giving effect to the wishes of those for whose benefit they were intended. Sect. 202 appears to be a section of wide operation applicable to all matters falling within its terms for which no specific provision has been made elsewhere. It is a positive legislative enactment that all questions arising between the company and any person touching “anything to be done or not to be done” under the provisions of the Act shall be determined by arbitration in the way pointed out. That seems to me to extend to anything to be done or not to be done under sect. 88. Now the main question at issue between the company and the traders of Warrington is whether the company have or have not duly dredged, and maintained dredged, the bed and banks of the river Mersey; and that is a question as to a thing to be done or not to be done under sect. 88. If the question is as between the company and the corporation of Warrington—as I think—to be settled by arbitration under sect. 88, sub-sect. 22, then it seems to me that for the same reasons it ought to be settled as between the company and the traders by arbitration under sect. 202. It appears to me that it would be an anomaly if it were held that the differences between the company and the corporation must be settled by arbitration, while those on the same matters between the company and the traders need not. I do not think that the tolls and damages claimed by the trader plaintiffs are moneys to be paid under the provisions of the Act of 1855. But still in accordance with what was done in the case of *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company* (*ubi sup.*), the action ought to be stayed until the question which falls to be determined by the arbitration has been decided. In my opinion, therefore, the action ought to be wholly stayed or dismissed as between the corporation of Warrington and the defendant company; and

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should be stayed until the determination of the main question as between the traders and manufacturers of Warrington and the defendant company.

COZENS-HARDY, L.J.—As I have the misfortune to differ from the majority of the court, it is necessary that I should, as briefly as possible, state my own views. This is an action in which the corporation of Warrington and certain traders carrying on business at Warrington, are co-plaintiffs, and the Manchester Ship Canal Company are defendants, and a preliminary objection has been raised that the jurisdiction of the court is ousted, or, in other words, that the High Court has no jurisdiction to entertain the action, and that the disputes between the parties must be decided by arbitration. Byrne, J. has overruled this objection. The question depends upon the proper construction and effect of a few sections in the Manchester Ship Canal Act of 1885 and the amending Act of 1896. The plaintiffs' case is shortly this: They say that the canal company were bound by statute to dredge and maintain dredged a certain portion of the river Mersey at a certain depth, and that they have not fulfilled this statutory obligation, and that heavy damages have been sustained by the individual traders by reason of this breach of duty on the part of the canal company. The traders also allege that they were entitled in the events which have happened to use a portion of the canal free from toll, and they seek to recover tolls which they have paid under protest. Sect. 88 of the Act of 1885 is an elaborate section, obviously inserted in the interest of Warrington. It commences as follows: [His Lordship read the preamble to that section, and continued:] Then follow twenty-three sub-sections, under which various rights are conferred upon the corporation and the traders, and various restrictions and obligations are imposed upon the canal company. Sub-sect. 14 binds the company to dredge, and maintain dredged, a certain part of the Mersey to a depth of 8ft., and sub-sect. 22 is as follows: [His Lordship read that sub-section, and continued:] Now, it will be observed from the introductory words that although certain rights are given by the section to the traders, power is left to the corporation and the canal company by agreement to modify these provisions, but not, I think, to make entirely new and independent provisions. For this purpose the corporation was apparently treated as representative of the traders. In 1896 an agreement dated the 9th April 1896, was entered into between the corporation and the canal company, which was, I think, intended to operate and take effect under the introductory words in sect. 88. By clause 1 of the agreement sub-sect. 14 of sect. 88 was, for the purposes of that agreement, to be read and have effect as if the same were in the words following: It is not necessary to read the whole clause; it is sufficient to say that it altered the portion of the Mersey which the canal company were bound to dredge and maintain dredged, and it contained various other provisions modifying the rights conferred by sect. 88 upon the traders as well as upon the corporation, and clause 10 was as follows: [His Lordship read that clause, and continued:] I may remark in passing, that this arbitration clause differs from the arbitration clause in sect. 88 of the Act of 1885, the appointment of the arbitrator resting with

the President of the Institution of Civil Engineers, and not with the Board of Trade. Sect. 43 of the Act of 1896 was as follows: [His Lordship read that section, and continued:] Now, it is necessary to consider the case of the corporation separately from the case of the traders. I cannot regard sect. 88, in its original form or as modified by the Act of 1896, as a mere agreement between the corporation and the canal company. I think it was an enactment dealing with, and conferring rights upon, not the whole public but a particular class of public—namely, manufacturers, traders, and others at or near Warrington—and this being so, it seems to me that sect. 88 must be taken to have conferred rights to be dealt with and enforced only in the manner prescribed by sub-sect. 22, or, in other words, I think that sub-section excludes the jurisdiction of the court in any case of difference between the corporation and the canal company falling within the language of the sub-section: (see *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company* (ubi sup.). The authorities which have decided that under the Building Societies Acts and the Friendly Societies Acts the jurisdiction of the courts is ousted may be referred to as illustrating the general principle: (see especially *Crisp v. Bunbury*, 8 Bing. 394) and *Municipal Permanent Investment Building Society v. Kent* (51 L. T. Rep. 6; 9 App. Cas. 260). In my view the position is not changed by reason of the Act of 1896. The scheduled agreement confirmed by the Act must either be regarded as something to be read into, and to form part of, sect. 88, or as something more than a mere agreement between the parties, and as in substance a public enactment affecting not merely the parties, but traders and others. I agree, therefore, with my Lord and Stirling, L.J. that the objection, so far as the corporation is concerned, is valid. With reference to the traders different considerations apply. Neither of the two arbitration clauses referred to in terms affects the traders, each relating only to differences between the corporation and the company. It is quite true that in a certain sense the corporation might be said to represent the traders for the purpose of obtaining from the arbitrator a declaration of right, yet it is difficult to see how either of those arbitration clauses can be applied to the case of individual traders, each of whom alleges that he has sustained damage by reason of the breach by the canal company of its statutory obligations. No traders could be a party to such an arbitration or require such an arbitration to be entered upon. The introductory words of sect. 88 suffice to show that it was intended to confer certain rights upon the traders for whose benefit the section was enacted, and even apart from that there is sufficient in the section itself to entitle the traders to maintain an action for damages unless there is some other provision in the Act expressly excluding the jurisdiction of the High Court: (see *D. Davis and Sons Limited v. Toff Vale Railway Company*, 72 L. T. Rep. 632; (1895) A. C. 542). It seems to me wrong to postpone the adjudication upon the claims of the traders until after an award in a reference to which they will not be parties. I agree with Stirling, L.J. upon this point. It is suggested, however, that sect. 202 of the Act of 1885 has the effect of ousting or postponing

the jurisdiction of the court. The section is as follows: [His Lordship read that section, and continued:] I may remark in passing that this arbitration clause differs from both the arbitration clauses I have already set out. No importance was attached to this section in the argument in the court below; but it is nevertheless open to the appellants to contend that the jurisdiction of the court is excluded by it. I am not able to attribute such force to the section. Even if, which may be doubted, it has any application to a claim for damages of the nature I have indicated, I think it is at the most only a clause enabling either party to apply to the court to stay the proceedings, and to refer to arbitration, and is not a clause excluding the jurisdiction of the court: (see *London, Chatham, and Dover Railway Company v. South-Eastern Railway Company*, 60 L. T. Rep. 370; 40 Ch. Div. 100). I cannot conclude that the jurisdiction of the court is ousted for all time, in every case of dispute between the canal company and members of the public with reference to the statutory obligations imposed on the canal company towards those members of the public. These obligations are both numerous and varied. They extend over nearly 100 sections. I find in some sections an express reference to sect. 202 (see, for example, sect. 72, sub-sect. 7, and sect. 85, sub-secta. 3, 8, and 10). It may be that sect. 202 only prescribes a mode of arbitration for those cases in which in the earlier part of the Act arbitration is prescribed, but no particular mode of arbitration is specified. But, however that may be, I do not find myself able to agree with the view of the majority of the court that it is not competent to us at the present moment to consider the case presented by the traders. The result, in my opinion, is that the objection prevails as to the corporation, but not as to the traders, and the strict course would be to strike out the corporation as co-plaintiffs, and to leave the other co-plaintiffs to continue the action. But, although no relief could be given to the corporation in this action, the misjoinder is not very material for the questions arising for decision as between the traders and the canal company involve or include the questions sought to be raised as between the corporation and the canal company, and under these circumstances, in my view, we ought now to deal with the merits of the appeal.

VAUGHAN WILLIAMS, L.J.—I think that so far as the Corporation is concerned, the action ought to be dismissed. We will deal with the traders collectively in the same way as we do individually. I understood that they claimed no damages, and only claimed a declaration. So far as it is an action by the traders there will be a stay thereof until further order, or, if we use the Scotch word, the action will be “superseded” until further order. That was what was said in the case of *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company* (*ubi sup.*). “Superseded” is the word used in the report. Then, with regard to the costs, I think that we all agree, having regard to the view of the majority of the court of what the judgment should be, that, inasmuch as this preliminary point of ouster of jurisdiction was not taken until the case was before Byrne, J., the defendants ought not to have any costs prior to that time—prior to their taking the point. But with

regard to the costs since the plaintiffs, having elected to go on, and have an inquiry held, those costs the defendants must have. Then with regard to the costs of this appeal, they must have those likewise.

Appeal allowed.

Solicitors for the appellants, *Grundy, Kershaw, Samson, and Co.*, Manchester and London.

Solicitors for the respondents, *Burton, Yeates, and Hart*, agents for *Alexander Wilson and Cowie*, Liverpool.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 29 and 30.

(Before BYRNE, J.)

CARMICHAEL v. EVANS. (a)

Partnership—Dissolution—Expulsion clause—Conduct detrimental to partnership business or flagrant breach of any duties of partner—Conviction by police magistrate for travelling without a ticket—Injunction.

Articles of partnership provided that the managing partner, in the event of either of the other partners being addicted to notorious intemperance or immorality or other scandalous conduct detrimental to the partnership business or at any time during the partnership permitting or being guilty of any flagrant breach of any of the duties of a partner, should be at liberty to remove either or both of them from the partnership on giving them six days' notice in writing. One of the partners was convicted by a police magistrate of travelling on a railway without a ticket with intent to avoid payment and fined the full penalty, and thereupon the managing partner gave him notice expelling him from the partnership.

On motion by the partner for an interim injunction to restrain his expulsion:

Held, that, as the plaintiff had been convicted of dishonesty, the case was within the expulsion clause, and that there was ample justification for the notice of dissolution, and the court declined to interfere by injunction.

APPLICATION for an interim injunction by the plaintiff, to restrain his expulsion from a partnership.

In July 1901 articles of partnership were entered into between the defendant Mrs. Elizabeth Harries Evans, Joseph Harries, and the plaintiff Peter Carmichael, whereby the parties became partners in the business of general drapers, carried on in the Brompton-road under the name or firm of “Tudor Brothers.”

The business had for some time previously been carried on by the defendant, and the bulk of the capital was provided by her, the other partners receiving salaries and being each further entitled to an eighth share in the net profits of the business.

By the partnership deed the defendant Mrs. Evans was to have the sole general direction and control of the business, and also the right to require the other partners to devote the whole of their time to the business; but she was only

(a) Reported by E. L. HOPKINS, Esq., Barrister-at-Law.

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bound to devote so much of her time to it as she should think fit.

By clause 22 of the deed it was provided amongst other things that in the event of Harries or the plaintiff, or either of them, being addicted to notorious intemperance or immorality or other scandalous conduct detrimental to the partnership business, or at any time during the partnership permitting or being guilty of any breach of any of the conditions of the deed, or any flagrant breach of any of the duties of a partner, or failing to account for moneys received, the defendant was to be at liberty to remove either or both of them from the partnership on giving to either or both not less than six days' notice in writing, and thereupon the partnership was to cease and determine at the expiration of such notice as regards the person to whom it was given. In any such event the defendant was empowered to publish a notice of the partial or total dissolution of the partnership, as the case might be.

The deed also contained provisions for ascertaining the value of the interest of the expelled partner.

On the 31st Dec. 1903 the plaintiff was convicted at the Westminster Police-court for having travelled on the London, Brighton, and South Coast Railway without a ticket and fined 40s. and 2l. 2s. costs. A report of the conviction appeared in several of the daily papers, but in none of them was any reference made to the fact that the plaintiff was a partner in "Tudor Brothers," though his full name was given, and he was described as "managing partner of a large drapery firm in Brompton-road."

The defendant, having seen a notice of the conviction in one of the papers, made inquiries as to the facts therein alleged, and, having determined to exercise the power of expulsion given to her by clause 22 of the partnership deed, she on the 14th Jan. 1904 sent to the plaintiff the following notice:

In consequence of your recent conviction at the Westminster Court for travelling on the London, Brighton, and South Coast Railway with intent to avoid payment, I hereby give you notice, in pursuance of the articles of partnership under which the business of Tudor Brothers is carried on by you, Mr. Harries, and myself, that the said partnership shall cease and determine so far as concerns yourself on the expiration of one week from this date.

The plaintiff thereupon brought this action against Mrs. Evans in which he claimed a declaration that the notice of dissolution on the 14th Jan. was void, and an injunction to restrain the defendant from excluding him from the partnership and from publishing notice of the dissolution, and now he moved for an interim injunction to restrain his exclusion from the partnership until trial of the action, and to restrain the defendant from publishing the dissolution.

From the evidence it appeared that the plaintiff had been a season-ticket holder on the Brighton line for about ten years; his season ticket had expired on the 8th Sept. 1903, and it had not been renewed on the 27th Nov. 1903, the day on which he had been detected travelling without a ticket. The plaintiff in his evidence alleged that he had been ill and overworked, and that he had always intended to renew his season ticket; that he had usually in the meantime taken

a daily ticket, but on this occasion he had inadvertently omitted to take a ticket.

He further alleged that as the name of Tudor Brothers was not mentioned in the newspapers, and it was not generally known that he was a partner, no harm whatever had been done to the business by the report of his conviction.

Evidence to the same effect was given by Harries, the other salaried partner.

The defendant in her evidence stated that the effect of the conviction was most injurious to the business; that the whole staff of the firm of Tudor Brothers, comprising male and female shop assistants, buyers, counting-house clerks, and porters, knew that the plaintiff was a partner; that the wholesale house from whom goods were purchased knew that the plaintiff was a partner of the firm, and many of the customers also had similar knowledge; that from the point of view of business dealings with wholesale houses with whom the credit of the firm and of the individual partners was of the highest importance, and from the point of view of the customers with whom business was transacted, the widely spread report that a member of the firm had been convicted, in the words of the magistrate, of a "shabby fraud" could not but detrimentally affect the welfare of the business.

Mr. Evans, the defendant's husband, who was himself engaged in a large drapery business, took the same view of the effect of the plaintiff's conviction.

There was also evidence that the plaintiff's brother, a builder, had considered it necessary since the plaintiff's conviction to advertise in the daily papers and trade journals that his business was not in any way connected with that of the plaintiff.

Rowden, K.C. and G. Henderson for the plaintiff.—The defendant ought to be restrained from acting under the expulsion clause until the trial of the action. The object of a clause of this kind is to protect the partnership. The court always construes clauses of this kind strictly in view of the abuse to which they may be subjected and of the hardship resulting from expulsion:

Lindley on Partnership, 6th edit., p. 427.

Immoral conduct on the part of a partner in a firm of bankers is not a sufficient ground for a dissolution as to that partner, although the articles of partnership contained a clause for dissolution in case any of the partners should do any act to the discredit or injury of the co-partnership:

Snow v. Milford, 18 L. T. Rep. 142.

The court ought to maintain the *status quo* pending the trial. If the fact that the plaintiff is a partner is not generally known, his continuance in the business will do no injury to the defendant. The offence for which the plaintiff was convicted is not within the terms of clause 22.

Levett, K.C. and M. Romer for the defendant.—The court ought not to interfere in this case. The defendant has the largest interest in the business, and she is convinced that the plaintiff's conviction is detrimental to the partnership business. The *status quo* would not be maintained by an interim injunction, for the defendant would until the trial have to carry on the business with

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a partner who has been convicted of dishonesty. Mutual trust and absolute honesty are essential features of partnerships. If a partner has been guilty of embezzlement or has committed a breach of trust, his co-partner may by notice dissolve the partnership from the date of the notice, notwithstanding the articles of partnership provide for its continuance for the joint lives of the partners:

Essell v. Hayward, 30 Beav. 158.

There is no suggestion that this notice of expulsion has been given otherwise than in good faith.

Rowden, K.C. in reply.

Cur. adv. vult.

Jan. 30.—BYRNE, J. (having referred to the notice of motion, and having read clause 22 of the deed of partnership, continued:—) It has been said in argument, that a clause of this description being of a very stringent character, the court must be careful to see that it is reasonably and fairly exercised, and that events have happened which justify expulsion before allowing it to operate. Having said that, I ought to add that in the present case there is no contest at all with reference to the main facts. The plaintiff in the action was a season-ticket holder on the Brighton line, and in the habit of travelling daily to and from London. On the 8th Sept. 1903 he allowed that season ticket to expire, and up to the 27th Nov. of the same year he had failed to renew it; on that day he was detected travelling without a ticket. Proceedings were subsequently taken in the police-court under the Regulation of Railways Act 1889, s. 5, sub-s. 3 (a), which imposes a penalty in the case of a person travelling without having previously paid his fare "with intent to avoid payment thereof." He was convicted and fined the full penalty with costs. I neither desire to exaggerate nor to minimise the nature of the offence, nor do I desire to dwell upon the circumstances more than to this extent—to say that the circumstances in connection with this conviction, so far as there is no dispute about them, are not such as induce me to think that this was otherwise than a bad instance of defrauding the railway company. The period of two and a half months was allowed to elapse without renewal of the season ticket, and the excuses given appear to me to be wholly insufficient. This was a matter in which every day the man must have been reminded of the fact of the absence of his ticket. Before the magistrate he said that sometimes he took a ticket and sometimes he did not during this period. In his affidavit he says that, except on three or four occasions, he did take a ticket when travelling. I do not go behind the conviction and the circumstances under which the conviction was obtained. He says this is not a matter which is calculated to be injurious to the business, and he has made an affidavit to that effect. An account of what had taken place before the police magistrate appeared in several of the daily papers. Although the literal accuracy of the report in the *Daily Telegraph* is not strictly proved, it is proved that this newspaper has published to the world remarks attributed to the magistrate showing that he was of opinion that the case was one of continued fraudulent conduct. The plaintiff does not challenge the accuracy of the accounts published, but he says that the name of the firm "Tudor

Brothers" was not mentioned, nor the names of the partners, and that it was not generally known that he was a partner. On the other hand, I have the evidence of Mrs. Evans and of Mrs. Evans' husband, who himself was the proprietor of another large drapery business in London, to the effect that such an act would be most injurious; and, moreover, that the fact that the plaintiff was a partner in this business was largely known to customers, employees, and others. [His Lordship then referred to the evidence, and continued:] Now, apart from the question on the facts, I go to the actual clause itself, and, amongst other things, it provides that if Peter Carmichael should be guilty of any flagrant breach of any of the duties of a partner, then the clause is to operate. I conceive it to be one of the first duties of a partner to be an honest man, and that not merely in his accounts as between himself and his partners, but in relation to third persons; and I cannot imagine anything more in the teeth of the duty of one partner towards another than that he should do something to bring himself within the penalties of the criminal law. If this had been the case of picking a pocket, I do not suppose his counsel would have ventured to say that it was not a flagrant breach of his duty; and it is no part of my duty for this purpose to try and draw nice distinctions between the degree of moral turpitude to be attached to one or other of offences of this nature. I find that the man has been convicted, and convicted of fraud under circumstances which, so far as I can see, afford no reasonable ground for saying that it was not of its kind a bad case. Under those circumstances the argument was presented, and strongly presented, to me that upon motion the court was not in the habit of allowing clauses of this description to be acted upon, but left the matter to be determined at the trial, only taking care of the preservation of the rights in the meantime. But, as I have observed, the material facts in the present case are admitted. There is no contest as to the conviction or the circumstances under which the conviction took place; and in my judgment this is exactly one of those cases that come within the clause, and there was justification for giving the notice which was given. I was appealed to on the ground of balance of convenience. To my mind, in the present case, the balance of convenience and of justice points to non-interference at the instance of the plaintiff. It is not immaterial in considering this question to remember that I offered the parties to make arrangements that the whole case might be finally tried within a fortnight; but that was refused on behalf of the plaintiff, although the defendant was willing to accept that proposition if the plaintiff would take a holiday and keep away from the business till the matter could be determined. But I do not base my decision upon that. If it be true, as I think it is, that the conduct of the partner is detrimental to the partnership business, and likely to do serious injury, that injury would be going on during the interval between now and the trial; whereas the exclusion of the plaintiff from the business would not inflict irreparable injury upon him, and he would have his remedy, if at the trial it should turn out that he was right, and that he ought not to have been excluded. I agree that this is an exceptional case in its circumstances, but I do not feel justified in

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granting an interlocutory injunction, and I therefore refuse the motion.

Solicitors: *Mackrell, Maton, Godlee, and Quincey; Nicholson, Graham, and Graham.*

KING'S BENCH DIVISION.

Tuesday, March 1.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

ALTON URBAN DISTRICT COUNCIL (apps.) v. SPICER (resp.). (a)

Rate—General district—Sporting rights—Arable, meadow, or pasture lands and woodlands—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 211.

The lessee of sporting rights over arable, meadow, pasture grounds and woodlands, such rights being let apart from the occupation of the land, is not entitled to be assessed in the proportion of one fourth part only of the net annual value to the general district rate by virtue of sect. 211 (1) (b) of the Public Health Act 1875.

CASE stated upon a complaint preferred by the appellants against the respondent for a general district rate made the 26th March 1903, at 1s. 11d. in the pound, rateable value 56l., on sporting rights over land.

The respondent rented, and had rented for many years, the shooting over certain lands, being arable, meadow, or pasture land and woodlands, situated within the appellants' jurisdiction.

The rate was properly made and was good on the face of it, and had been duly demanded from the respondent, but the respondent had never been in the habit of paying more than one-fourth thereof. He therefore declined to pay the whole rate, but made a legal tender of one-fourth, which was refused.

In March 1895 the predecessors of the appellants entered a complaint for the recovery from the respondent of the general district rate, but it was decided by the court of summary jurisdiction that the respondent was, under sect. 211 (1) (b) of the Public Health Act 1875, only liable to be assessed in respect of his right of sporting over the arable, meadow, or pasture ground and woodlands in the proportion of one fourth part only of the net annual value thereof, and that decision had never been questioned or appealed against.

It was contended on behalf of the appellants that the justices had no jurisdiction, and that, the rate having on its face been duly made, their duties were purely ministerial, and that they were obliged to make an order on the respondent for the full amount.

The justices' attention was called to sect. 256 of the Public Health Act 1875, and to the words "If no sufficient cause for nonpayment be shown, the court may make an order . . ." and also to *Reg. v. Barclay and others (Essex Justices)*; *Ex parte Weaver* (46 L. T. Rep. 102), and, to the judgment of Cave, J., where he decided that, upon a proceeding before justices to enforce payment of a general district rate, it is competent to the justices to hear objections to the mode of

assessment, inasmuch as it affects their right to enforce the rate.

The justices accordingly decided that they had jurisdiction to adjudicate, and they overruled the objection taken by the appellants.

After hearing the parties they decided that the sporting rate on the arable, meadow, or pasture land and woodlands was properly assessable only in the proportion of one fourth part of the net annual value thereof, and, as a legal tender had been made of this fourth part, they refused to make any order on the complaint.

By sect. 211 of the Public Health Act 1875 (38 & 39 Vict. c. 55) it is provided:

With respect to the assessment and levying of general district rates under this Act the following provision shall have effect—namely, . . . (b) the owner of any tithes, or of any tithe commutation rentcharge, or the occupier of any land used as arable, meadow, or pasture ground only or as woodlands . . . shall be assessed in respect of the same in the proportion of one fourth part only of such net annual value thereof.

Foote, K.C. (Bernard with him) for the appellants.—The question raised here is whether shooting rights over land are an occupation of land used as arable, meadow, or pasture ground only or as woodlands so as to come within sect. 211 (1) (b) of the Public Health Act 1875. A right to shoot over land by a person who is not in occupation of the land is merely an incorporeal hereditament, and cannot come within the words of that section:

Eyton v. Mold Overseers, 43 L. T. Rep. 472; 6 Q. B. Div. 13.

The judgment of Field, J. in that case shows the nature of such rights. Until the Rating Act 1874 (37 & 38 Vict. c. 54), shooting rights as such were not rateable, but by that statute the Poor Rate Acts were extended to rights of fowling and shooting, killing game and rabbits, and fishing when severed from the occupation of land, and when the right of sporting was severed from the occupation and let separately, either the owner or the lessee could be rated. The justices here were wrong in not holding the respondent liable for the whole rate.

M. M. Macnaghten for the respondent.—The sporting rights which the respondent rented were only over arable, meadow, pasture, and woodlands, and so the exemption granted by sect. 211 (1) (b) of the Public Health Act 1875 applies, and he is only liable to be assessed at one fourth part of the annual value. In order to exercise his right, which is a *profit à prendre*, he must go on the land, and *quâ* his right he is in occupation. He referred to

Holywell Union v. Halkyn District Mines Drainage Company, 71 L. T. Rep. 818; (1895) A. C. 117.

Lord ALVERSTONE, C.J.—Mr. Macnaghten is entitled to contend that you cannot exercise a right of shooting without going on the land, but that is a very long way off from showing that the person entitled to the shooting rights is the occupier of the land. When the statutes are looked at the point is clear. Prior to 1874 shooting rights were not rateable, but the Rating Act 1874 extended the Poor Rate Acts to rights of shooting and fishing when severed from the occupation of the land. Therefore a new rateable hereditament was created which was independent of the

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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ordinary occupation of the land, and, by sect. 6 of the Act of 1874, where any right of sporting when severed from the occupation of the land is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier. That being so, having regard to the provisions of the Rating Act 1874, it could not be contended that the lessee of sporting rights was not liable to be rated. But it is said on behalf of the respondent here that he is entitled to take advantage of sect. 211 (1) (b) of the Public Health Act 1875 because he is the occupier of land used as arable, meadow, pasture ground, or woodlands, because he must go upon them to exercise his right of sporting. The answer, however, to that contention is that the respondent is not the occupier of land used as arable, meadow, pasture ground, or woodlands, but of a special rateable hereditament liable to be rated by the Rating Act 1874. The justices were therefore wrong in allowing a reduction of three-fourths of the net annual value.

WILLS, J.—I am of the same opinion. I think the use of the word "occupier" in sect. 6 (2) of the Rating Act 1874 is due to the fact that the greater part of the legislation as to poor rates is based on occupation, and so sporting rights were considered as being occupied. The Public Health Act 1875 deals, however, with the occupation of land, and it is only the person who occupies the land, who gets the benefit of the reduction. The respondent here, however, is the statutory occupier of sporting rights and not the occupier of the land over which those rights exist.

KENNEDY, J.—I agree.

Judgment accordingly.

Solicitors: Church, Adams, and Prior, for C. and W. Trimmer, Alton; Cunliffe and Davenport, for Bailey and White, Winchester.

Tuesday, March 1.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

DUNN (app.) v. HOLT (resp.). (a)

Highway—Wilful obstruction—No obstruction in fact—Truck in street for purpose of cleaning house—Purpose, time, and space reasonable—Metropolitan Police Act 1839 (2 & 3 Vict. c. 47), s. 54.

A truck, 8ft. long by 2ft. 8in. wide, containing an apparatus for removing dust from houses, was placed by D. in a highway 30ft. wide for some hours while the dust was being removed from a certain house. There was no evidence that anyone was incommoded or that anyone was prevented from passing along the highway. It was found as a fact that the business, purpose, and time selected were reasonable, and that neither the time nor the space occupied were excessive, but that the system of cleaning was not necessary to the ordinary comfort or exigency of life and was still in the experimental stage, and that the noise of the apparatus and the collection of sightseers might cause discomfort or inconvenience to the occupiers of houses and people using the street.

Held, that there was no evidence of wilful obstruction within sect. 54 (6) of the Metropolitan Police Act 1839.

CASE stated on an information preferred by the respondent against the appellant under sect. 54 of the Metropolitan Police Act 1839 (2 & 3 Vict. c. 47) for wilfully causing an obstruction in a thoroughfare by means of a truck.

On the 21st April, at about 10.30 a.m., the appellant caused a truck to be brought to a public thoroughfare called Trebovir-road, and caused the truck to be placed opposite No. 7 on the carriage-way.

The truck contained an apparatus for removing dust from and cleaning houses and their furniture, carpets, and contents. This apparatus consisted of a motor driven by petrol, which, by creating a vacuum, caused the dust and dirt to pass from the house through indiarubber tubes into a receptacle on the truck.

The indiarubber tubes were passed from the truck over the pavement for foot passengers, but in such a manner and at such a height as not to interfere with any persons using the pavement or carriage-way.

The noise made by the working of the motor was considerable, and not unlikely to frighten horses and prevent persons driving them from passing near.

The appellant was in the employment of the British Vacuum Cleaner Company Limited, the owners of the truck and apparatus, who were employed by the occupier of the house, No. 7, Trebovir-road, to remove the dust and dirt from and clean the house and furniture, carpets, and contents.

The van and apparatus remained opposite the house from 10.30 a.m. till 5.30 p.m., a period of seven hours, which was not a longer time than necessary to remove the dust and dirt into the receptacle on the truck and to clean the house and contents. The dirt and dust were placed in the receptacle on the truck by the process, which went on continuously. The truck and the apparatus and receptacle containing the dust was then driven away.

The carriage-way on which the truck stood was 30ft. wide. The pavement for foot passengers was 10ft. wide. The extreme length of the truck, which stood lengthwise beside the pavement, was 6ft., and the extreme width was 2ft. 8in.

Sufficient width of carriage-way was left to enable vehicles to pass, and there was no evidence that anyone was actually prevented from passing along the street, or that any individual was incommoded.

It was proved that during the period between the 1st June 1903 and the 2nd July 1903, 721 houses in the London area alone had been cleaned by the British Vacuum Cleaner Company in the above manner.

It was contended on the part of the respondent that the acts of the appellant amounted to wilfully causing an obstruction in a thoroughfare by the means specified in sect. 54 (6) of 2 & 3 Vict. c. 47.

It was contended on behalf of the appellant that he was not liable to be convicted of the offence with which he was charged, because the facts proved did not show that the appellant did wilfully cause an obstruction or allow the truck to stand longer than was necessary for

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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loading or unloading; that the appellant being employed by the occupier of the house, No. 7, Trebovir-road, for the purpose of removing the dust and dirt from and cleaning the house and contents in a reasonable and proper manner, and having kept the truck in Trebovir-road for no longer time than was reasonably necessary for such purposes, this was a reasonable and proper user of the highway, and the appellant had not wilfully obstructed the thoroughfare within the meaning of the section.

It was further contended by the appellant that the act of removing the dust and dirt from the house to the receptacle upon the truck by means of the vacuum apparatus was a loading of the dust and dirt upon the truck.

It was further contended upon behalf of the appellant that the obstruction referred to in the section is an actual obstruction rendering the passage through the thoroughfare impossible or troublesome.

It appeared to the magistrate that the acts of the appellant as constituting a voluntary infringement upon the public right of free passage amounted to wilful obstruction within 2 & 3 Vict. c. 47, s. 54 (6), unless they could be justified as a reasonable temporary appropriation by him of part of the roadway for a reasonable purpose of business, unaccompanied by any unreasonableness in the time chosen for the operations, substantial excess in the time or space occupied by them, existence of undue noise or crowd arising from them, or other elements converting them into a common law nuisance, regard being had to the incidents of everyday life.

In his opinion upon the evidence (1) the business purpose was in itself reasonable; (2) the time selected for the operation was reasonable; (3) neither the time nor space occupied by it was excessive; (4) on the other hand, the system of carpet cleaning involved was in no sense necessary to the ordinary comfort or exigency of life; (5) it is still in the experimental stage, and cannot be regarded as an incident of everyday life; (6) the present noise of the machinery used and the collection of sightseers attracted by the working of it are or may be productive of discomfort and inconvenience to occupants of houses and people using the streets which can scarcely be dismissed as trivial or unsubstantial. He further did not adopt the contention that the removal of dust in the receptacle was a "loading" within the first part of sect. 54 (6), both because the information was founded on the second part of the section and because he thought the removal of the dust was a mere secondary incident in the operations.

On the above grounds he came upon the whole to the conclusion that the appellant had not made out any legal justification for his appropriation of the roadway, and he accordingly convicted him.

By the Metropolitan Police Act 1839 (2 & 3 Vict. c. 47), s. 54:

Every person shall be liable to a penalty of not more than 40s. who within the limits of the metropolitan police district shall in any thoroughfare or public place commit any of the following offences; (that is to say) . . . (6) Every person who shall cause any cart, public carriage, sledge, truck, or barrow, with or without horses, to stand any longer than may be necessary for loading or unloading, or for taking up or setting down passengers, except hackney carriages standing for

hire in any place not forbidden by law, or who by means of any cart, carriage, sledge, truck, or barrow, or any horse or other animal shall wilfully interrupt any public crossing, or wilfully cause any obstruction in any thoroughfare.

Danckwerts, K.C. (R. E. Vaughan Williams and D. H. Crompton with him) for the appellant.—The conviction was wrong, for before the magistrate could convict he must find that there was a material obstruction—that is, a common law obstruction:

Original Hartlepool Collieries Company v. Gibb, 36 L. T. Rep. 433; 5 Ch. Div. 713.

Each case must be considered on its merits, and no limit is placed by sect. 54 (6) of the Metropolitan Police Act 1839 as to what is a necessary time for loading and unloading. A pantechmicon van might stand outside a house all day and be much more of an obstruction than this truck, but it could not be suggested that proceedings ought to be taken for that. If the use of the highway is reasonable and the space occupied not excessive there can be no offence.

Macmorran, K.C. (Arthur Gill with him) for the respondent.—Everybody has a right to a free and uninterrupted use of the whole of the highway, and it is no answer to say that persons by going round any obstruction could get past. He referred to

Attorney-General v. Brighton and Hove Co-operative Supply Association, 81 L. T. Rep. 762; (1900) 1 Ch. 276;

Horne v. Cadman, 54 L. T. Rep. 421; 16 Cox C. C. 51;

Chelsea Vestry v. Stoddard, 43 J. P. 782.

What the appellant claims here is to practically carry on his business in the highway. The conviction was right and should be affirmed.

LORD ALVERSTONE, C.J.—I think that every case of this kind where a person is summoned for wilfully causing an obstruction to a thoroughfare must depend upon its particular facts, and I have not the least intention of expressing any opinion that people have a right of appropriating a street for the purpose of carrying on their business, or that this company or anybody else have any right to put their machinery in the street anywhere, or that it may not be a wilful obstruction. All I say is that the magistrate seems to me to have stated facts to show that there was no evidence of an offence under this statute. He first finds that nobody was in fact obstructed; he then gives the width of the street, and that some 2ft. 8in. or 2ft. 10in.—I think it is out of a width of 30ft.—were obstructed for some hours in the day. I do not want to deal with this case in detail, which comes from a very experienced magistrate, because he says how he finds. He says he finds the business purpose was in itself reasonable—that is, it was reasonable to have the house cleaned at that time; the time selected for the operation was reasonable; neither the time nor space occupied by it was excessive. On the other hand, the system of carpet cleaning involved was in no sense necessary to the ordinary comfort or exigency of life; it is still in the experimental stage, and cannot be regarded as an incident of everyday life; the present noise of the machinery used and the collection of sightseers attracted by the working of it are or may be productive of discomfort and inconvenience to

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occupants of houses and people using the streets, &c. It seems to me all those three things might be very material indeed if he was dealing with a case where in fact he was able to say there had been wilful obstruction, or that the people or the road had been wilfully obstructed, but it seems to me, having found as he has that it was a reasonable use and there was no obstruction in fact, that to nullify the effect of those findings by saying that it was experimental or had not become part of the ordinary comfort and exigency of life is applying a test which ought not to be applied. I think that in this case there was no evidence of a wilful obstruction of the highway. I desire to repeat that I do not want anything I say to suggest or indicate that the company have the right of carrying on their business in every highway, or to appropriate any part of the highway independently of the inconvenience caused to other people. I think in this case there was no evidence on which we can properly find that there was wilful obstruction of the highway under sub-sect. 6 of sect. 54 of the Metropolitan Police Act, and I think the appeal should be allowed.

WILLS, J.—I agree.

KENNEDY, J.—I am of the same opinion. It appears to me that it must in each case be a question of degree, and, therefore, in this case, in order that we may do as I concur with my Lord and Wills, J. we ought to do—namely, reverse the decision—let us see whether there was anything to show such circumstances as justify the magistrate finding as he did. I think, from the very fair and full way that the case is stated, we have the means of seeing that there was nothing which ought to have led to this conviction on the facts. The learned magistrate has given us some reasons which do not, I confess, seem to be applicable. I do not think the noise of the machinery used, so as to possibly cause discomfort and inconvenience to occupants of neighbouring houses, is an obstruction of a highway, or is an element of the obstruction of a highway. Of course, if it causes a crowd, it would be otherwise. So, in the same way, I do not think it is very relevant to consider that the system of carpet cleaning involved is not necessary to the ordinary comfort or exigency of life. If that is to be considered, it is prohibitive of every new invention of the same kind, if there could be any justification to bring machinery there to clean carpets. It must be a matter of degree to justify a conviction for wilful obstruction of a highway, and when it is said by Mr. Macmorran in his argument that a trader has not got a right to use the streets for part of his trade, in a degree we all know, living, as we have to live, in a city, and making reasonable allowance for reasonable conduct, that there are people who, in selling things, do pass their trucks, I should think, down every street in London, certainly in the west of London, and, if they do not stop too long, I do not think you should condemn them because while a customer comes to them they are using the street for their trade. This is a big machine and a novel one, and might be a nuisance if used differently to the way in which the magistrate has stated it has been used on this occasion in this place.

Appeal allowed.

Solicitors: *Hasties; Wontner and Sons.*

March 9 and 10.

(Before CHANNELL, J.)

MOUNT LYTELL MINING AND RAILWAY COMPANY LIMITED v. COMMISSIONERS OF INLAND REVENUE. (a)

Revenue—Stamp duty—Company—English debenture—Colonial debenture—Substituted security—Stamp Act 1891 (54 & 55 Vict. c. 39), schedule, "Marketable security" (3) (4); s. 82.

A colonial company was formed for the purpose of taking over the assets and liabilities of an English company, and by agreement the holders of debentures in the English company delivered them up, and accepted in lieu thereof debentures of an equivalent amount in the colonial company.

Held, that these debentures in the colonial company were not "given in substitution for a like security" within the Stamp Act 1891, schedule, "Marketable security" (4).

CASE stated by Commissioners of Inland Revenue.

In 1899 the North Mount Lyell Copper Company Limited (hereinafter called the North Company), being a company registered under the Companies Acts 1862 to 1893, issued under the seal of the company a series of debentures of varying amounts, whereby they promised to pay to bearer, or, when registered, to the registered holder, the respective amounts thereof.

In order to secure such debentures a trust deed was on the 7th Dec. 1898 executed between the North Company of the one part and General Sir Hugh Gough and William Jacks (as trustees for the debenture-holders) of the other part, containing the conditions usual in such trust deeds.

By an agreement, dated the 22nd May 1903, made between a company called the Mount Lyell Mining and Railway Company Limited (being a company registered under the laws of the State of Victoria) of the one part and the North Company of the other part it was provided that a new company should be incorporated to take over the assets and liabilities of the companies parties thereto, including the liability of the North Company to the debenture-holders, to whom debentures in the new company were to be given as therein provided.

By a subsidiary agreement, dated the 18th June 1903, made between Daniel James Mackay (on behalf of all the holders of the outstanding debentures of the North Company) of the one part and the North Company of the other part, it was (amongst other things) provided that every holder of debentures of the North Company should deliver up the debentures held by him and accept in lieu thereof debentures of an equivalent amount in the new company to be formed as aforesaid; such debentures were to be framed and secured as therein mentioned, and by clause 5 the delivery of such substituted debentures was to be accepted in satisfaction of the liability of the North Company to him under the debenture trust deed and debentures.

By an agreement dated the 6th Aug. 1903, and made between the aforesaid Mount Lyell Mining and Railway Company Limited, of the State of Victoria, of the first part, the North Company of the second part, and Alfred Mellor, on behalf of a new company which it was contemplated should

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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be formed under the laws of the State of Victoria, under the style of the Mount Lyell Mining and Railway Company Limited (the appellant company) of the third part, it was agreed to sell the respective undertakings of the old companies to the appellant company when incorporated, and as to the assets of the said North Company subject to the existing mortgage debentures to be satisfied by the issue of debentures of the appellant company as therein provided.

On the 11th Aug. 1903 the appellant company was duly incorporated under the laws of the State of Victoria, in the Commonwealth of Australia, and by deed of that date it duly adopted under seal the last-mentioned agreement.

A holder of one of the above-mentioned debentures issued by the North Company surrendered such debenture at the office of the appellant company in London, and in lieu thereof received the debenture under the seal of the appellant company which is the subject of adjudication. In accepting such new debenture he acted under the agreement of the 18th June 1903, and he thereby released and gave up all right against the North Company and all rights in respect of the first-mentioned debenture.

The appellant company contended that the instrument in question falls to be charged only with substituted security duty at the rate of 6d. for every 20l. thereof.

The commissioners, being of opinion that the instrument in question was a marketable security, being a security transferable by delivery, and bearing date after the 6th Aug. 1885, by reference to the heading "Marketable Security" sub-head (3) in the first schedule to the Stamp Act 1891, and that it was not within the fourth sub-head of that heading, assessed the duty at 1s. for every 10l. and for every fractional part of 10l. of the money thereby secured—in all, 11s.

By the Stamp Act 1891 (54 & 55 Vict. c. 39), schedule, "Marketable security":

(3) Marketable security (except a colonial Government security) being a security transferable by delivery and bearing date or signed or offered for subscription after the 6th August 1885. For every 10l., and also for any fractional part of 10l., of the money thereby secured, 1s. (4) Marketable security (except a colonial Government security) being such security as last aforesaid given in substitution for a like security duly stamped in conformity with the law in force at the time when it became subject to duty. For every 20l., and also for any fractional part of 20l., of the money thereby secured, 6d.

And by sect. 82:

(1) Marketable securities for the purpose of the charge of duty thereon include (a) a marketable security by or on behalf of any company or body of persons corporate or unincorporate formed or established in the United Kingdom; and (b) a marketable security by or on behalf of any foreign State or Government or foreign or colonial or municipal body, corporation, or company (hereinafter called a foreign security) bearing date or signed after the 3rd day of June 1862—(i.) Which is made or issued in the United Kingdom; or (ii.) which though originally issued out of the United Kingdom has been after the 6th Aug. 1885 or is offered for subscription and given or delivered to a subscriber in the United Kingdom; or (iii.) which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom; (c) a marketable security by or on behalf of any colonial

Government which if the borrower were a foreign Government would be a foreign security (hereinafter called a colonial Government security).

W. F. Hamilton, K.C. and E. J. Elgood for the appellants.—The debenture in question was "given in substitution for a like security"—that is, given in lieu of or in place of. The security need not be in the same company, but the words "in substitution" are used in the same sense as they are used in sect. 1 of the Stamp Act 1891, which says that the duties to be charged are to be in substitution for those heretofore chargeable. The new security takes the place of the old one, and so must be in substitution. This case is very different to *City of London Brewery Company v. Commissioners of Inland Revenue* (79 L. T. Rep. 648; (1899) 1 Q. B. 121), for there the old security still existed, and it could not be said that the new one was in substitution.

The Attorney-General (Sir R. Finlay, K.C.) and Rowlatt for the respondents.—This in one sense may be a security given in substitution, but it cannot be said that a colonial security given for an English security is a security given in substitution for a like security. It is a new security, for there is a new debtor. It is a novation, not a substitution. Sect. 82 of the Stamp Act 1891 shows a difference is drawn by the statute between an English and a colonial marketable security. The appellants desire to read "given in substitution" as "taken in substitution."

W. F. Hamilton, K.C. in reply.

CHANNELL, J.—In this case I am not at all anxious to decide questions which I think I have not necessarily to decide. There are some portions of the Attorney-General's argument which I confess I am not prepared to accept without further consideration. They may be correct. It may be that I personally have formed an altogether erroneous view of what is meant by "substitution" in the Stamp Act 1891. I gave my opinion once before in one of these cases—*City of London Brewery Company v. Commissioners of Inland Revenue* (sup.)—and I was corrected by the Court of Appeal. I confess I do not understand fully the grounds of that decision. I understand one of the grounds, but the other one I do not quite understand, so it may be I take an erroneous view of the matter. Consequently I do not propose to decide or say anything one way or the other about one of the points that the Attorney-General has raised, and which he says will govern a great many cases—namely, as to the distinction between giving and taking in substitution. I think I have to look at the exact wording of this schedule, and it is, "Marketable security except a colonial Government security being such security as last aforesaid given in substitution for a like security." The points that I do not feel sure about are that there is any "giving in substitution" and "taking in substitution," and so on. Those are the points, and I give no decision one way or the other. But it must be for a "like security" duly stamped, and it seems to me that "like security," occurring where it does in the schedule to this Stamp Act, means "for a security which is like this one for the purpose of stamping." When, however, you see that one of these is a debenture of an English company and the other of a colonial company, and that under sect. 82 of the Stamp

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Act, although when stampable may be stamped with the same amount of stamp, yet nevertheless the considerations under which they become liable to a stamp are not the same, it seems to me that there is a difficulty in holding that the one security is a like security with the other for stamp purposes. On that ground I think I must hold that this is not a substituted security. I say nothing about the other points one way or another.

Appeal dismissed. Judgment for the Crown.

Solicitors: James White and Leonard; Solicitor of Inland Revenue.

March 10 and 11.

(Before CHANNELL, J.)

ATTORNEY-GENERAL v. CHAMBERLAIN AND OTHERS. (a)

Revenue—Estate duty—Settlement estate duty—Precatory trust—Letter with wishes of testator—Finance Act 1894 (57 & 58 Vict. c. 30), ss. 1, 2 (1) (c), 5 (1).

N. C., by his will dated the 13th Dec. 1901, devised and bequeathed all his estate and effects of every description to his brother, C. T. C., absolutely, and he appointed his said brother, H. J. M., and C. G. executors and trustees of his will.

On the 11th Jan. 1902 N. C. signed a document or letter (which has not been admitted to probate) which was headed: "Instructions to my executors Crawford, Morgan, and Gasquet.—Dear Brother Crawford (I dictated this to Gasquet).—Like many others who have gone before me, I have failed to make provision for the distribution of my property amongst my relatives and friends before it became too late to do it with care. For this reason I have left all my estate to you in the fullest reliance that you will, as far as possible and to the uttermost, carry out any wish that I may express in writing now or later, or which may be conveyed to you verbally by Gasquet or my good-hearted cousin Henry. I have made a settlement on P. D. which should suffice for him in the struggle of life which we all have to face. As regards our family, you will be the best judge how and when a suitable distribution should be made. I do not fetter your discretion in any way. You are an old man, and therefore do not delay the distribution." And then followed directions as to the disposal of certain property and amounts to be paid to certain persons. The document concluded: "Finally, these are the instructions referred to in my will. They are not in any way to fetter Crawford, and may probably be added to if I am spared, or I may carry some out in my own lifetime."

A copy of this document was sent to C. T. C., who, on the 14th Jan. 1902, wrote to C. G. a letter in which he said: "All I wish to say now is that every wish expressed by my brother shall be carried out to the very fullest extent so far as I am concerned, and as far as all we three executors are concerned, for his wishes are sacred, every word."

The effect of this letter was communicated to N. C. N. C. died on the 18th Feb. 1902, and his will was

proved by all the executors, and estate duty and legacy duty was paid on his estate, including sums given or settled by the testator within twelve months of his death.

C. T. C. took possession as beneficial owner of the residuary personal estate and of the freehold and leasehold estate of N. C., and he made on the 13th May 1902 (within twelve months next before his death) a settlement of 5000l. on each of his four nephews and nieces. C. T. C. also gave and paid other sums to various persons in accordance with the instructions in the letter of the 11th Jan. 1902.

C. T. C. died on the 13th Dec. 1902.

Held, that no trust was created, and that the settlement of 5000l. so made was a gift made by C. T. C. within twelve months of his death, and so estate duty and settlement estate duty were payable in respect thereof.

INFORMATION.

Field-Marshal Sir Neville Bowles Chamberlain, G.C.B., G.C.S.I., of Lordswood, near Southampton, by his will, dated the 13th Dec. 1901, devised and bequeathed all his estate and effects of every description to his brother, General Sir Crawford Trotter Chamberlain, his heirs, executors, and administrators, absolutely, but if he should die in the lifetime of the testator, or become from any reason incapable of managing his affairs (the decision of the testator's executors thereon, or that of a majority, to be final), the testator directed his executors to hold his estate and effects upon such trusts as he should at any time make known to them, and the testator appointed his brother Sir Crawford Trotter Chamberlain, Henry John Morgan, and Charles Gasquet executors and trustees of his will.

On the 11th Jan. 1902 the testator signed the following document or letter (which has not been admitted to probate):

Instructions to my executors Crawford, Morgan, and Gasquet.—Dear Brother Crawford (I dictated this to Gasquet).—(1) Like many others who have gone before me, I have failed to make provision for the distribution of my property amongst my relatives and friends before it has become too late to do it with care. For this reason I have left all my estate to you in the fullest reliance that you will as far as possible and to the uttermost carry out any wish that I may express in writing now or later, or which may be conveyed to you verbally by Gasquet or my good-hearted cousin Henry. I have made a settlement on P. D. which should suffice for him in the struggle of life which we all have to face. As regards our family, you will be the best judge how and when a suitable distribution should be made. I do not fetter your discretion in any way. You are an old man, and therefore do not delay the distribution. I should like you to prefer those who are least likely to be well off. Keep, of course, anything for yourself. As Sir Henry Chamberlain is what is usually called the head of the family and is not well off, I should like him to have 2000l. It may be desirable to tie up Hetty's share. (2) I wish to be cremated and my remains interred in my wife's grave at Rownhams with as little expense and ostentation as possible. (3) I wish the following amounts to be paid to my servants. (Here followed the names of various persons and the amount each person was to receive.) (4) Decorations belonging to the Crown to be returned according to custom. (5) My journals, letters (especially those copied by my sister Harriet), and other papers relating to my career, opinions, or official life (amongst which I most value the general order of Lord Lawrence, Viceroy when I left in

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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India in 1864, the last being my Magna Charta)—all these for my nephew Neville Fitzgerald to use as he thinks fit. (6) The sword I used in the first Afghan war is for Harry's younger son, Neville Graham. (7) The rifle given me by the Duke of Edinburgh is for Neville Fitzgerald. (8) My Field-Marshal baton is for Harry, also large photograph. My watch and one of the clocks for P. D. (9) The picture of the Nile for the Naval and Military Club. Henry Morgan, as executor, 1000*l.* The following charitable legacies (not to be paid if I have done so whilst living): (a) British and Foreign Unitarian Association (receipt of the treasurer to be a good discharge), 1000*l.*; (b) Church of the Saviour, London-road, Southampton, 1000*l.*, to be paid to the trustees of the church; (c) Queen's Jubilee Institute for Nurses, Southampton, 1000*l.*; (d) South Hants and Southampton Hospital, 1000*l.* (Here followed certain legacies to various persons.) (10) To the School for Officers' Daughters, I. Finally, these are the instructions referred to in my will. They are not in any way to fetter Crawford, and may probably be added to if I am spared, or I may carry some out in my own lifetime.—Lordeswood, January 11, 1902.—(Signed) NEVILLE CHAMBERLAIN.

A copy of this document or letter was sent to Sir Crawford Trotter Chamberlain, who wrote the following letter to the defendant Charles Gasquet:

Villa des Chameropa, Cannes, 14th January 1902.—Dear Mr. Gasquet,—Last evening I received from Henry Morgan a copy of the letter addressed to me by my brother, dictated by him. H. M. asks me to acknowledge it to yourself, and to make any suggestions. All I wish to say now is that every wish expressed by my brother shall be carried out to the very fullest extent so far as I am concerned, and as far as we all three executors are concerned, for his wishes are sacred, every word. Ill as I fear he is, I hope and pray that he may yet be spared and recover, and that it may be long ere a will shall be useful. He has, I am sure, suffered awfully, and it has been great pain to me not to be able to go to him as my heart longs to do. Lady C. is in very delicate health and a great invalid at present, and, unless Sir Neville's condition was such as to make my travelling at this season a necessity, I am hardly justified in running the risk, for I am under a doctor's hands just now, but nothing very special. Please do not let Sir N. know this if you feel it right to let him know you have heard from me of my acceptance to the very fullest of the trust he has reposed in me.—With every good wish to yourself, yours sincerely (sd.) C. T. CHAMBERLAIN.

The effect of the foregoing letter of the 14th Jan. 1902 was communicated (so far as the writer desired it should be) to the testator, Sir Neville Bowles Chamberlain.

After the letter of the 11th Jan. 1902 the testator verbally expressed some further wishes or "instructions" to the defendant Charles Gasquet to the following effect—viz.:

The nurse to have 5*l.*; the poor woman named Bettridge to have 5*l.*; the clergyman to have 25*l.* for the funeral service; his medals to be kept together; the groom to have 20*l.* instead of 15*l.*; various publications of a political character to be given to the Liberal Association at Southampton; various friends to have small remembrances of him; and Mr. Basil Chamberlain's share and Mr. Houston Chamberlain's share to revert to the family.

He also made the following gifts for charitable purposes mentioned in the letter of the 11th Jan. 1902—viz.:

250*l.* to the Church of the Saviour, Southampton, for a new organ; 1000*l.* to the South Hants and South-

ampton Hospital; 1000*l.* to the Southampton Jubilee Nurses' Institute; 1000*l.* to the British and Foreign Unitarian Society.

Estate duty has been paid on these gifts as having been made within twelve months of the testator's death.

The testator, Sir Neville Bowles Chamberlain, died on the 18th Feb. 1902, and his will, dated the 13th Dec. 1901, was proved by all the executors in the Principal Registry of the Probate Division of the High Court on the 11th March 1902. The testator left personal property valued at 88,525*l.* 17*s.* 6*d.*, and real and leasehold property valued at 4180*l.* Estate duty at 6 per cent. was paid on an amount exceeding 100,000*l.*, including sums given or settled by the testator within twelve months of his death.

On the 16th June 1902 the executors paid 2326*l.* 17*s.* 10*d.* for legacy duty at 3 per cent. and interest on 77,449*l.* 12*s.* 6*d.*, the value of the testator's residuary personal estate after deducting estate duty, debts, funeral expenses, and expenses of administration.

The declaration by the executors at foot of the residuary account stated the sum of 77,449*l.* 12*s.* 6*d.* as being the whole of the residue and moneys which "we intend to retain for the use of Sir Crawford Trotter Chamberlain, G.C.I.E., C.S.I., being a brother of the deceased."

On the 16th June 1902 the executors also paid 122*l.* 16*s.* 7*d.* for succession duty (less discount) at 3 per cent. on 4180*l.*, the value of the real and leasehold property of the testator, stating by their declaration (at foot of the succession duty account).

That this is a just and true account of all the succession in real and leasehold property of General Sir Crawford Trotter Chamberlain, G.C.I.E., C.S.I., upon the death of the before-named Field-Marshal Sir Neville Bowles Chamberlain and that the General Sir Crawford Trotter Chamberlain is a brother of Field-Marshal Sir Neville Bowles Chamberlain, the predecessor, from whom the property is derived.

The testator died a widower without issue. His father left issue by two marriages. Sir Henry Chamberlain, referred to in the letter of the 11th Jan. 1902, is a grandson of one of the testator's half-brothers.

At the date of the testator's will Sir Crawford Trotter Chamberlain was his only surviving brother and Mrs. Guthrie was his only surviving sister, both of them being of the whole blood. There were living five children of deceased brothers of the testator of the whole blood—viz., Basil Hall Chamberlain, the defendant Henry Chamberlain, Houston Stewart Chamberlain, and Harriet Sarah Chamberlain (children of testator's brother William Chamberlain), and Neville Francis Fitzgerald Chamberlain, a child of testator's brother Charles Chamberlain.

Sir Crawford Trotter Chamberlain took possession as beneficial owner of the residuary personal estate and of the freehold and leasehold estate of Sir Neville Bowles Chamberlain, and he made (within twelve months next before his death) a settlement of 5000*l.* on each of his four nephews and niece in manner hereinafter mentioned.

The defendants alleged that the nephews and niece were told by or by the direction of Sir Crawford Trotter Chamberlain, that these sums were gifts to them from Sir Neville Bowles Chamberlain.

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Sir Crawford Trotter Chamberlain also gave to Henry John Morgan (a first cousin of himself and of Sir Neville Bowles Chamberlain) the sum of 5000*l.*, and to Sir Henry Chamberlain 2000*l.*; and he purchased an annuity of 30*l.* for Mary Stubbings, and Miss Helena Gambier 300*l.*, Miss Mabel Gambier 50*l.*, Meta Young 50*l.*, and Grace Hanwell 50*l.* He also paid to Sir Neville Bowles Chamberlain's servants the amounts mentioned in the letter of the 11th Jan. 1902, and 1000*l.* to the British and Foreign Unitarian Society.

The settlements by Sir Crawford Trotter Chamberlain of 5000*l.* each on his four nephews and niece were made (except the settlement of Basil Hall Chamberlain, which was by agreement not under seal) by deeds all substantially in the same form and containing similar recitals. The settlement on the defendant Henry Chamberlain was made by an indenture dated the 13th May 1902, and between Sir Crawford Trotter Chamberlain of the first part, the defendant Henry Chamberlain of the second part, and the defendants Henry Chamberlain, Joseph Horace Noble, Henry Seymour Chamberlain, and Charles Gasquet of the third part, whereby, after reciting that Sir Crawford Trotter Chamberlain, being desirous of making such settlements in favour of the defendant Henry Chamberlain or his issue as is hereinafter contained, had recently paid the sum of 5000*l.* to the defendants Henry Chamberlain, Joseph Horace Noble, Henry Seymour Chamberlain, and Charles Gasquet, to the intent that the same should be held by them upon the trusts hereinafter declared, it was witnessed that, in pursuance of such desire and in consideration of the natural love and affection of Sir Crawford Trotter Chamberlain for his nephew, the defendant Henry Chamberlain, it was declared by the parties thereto that the defendants Henry Chamberlain, Joseph Horace Noble, Henry Seymour Chamberlain, and Charles Gasquet should invest the sum (after payment of certain costs) as therein mentioned, with power to vary investments, and should pay the income of the trust funds to the defendant Henry Chamberlain during his life, provided that if he should become bankrupt or should assign or charge the income or part thereof, or some other event should happen whereby such income if belonging to him would become vested in or charged in favour of some other person, the trustees should during the remainder of his life pay or apply all or any part of the income unto or for the personal support or benefit of all or any one or more of the following persons, viz., the defendant Henry Chamberlain, his wife and children, if any, and the persons for the time being interested in the trust funds under the trusts thereafter declared as the trustees should in their absolute discretion think proper; and subject to such discretionary trust should during such remainder of the life of the defendant Henry Chamberlain hold the income upon the trusts upon which the same would be held under the now stating indenture if the defendant Henry Chamberlain were then dead; and after his death should stand possessed of the trust funds in trust for the children or remoter issue of the defendant Henry Chamberlain as he should by deed or will appoint; and in default of appointment in trust for his children who being sons should attain twenty-one, or

being daughters should attain that age or marry, in equal shares, and in default of children attaining a vested interest in trust for the defendant Henry Chamberlain absolutely, and the settlement contained a power for Henry Chamberlain to appoint a life interest in the trust funds to any widow who might survive him.

The sum of 5000*l.* was paid by Sir Crawford Trotter Chamberlain to the defendants as trustees of the last-mentioned settlement on or about the date thereof, and the investments representing the sum are now in their possession.

Sir Crawford Trotter Chamberlain by his will dated the 20th Oct. 1902, after making various specific and other gifts, devised and bequeathed all his real and residuary personal estate to his wife upon trust that she or other the trustees of his will should convert the same into money and should stand possessed of the proceeds (charged with an annuity of 200*l.*) in trust for his wife during her life, and after the death of his wife in trust for such of the four nephews and niece, Neville Francis Fitzgerald Chamberlain, Basil Hall Chamberlain, Henry Chamberlain, Houston Stewart Chamberlain, and Harriet Sarah Chamberlain, as should be living at the death of the survivor of the testator and his wife in equal shares with certain provisions for settlement of the shares of his niece and of Houston Stewart Chamberlain.

Sir Crawford Trotter Chamberlain died on the 13th Dec. 1902, and his will was proved by his widow and executrix in the Principal Registry of the Probate Division of the High Court on the 9th Jan. 1903. Estate duty has been paid in respect of real and personal estate of the value of about 60,000*l.*, the greater part of which consisted of property derived by him under the will of Sir Neville Bowles Chamberlain.

Under the circumstances aforesaid it was claimed that estate duty and settlement estate duty under the Finance Act 1894, ss. 1, 2 (1) (c), and 5 (1), became payable on the property (namely, the sum of 5000*l.* or investments representing the same) comprised in the settlement of the 13th May 1902 as property passing on the death of Sir Crawford Trotter Chamberlain within the meaning of the Act.

The Commissioners of Inland Revenue applied to the defendants for an account and payment of such duties, but the defendants have refused and still refuse to pay the duties, and contend that no such duties are payable.

The Attorney-General, on behalf of His Majesty, prayed that it might be declared that on the death of Sir Crawford Trotter Chamberlain estate duty and settlement estate duty became payable under the provisions of the Finance Act 1894 in respect of the principal value of the property comprised in the indenture of settlement of the 13th May 1902 as property passing on his death under the settlement within the meaning of the Act, and that the defendants are accountable for such duties accordingly.

By the Finance Act 1894 (57 & 58 Vict. c. 30), s. 1:

In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty

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called "estate duty" at the graduated rates hereinafter mentioned, and the existing duties mentioned in the first schedule to this Act shall not be levied in respect of property chargeable with such estate duty.

And by sect. 2:

(1) Property passing on the death of the deceased shall be deemed to include the property following—that is to say, . . . (c) Property which would be required on the death of the deceased to be included in an account under sect. 38 of the Customs and Inland Revenue Act 1881 (44 & 45 Vict. c. 12), as amended by sect. 11 of the Customs and Inland Revenue Act 1889 (52 & 53 Vict. c. 7), if those sections were herein enacted and extended to real property as well as personal property and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom.

By sect. 5:

(1) Where property in respect of which estate duty is leviable is settled by will of the deceased or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property—(a) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but (b) during the continuance of the settlement estate duty shall not be payable more than once.

By the Customs and Inland Revenue Act 1881 (44 & 45 Vict. c. 12), s. 38:

(1) Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or movable property to be included therein according to the value thereof. (2) The personal or movable property to be included in an account shall be property of the following description, viz.: (a) Any property taken as a *donatio mortis causa* made by any person dying on or after the 1st June 1881, or taken under a voluntary disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bona fide* made three months before the death of the deceased. (b) Any property which a person dying on or after such a day, having been absolutely entitled thereto, has voluntarily caused, or may voluntarily cause, to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person. (c) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will whereby an interest in such property for life or any other period determinable by reference to death is reserved, either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power to restore to himself, or to reclaim the absolute interest in such property.

By the Customs and Inland Revenue Act 1889 (52 & 53 Vict. c. 7), s. 11:

(1) Sub-sect. 2 of sect. 38 of the Customs and Inland Revenue Act 1881 (44 & 45 Vict. c. 12) is hereby amended as follows: The description of property marked (a) shall be read as if the word "twelve" were substituted for the word "three" therein, and the said description of property shall include property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforth retained, to the entire exclusion of the

donor, or of any benefit to him by contract or otherwise. The description of property marked (b) shall be construed as if the expression "to be transferred to or vested in himself and any other person" included also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone or in concert or by arrangement with any other person. The description of the property marked (c) shall be construed as if the expression "voluntary settlement" included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression "such property" wherever the same occurs, included the proceeds of sale thereof. The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after the 1st June 1889 on his life where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit.

The Attorney-General (Sir R. Finlay, K.C.) and Vaughan Hawkins for the Crown.—The defendants say that a trust was created here, but we contend that there was no trust. In order to constitute a trust the request, or whatever it is, must come to the notice of the devisee and be assented to by such devisee. The document in question was communicated to an executor to be sent to the devisee, and the acceptance, if it can be so called, was addressed to an executor. In the dictated letter Sir Neville Chamberlain says: "I do not fetter your discretion in any way." Lord Langdale in *Knight v. Knight* (3 Beav. 148; 52 R. R. 74) says, at p. 172: "As a general rule, it has been laid down that when property is given absolutely to any person and the same person is by the giver who has power to command recommended or entreated or wished to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust, first if the words are so used that upon the whole they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain. . . . On the other hand, if the giver accompanies his expression of wish or request by other words from which it is to be collected that he did not intend the wish to be imperative; or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subjects from the object of the wish or request; or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus the words 'free and unfettered' accompanying the strongest expression of request were held to prevent the words of the request being imperative. Any words by which it is expressed or from which it may be implied that the first taker may apply any part of the subject to his own use are held to prevent the subject of the gift from being considered certain; and a vague description of the object—that is, a description by which the giver neither clearly defines the object himself nor names a distinct class out of which the first taker is to select, or which leaves it doubtful

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what interest the object or class of objects is to take—will prevent the objects from being certain within the meaning of the rule." They also referred to

White and Tudor's Lead. Cas., 7th edit., vol. 2, p. 337 *et seq.*

All these wishes of Sir Neville Chamberlain are in the letter and not in the will. There is nothing here to create a precatory trust. There is an absolute gift to Sir Crawford Chamberlain, and the document or letter of the 11th Jan. 1902 creates no trust. They referred to

Re Williams; Williams v. Williams, 76 L. T. Rep. 600; (1897) 2 Ch. 12;

Re Hanbury; Hanbury v. Fisher, 90 L. T. Rep. 66; (1904) 1 Ch. 415.

The defendants here must show an enforceable trust. The deeds of May 1902, under which the defendants take, are made by Sir Crawford Chamberlain as beneficial owner of the property of Sir Neville Chamberlain. There is no recital of the trust, and the consideration is natural love and affection. They referred to

Finance Act 1894 (37 & 38 Vict. c. 30), s. 2 (1) (c).

An executor may make a gift even although he is an executor. In *Stead v. Mellor* (36 L. T. Rep. 498; 5 Ch. Div. 225) a testatrix gave all her personal estate to trustees upon trust, after payment of certain expenses, debts, and legacies, to hold the residue "in trust for such of my nieces A. and B. as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." A. and B. having survived the testatrix, it was held that they took the residue for their own benefit. They also referred to

Re Maddock; Llewellyn v. Washington, 86 L. T. Rep. 644; (1902) 2 Ch. 220.

Haldane, K.C., Jenkins, K.C., and K. G. Metcalfe for the defendants.—If there is an intention to create a trust which fails, but the donee is only to take "on trust," then the donee holds for the next of kin or the heir-at-law. If the donee takes on a precatory trust which fails, then he takes absolutely. Sir Crawford Chamberlain was a trustee with a special power to select the beneficiaries. What he did was only done as trustee and in execution of that special power. The Crown to succeed must show that Sir Crawford Chamberlain had a beneficial interest. The words "in the fullest reliance" show that it was intended to create a trust. They referred to

McCormick v. Grogan, L. Rep. 4 H. L. 82;

Grant v. Lynam, 4 Russ. 292; 28 R. R. 97;

Crutys v. Colman, 9 Ves. 319; 7 R. R. 210;

Re Weekes' Settlement, 76 L. T. Rep. 112; (1897) 1 Ch. 289.

The Attorney-General in reply.—In *Meredith v. Heneage* (1 Sim. 542; 10 Price, 306; 27 R. R. 243) a testator, after giving his real and personal estate to his wife in fee, said that he had so given the same to her unfettered and unlimited in full confidence that in her future disposition thereof she would distinguish the heirs of his late father by devising the whole of his estate together and entire to such of his father's heirs as she might think best deserved her preference, and this was held to create no trust. He also referred to

Sullivan v. Sullivan, (1903) 1 Ir. Rep. 193 Ch.

CHANNELL, J.—I have not been encouraged by the authority that the Attorney-General quoted to me, which tells me this is about one of the most embarrassing questions that any judge can have to deal with; but, having had the opportunity of looking into, at any rate, one of these cases and considering this matter and having had the advantage of an admirably clear argument on both sides, I think it is better to dispose of it at once rather than take any time to consider and possibly be further embarrassed by the contradictory expressions which probably are to be found both in the authorities and in the different expressions of recommendation, or desire, or trust, or whatever else there may be in the various letters and documents in the cases. I think I have now the principles pretty fairly in my mind. Duty is claimed here on the ground that this settlement of the 5000*l.* was a gift, and I suppose the real question I have to consider is whether that settlement was made at a time when the settlor was under an enforceable obligation either to make that settlement or in some other way to execute the trusts which are alleged to have been imposed upon him. I have to decide that question in a different way and with less material than a court would generally have. It is quite clear that if there was any trust at all, any binding enforceable obligation, it was created not by the will or even by the letter of the testator alone, but by the assent to it which was given by Sir Crawford Chamberlain in his letter of the 14th Jan. Where the obligation arises in that way by assent given by the donee, it is clearly explained by the Lord Chancellor and by Lord Westbury in *McCormick v. Grogan* (L. Rep. 4 H. L. 82) that the ground of the jurisdiction is to prevent something in the nature of fraud; that when a donee has assented to certain directions, and communicated his assent to the testator, and thereupon the testator has either made a testamentary instrument or allowed to stand a testamentary instrument previously made, to depart from that would be something in the nature of fraud. If that is, as it obviously is, the ground upon which the court could enforce an obligation so incurred, it follows that in the ordinary way the court would have before it, when considering whether the particular man was committing either a fraud or something in the nature of a fraud, the circumstances of the refusal to perform the obligation, and would know what he was doing or proposing to do, and would judge whether or not that came within this jurisdiction to prevent frauds or things in the nature of fraud. But here I have not anything of the sort, because Sir Crawford Chamberlain desired from the first to comply with this obligation, whether it was merely a moral obligation or an enforceable obligation or not. He was doing his best, and I think he did throughout comply with the obligation, if there was one. The only thing that has been suggested in any way in reference to his deviating in fact from what he was requested or directed, as the case may be, to do, is that it is suggested possibly he appropriated to himself somewhat more than he ought to have done of the property of which he was entitled certainly to appropriate to himself some part. I do not think he even did that. It seems he more or less appropriated to himself and to his wife, for a time at any rate, about half of the property, but, even as to that half, the

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largest portion of it, at any rate, eventually went back after his wife's death, under his disposition of the property, to what would be the family of the Chamberlains—that is, of himself and his brother Sir Neville Chamberlain. Therefore I do not think there is the slightest ground for thinking that Sir Crawford Chamberlain did not absolutely comply in fact with this obligation, whether it was a moral obligation or only an enforceable obligation. Then there was a suggestion by Mr. Jenkins, I think, that it is a little hard upon the parties taking under this settlement if they have to pay this duty, because they would practically be paying it twice over. Where the question depends upon the construction of the Taxing Act of Parliament, it may be material to consider whether a particular construction inflicts hardship or inflicts what some constructions sometimes do, a duty twice over. But where it depends upon the facts, of course it is not material. The amount of duty that people have to pay when they get benefits from their deceased relations or friends depends upon what may be called an accident as to the mode in which they take it. Sometimes it is more, and sometimes it is less. Here the whole question is as to the mode in which these beneficiaries take. It happens not to make a very great deal of difference in this case. If the provisions which are suggested to be obligatory had been inserted in Sir Neville Chamberlain's will, the Crown would have taken the same duty as they have already had, because it happens that all parties are chargeable with a 3 per cent. duty. But whether the incidence of it would be the same would depend upon whether the 5000*l.* had been given free of duty or not. If it had been given free of duty, the duty would have fallen where it has fallen in the present case, upon the person in the position of residuary legatee; but, if not, it would have fallen upon the parties taking this 5000*l.* There are all sorts of things you cannot tell anything about in reference to that. Passing on to what is the real question, I think it must be put in this way: Whether this alleged obligation was enforceable at the time when this settlement was made. As I pointed out, there being no refusal in fact, I have not before me the circumstances of any refusal so as to judge whether it was fraudulent. I think what I have to consider is this: If at the time when Sir Crawford Chamberlain in fact made this settlement he had said, "I have been acting upon these directions up to the present time, but I consider I am only under a moral obligation to do it, at the outside; I have changed my mind; I have determined not to act upon them any more, and I propose to give the whole property away to some charity," or some person who was not in any sense the object of the bounty of Sir Neville Chamberlain, could the Court of Chancery either at the instance of Mr. Henry Chamberlain, who takes under this settlement, or any other member of the family, have granted any kind of order, either for an injunction to restrain him from so acting, or an order compelling him to execute the trusts, or anything of that kind? I think that is the question I have to consider and deal with. That depends upon the construction of the whole of the three documents. I leave out, because it does not add to it, the verbal

instructions given, which, though they come in, do not affect the question really. The three documents are the will, the dictated letter of the 11th Jan., and the letter of Sir Crawford of the 14th Jan. The obligation, if there was one, of course arises from the letter of the 14th Jan., which says in substance, "I will carry out the wishes to the very fullest extent." But if there is in the other document of the 11th Jan. an express reservation of a full direction to Sir Crawford Chamberlain to carry the suggestions out or not, then the assent must be interpreted with reference to that, and it is just as if Sir Crawford Chamberlain had said, "I will carry out your wishes, but I understand those wishes to be that I may have a power, if I think fit, of not acting upon them according to circumstances, and it is upon that condition and in that view that I accept and tell you that I propose to carry out your wishes." Of course if that had been said, there is no binding obligation to do anything in point of fact, and the question, therefore, although the obligation is created by the letter of the 14th, depends really upon what is the true interpretation of the document of the 11th. That document of the 11th Jan. I think you must also construe in reference to the will which had been made a short time previously. It is true that the actual terms of that will do not appear, so far as I know, to have been known to Sir Crawford Chamberlain at the time he wrote his letter, but the general effect of the will was undoubtedly known, and the will is, in point of fact, referred to in the latter part of the letter of the 11th Jan. Therefore those two documents, it seems to me, have to be construed together. The letter of the 11th Jan., if you read part of it alone, is undoubtedly capable of creating a binding obligation. There are words in it which, according to the cases, would be amply sufficient, but a difficulty arises, and the whole question arises, about certain other words which come in. I will deal first with the words that would create the obligation. If we had simply the paragraph in the case, "I have left all my estate to you in the fullest reliance that you will, as far as possible and to the utmost, carry out any wish that I may express in writing now or later, or which may be conveyed to you verbally by Gasquet," and so on, and had gone on at the end of that sentence with, "I wish to be cremated and my remains interred. I wish the following amounts to be paid to my servants," and all those numbered things down to "to the School for Officers' Daughters, 1*l.*" (of course, the blank pounds would have made that inoperative)—if the thing had stood in that way I do not think there could be a possible doubt that within the cases it would have been a binding obligation. But there is the passage, which I have omitted, in reference to the family, and the passage at the end which I have also omitted. They are the two passages which make the difference. I think, when you have to consider those passages, you have to refer back to the will. Mr. Jenkins in his very clear argument has put a perfectly intelligible view of these two doubtful and difficult passages. He admits, quite frankly, that if the final passage, "Finally, these are the instructions referred to in my will. They are not in any way to fetter Crawford," relates to the whole of the document, then it prevents there being any binding obligation; but he suggests,

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and it is a perfectly plausible suggestion, that that passage refers back to the previous passage in which there has been said, "I do not fetter your discretion in any way." I do not think, for reasons which I will explain presently, that it is the correct view, but it is a perfectly possible one. It throws us back upon the consideration of the other passage which makes the difficulty: "I have made a settlement on P. D. which should suffice for him in the struggle of life we all have to face." That is information given in order to explain that there will not be any necessity for providing for P. D. "As regards our family," that I read as meaning "our own family," as this is from one brother to another, and as the gentleman who was writing it had no children and no wife their family would be the same. Whether the wife would come in with the "family" appears to be a doubtful question; but I think I could decide that, if I had to decide it. "As regards our family," under the circumstances clearly means the family of the two brothers. "As regards our family, you will be the best judge how and when a suitable distribution should be made. I do not fetter your discretion in any way. You are an old man, and therefore do not delay the distribution." That is a reference to a passage which has gone before which I will read directly. "I should like to prefer those who are least likely to be well off. Keep, of course, anything for yourself. As Sir Henry Chamberlain is what is usually called the head of the family and is not well off, I should like him to have 2000*l*. It may be desirable to tie up Hetty's share." Now, the question is whether those are suggestions made to the brother who is to have the absolute property for himself as to how he should when he dies dispose of it, or whether it is intended to be a binding obligation to distribute this property, which in that event would mean the residue of the property after giving specific amounts which are afterwards mentioned amongst a class, including in that class the donee himself—"Keep, of course, anything for yourself"—with an absolute discretion as to the amount of the shares and an absolute discretion as to the particular individuals who are to be given something as members of the family, but still a binding obligation not to give the property away from the class. I do not say it is impossible that the words could have that meaning. The thing is quite intelligible, and the words might have that meaning. But I think there is a difficulty in those words alone, even if one does not look at the other circumstances, and that arises in the passage "Keep, of course, anything for yourself." It does not seem to me such a very odd sort of power to give to anybody. It is a power to distribute amongst a class, including the person himself, who is to take as much as ever he likes. On the very face of it that looks discretionary rather than any obligation to divide. I think Mr. Jenkins told me that under the present law in reference to powers of appointment and so on, if a power of appointment is given without words to the contrary, you may now give the whole to one. I gather that is so by a comparatively modern statute, and that to a certain extent the old doctrine about illusory appointments has been trenchanted upon. I do not think I need go into it. This is not a case in which it is a statutory obligation, or in which the statute would apply. That lan-

guage in itself is, to my mind, almost enough to say that the person writing that could not have meant anything more than a suggestion, and could not have meant any obligation, because otherwise he would have said something as to the proportion which he meant the person to whom he was giving this large power to take for himself. And now one must turn to matters which to my mind are pretty well conclusive of the other view. At this stage I think it is convenient to refer to a passage at p. 95 of the judgment of the Lord Chancellor in *McCormick v. Grogan* (*sup.*). That case throws a great light on what I have to decide here, although the actual decision throws no light at all. The actual decision proceeded upon this. In that case there was no assent proved on the part of the donees to the suggested directions of a certain letter. Of course, if that was so, the case came to an end. But as I gather, I have not seen the report in the Court of Appeal in Ireland, that had there proceeded possibly upon different grounds, certainly partially upon a different ground, and the Lords dealt with that different ground, and this passage occurs where they are dealing with the question of the intention of Mr. Craig, whose dispositions were in question: "I think the letter itself, and all the circumstances attending it, lead to the conclusion that it was the full intention of the testator, uninduced by anything except that it was his own wish so to deal with his property, to give Mr. Grogan full and complete control over the property and to leave the instructions simply as a guide which might assist him in the discretion which he would himself exercise. In fact, what I believe to have been his intention is better expressed than I can myself express it in the words of the Court of Appeal when reversing the decision of Lord Chancellor Blackburne. It is there said by the Lord Justice of Appeal: 'If we could look into the thoughts of Abraham Walker Craig as they were at the moment when he was inditing the will and letter, I am persuaded that what we should find there would be a purpose to this effect, to set up after his decease, not an executor or a trustee, but as it were a second self, whom, while he communicates to him confidentially his ideas as to the distribution of his property, he desires to invest with all his own irresponsibility in carrying them into effect.' That, I think, is not by any means an unjust description of the instrument in question." I myself think, when you come to read the whole of this, the will and the introductory part of this letter of instruction, that it is exactly what Sir Neville Chamberlain intended to do. You start with the will. He gave by the will all his estate to his brother Sir Crawford absolutely, "but if he should die in the lifetime of the testator, or become from any reason incapable of managing his affairs," the testator's executors were to hold his said estate and effects upon such trusts as he should at any time make known to them." There you begin with the fact that the executors, if the matter came to them under that "but if," were to be subject to a binding trust which was to be communicated, and Sir Crawford was to stand certainly in a different position. That is a very strong circumstance to begin with. It is quite possible that Sir Neville might, after making that will, have more or less changed his mind and have thought, "Well, after all, I had better bind Sir Crawford, and I

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will write positive directions to him and get him to give his assent to these positive directions." He might have done so, but, when you come to look at the directions, did he? He begins in this way: "Like many others who have gone before me, I have failed to make provision for the distribution of my property amongst my relatives and friends before it has become too late to do it with care." He is regretting that he has not been able to make the will that he should like to make, and, regretting that, what is he to do? I think he is contemplating doing exactly what is said in *McCormick v. Grogan* (sup.) to create the second self whom he desires to invest with his powers of distributing this property absolutely, to give him those powers, and to make him something like the *bon père de famille* who is supposed to provide and create interests and that sort of thing when he divides his property up amongst his children. He is going to put him into the position to make the proper and best distribution amongst the family because he cannot do it himself, having put it off too late, and because his brother is alive whom he absolutely trusts to do what he thinks to be absolutely best, and he desires to leave it absolutely to his discretion. That is what those introductory words seem to mean. If you start with that, you then get to this passage—it is no doubt capable of making the trust and capable of not doing so—and come to the very large words of discretion which he gives him, repeating, "I do not fetter your discretion in any way" and "Keep, of course, anything for yourself." "Of course" is an expression which is commented upon in *Sullivan v. Sullivan* (1903) 1 Ir. Rep. 193 Ch.), where the Master of the Rolls in Ireland delivering the judgment there says, at p. 201: "Why 'of course'? 'Of course' she could not modify it if it imposed a binding trust, and, if not, 'of course' she could." That is what was said in that case, and the same thing is here—"Keep, of course, anything for yourself." The "of course" certainly, when you come to consider it, has some meaning. When you get to the bottom, "Finally, these are the instructions referred to in my will"—that is to say, these are the things that are to be obligatory upon the trustees and executors if it ever comes to them, but they are not in any way to fetter Crawford. That means to say, "My desire is that inasmuch as I cannot dispose of my property equitably and reasonably amongst people who have claims upon me and whom I should desire to benefit, and as I do not think I am capable now of positively instructing anybody to do it in the way that I should like, I will leave the whole thing to my brother. I know he is an honourable man, a man who when he dies will in all probability distribute the property just as I should, and do it better than I can in my present condition, and I will remind him not to get into the same difficulty as I am in, and not to put it off too late," and accordingly he puts in: "You are an old man, and therefore do not delay this distribution." He is getting his brother to do that which he cannot do himself by putting his brother in the same position that he is in—namely, giving him absolute control and disposition over the property altogether. I think that is the true interpretation of the document, and, as I pointed out, I think in accepting those words and accepting

those directions Sir Crawford accepts them subject to the full power and limitation that there is in them, and that he takes therefore with absolute power to do anything that he likes with the property with, at the outside, a moral obligation which as an honourable man he would be likely to feel bound by, and which in point of fact I do not doubt in this case he did in fact feel bound by, an honourable obligation to regard those wishes expressed by his brother unless he saw reason to the contrary. As I illustrated the case yesterday, if any of those servants who were to have money had misbehaved themselves, he clearly would have had power, in my judgment, to say: "I do not think now my brother would if he were alive have given that man his 25*l.*, and I shall not give it." He clearly could do anything of that kind in the way it was left to him. That being my view of this case, it follows that the settlement that was made, although made in point of fact under a sense of moral obligation, was in point of fact a gift. The motive for making the gift does not at all affect the question of the thing being a gift. I think it was a gift, and I think it follows this particular duty in this particular case happens to be payable. If it was only substitution, it would have been paid if these instructions had gone into the will and been binding. The judgment will be therefore for the Crown. Judgment accordingly.

Solicitors: Solicitor of Inland Revenue; Gasquet and Metcalfe.

Tuesday, March 29.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.).

WIELAND (app.) v. BUTLER-HOGAN (resp.). (a)

Public health—Unsound meat—Meat going bad while stored—Meat not set out or offered for sale—"Intended for the food of man"—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 116, 117.

On a Monday morning, shortly after twelve o'clock at noon, an inspector of nuisances visited the shop where the appellant carried on the business of a butcher. The shop contained a safe which the inspector found closed. It was opened by him and found to contain some meat which showed signs of decomposition. Business was carried on at the appellant's shop up to midnight on the previous Saturday, when all the meat remaining unsold was placed in the safe, and was then sound and fit for the food of man. On the Monday in question the safe had not been opened after midnight on the previous Saturday until the inspector's visit, a period of thirty-six hours.

In the ordinary course of the appellant's business all the meat contained in the safe would have been examined before setting it out for sale, and any part found to have been unsound would have been removed.

Held, that there was no evidence that the meat was deposited on the appellant's premises for the purpose of sale and intended for the food of man.

Mallinson v. Carr (63 L. T. Rep. 459; 17 Cox C. C. 220; (1891) 1 Q. B. 48) distinguished.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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WIELAND (app.) v. BUTLER-HOGAN (resp.).

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CASE stated on an information preferred by the respondent against the appellant under the Public Health Act 1875 for that on the 12th Oct. 1903 certain meat in the possession of the appellant was deposited for the purpose of sale on his premises, and was intended for the food of man and was unsound.

The facts proved and admitted before the justices were as follows:

On Monday, the 12th Oct. 1903, shortly after twelve o'clock at noon, an inspector of nuisances for the district visited the shop where the appellant carried on the business of a butcher. One customer was present in the shop, which was being cleaned under the direction of the appellant's manager.

The shop contained a safe which the inspector found closed. It was opened by him and found to contain a large quantity of meat for the most part perfectly sound, but part of a neck of mutton weighing about 3lb., some sausages, and nine pieces of cooked meat in separate dishes showed signs of decomposition.

All these were seized by the inspector, and, after being submitted for inspection, were taken before and condemned by a justice on the same day as unsound and unfit for the food of man.

The meat condemned was unsound and unfit for the food of man at the time of seizure by reason only of decomposition or putrefaction.

Evidence on behalf of the appellant was adduced as follows:

Business was carried on at the appellant's shop up to midnight on the previous Saturday, when all the meat remaining unsold was placed in the safe, and was then sound and fit for the food of man.

The ordinary course of business at the appellant's shop was to devote the morning on Mondays, when very little trade takes place, to cleansing and preparatory work, and not to set out or examine the contents of the safe until the process is complete.

On the Monday in question the safe had not been opened after midnight on the previous Saturday until the inspector's visit, a period of thirty-six hours. Further, in the ordinary course of the appellant's business, all the meat contained in the safe would have been examined before setting it out for sale, and any part found to have been unsound would have been removed.

The justices were of opinion that the facts as above stated constituted an offence against sects. 116 and 117 of the Public Health Act 1875, and they convicted the appellant.

By the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 116:

Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal, carcass, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk exposed for sale or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal, carcass, meat, poultry, game, flesh, fish, fruit, vegetable, corn, bread, flour, or milk appears to such medical officer or inspector to be diseased or unsound or unwholesome, or unfit for the food of man, he may seize and carry away the same himself or by an assistant in order to have the same dealt with by a justice.

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And by sect. 117:

If it appears to the justice that any animal, carcass, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk so seized is diseased or unsound or unwholesome, or unfit for the food of man, he shall condemn the same and order it to be destroyed or so disposed of as to prevent it being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding 20l. for every animal, carcass, or fish, or piece of meat, flesh, or fish, or any poultry or game, or for the parcel of fruit, vegetables, corn, bread, or flour, or for the milk so condemned, or, at the discretion of the justice, without the infliction of a fine to imprisonment for a term of not more than three months. The justice who under this section is empowered to convict the offender may be either the justice who may have ordered the article to be disposed of or destroyed or any other justice having jurisdiction in the place.

Clarke Hall for the appellant.—The justices were wrong, for on the case as stated by them it is clear that this meat was not deposited for sale and intended for the food of man. [He referred to the corresponding provisions in the Public Health (London) Act 1891 (sect. 47).] In no sense could it be said that this meat was intended for the food of man, and it cannot be said that because meat goes bad on the premises before the person owning the premises has the opportunity of examining it, that constitutes an offence within the Public Health Act 1875. The facts in *Mallinson v. Carr* (63 L. T. Rep. 459; 17 Cox C. C. 220; (1891) 1 Q. B. 48) are very different from the present case, for there the defendant kept the meat on his premises after he knew it was unsound and unfit. Here there was no evidence that the appellant meant to keep the meat after he discovered it was bad; in fact, the evidence shows it would have been examined before he set it out.

R. Cunningham Glen for the respondent.—Under sects. 116 and 117 the onus is on the appellant. The intention was for the justices to consider, and, although they have set out in the case the evidence given by the appellant, the fact that they convicted him shows that they did not believe him. Here the seizure was not until twelve o'clock, and there was a customer in the shop. The conviction was therefore right.

Lord ALVERSTONE, C.J.—Of course if the argument put forward by Mr. Glen on behalf of the respondent is good on the case as it is stated, this conviction would have to stand. If the justices had only treated what they have set out in the case as evidence which they heard, but did not believe, he might be right; but I cannot think that the justices meant it to be understood that they did not believe the evidence given for the appellant. They say: "We were of opinion that the facts as above stated constituted an offence against the Public Health Act 1875, ss. 116, 117, and convicted the appellant." That statement, I think, shows that their findings amounted to that the meat had gone bad between Saturday and Monday, that the meat had not been dealt with up to the time on Monday when the inspector opened the safe, and that up to that time on the Monday the meat had not been handled or moved from the safe. That being so, I do not think that there was any evidence that meat in the

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possession of the appellant was deposited for the purpose of sale on his premises and was intended for the food of man in addition to being unsound. In *Mallinson v. Carr* (63 L. T. Rep. 459; 17 Cox C. C. 220; (1891) 1 Q. B. 48) the decision turned on the fact that the respondent had retained the meat on his premises after he knew that it was unsound and unfit. I think the justices here were wrong, and the appeal must be allowed.

DARLING, J.—I am of the same opinion. What the magistrates had to consider here was whether the meat was deposited for the purpose of sale on the premises, and was it intended for the food of man. The evidence given, and which we must take the magistrates believed, shows that it was not intended for the food of man, for they say: "In the ordinary course of appellant's business all the meat contained in the safe would have been examined before setting it out for sale, and any part found to have been unsound would have been removed." That shows the meat was not exposed in the business at all, and the evidence amounted to that, whatever the condition of the meat was at the time the safe was opened, at that time it was not intended for the food of man, for it would have had to have been examined first.

CHANNELL, J.—I agree.

Appeal allowed.

Solicitors: *W. T. Ricketts and Son; F. Shelton.*

ERRATA.—*Hewman and Co. v. Duckworth*.—At page 546 (ante), 2nd col., line 37, for "by" read "for," and in line 39 for "for" read "by."

Supreme Court of Judicature.

COURT OF APPEAL.

April 12 and 13.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

MARKS v. SAMUEL. (a)

APPLICATION FOR NEW TRIAL.

Slander—Accusation of bringing "blackmailing" action—Imputation of criminal offence—Action for slander maintainable.

An action for slander founded upon an accusation that the plaintiff had brought a "blackmailing" action was held to be maintainable on the ground that the words spoken might fairly be interpreted by hearers as imputing to the plaintiff an indictable offence.

THE plaintiff, Arnold Jacobs Marks, who carried on business as a director of a public company, brought an action against the defendant, Henry Samuel, who also carried on business as a director of a public company, for an alleged slander.

The plaintiff alleged, by his statement of claim, that the defendant, at a meeting of the shareholders of a gold-mining company, stated that his counsel had accused the plaintiff of bringing a "blackmailing" action. The plaintiff alleged that the defendant had originated the slander himself.

By his defence the defendant pleaded that the occasion on which the alleged words were spoken was privileged, the words having been spoken *bonâ fide* and without malice, and were themselves privileged by reason of their being spoken at a meeting of the shareholders of a company, at which both the plaintiff and the defendant were present as shareholders, and were spoken for the purpose of vindicating the defendant's character against an attack by the plaintiff, and in reasonable and necessary self-defence.

At the trial of the action in Nov. 1903, before Grantbarn, J. and a special jury, the jury stopped the case, and judgment was entered for the defendant.

Thereupon the plaintiff applied for a new trial of the action or that judgment might be entered for him.

Bray, K.C. and P. Rose Innes, for the plaintiff, supported the application.

Rufus Isaacs, K.C. and A. Neilson, for the defendant, contended that the action was not maintainable at all, the words alleged to have been used not being actionable; that it was not suggested that anything was said with reference to the plaintiff's trade or calling; that the bringing of a "blackmailing" action was not a criminal offence, anyone being entitled to bring an action, however unfounded it might be; and that in the absence of special damage (which was not alleged) there was no cause of action.

Bray, K.C., in reply, contended that when a "blackmailing" action was spoken of any listener would naturally draw the deduction that the plaintiff was accused of being a "black-mailer"—imputing to him an indictable offence—which was actionable; and that therefore the mode in which the words would have been understood by a bystander had to be considered.

WILLIAMS, L.J.—On the whole, we think that there must be a new trial here. I will deal first with the point that was made by Mr. Rufus Isaacs. He, of course, was right in his submission that, unless this statement of claim is a statement of claim in which the alleged slander imputed or might impute a criminal offence, this action fails. There is no special damage alleged, and it is not a case in which there is any imputation of professional misconduct at all, or misconduct by a tradesman in his trade, or anything of that sort. It is just one of those cases in which spoken words are not actionable unless they are spoken words which impute or might impute a crime in the opinion of the tribunal which ultimately deals with the matter. If they appear to have been words not necessarily which were intended by the speaker to impute a crime, but which the hearers might understand as imputing a crime, they may be actionable. Now, the words, as set forth in the second paragraph of the statement of claim, are these: "On the 30th May 1902, at a meeting of shareholders of the Elandsfontein No. 2 Gold Mining Company, held on such date at the Institute of Accountants, Moorgate-street, E.C., the defendant falsely and maliciously spoke and published of and concerning the plaintiff the following words: 'On that occasion (meaning upon the hearing of certain arbitration proceedings arising out of the said action in the Mayor's Court) Mr. Marks (meaning the plaintiff) was taxed with having brought

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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a blackmailing action (meaning the said action in the Mayor's Court) against me. He was awfully indignant about it, and wanted to know if it was by instructions of mine that my counsel accused him (meaning the plaintiff) of having brought a blackmailing action. My counsel said it was upon his (meaning the plaintiff) own evidence." Now, the next paragraph, No. 3, contains the innuendo. But I will first say a word upon the matter, without any reference to the innuendo at all. I am not at all prepared to say that even without any innuendo it would be right to say that these words actually used could not be reasonably understood by the hearers as imputing to the plaintiff a criminal offence. I mean by that a criminal offence in making a claim, supporting it by an action, and supporting it in that action by criminal means—that is to say, either by false evidence given by the plaintiff himself, or by false evidence obtained by him for the purpose of the action. If there was such an action brought and thus supported, it seems to me that it would be a blackmailing action, and a blackmailing action brought by such means and in such manner as to constitute an indictable offence. When one comes to look at the third paragraph of the statement of claim and see what the innuendo is, that paragraph confirms what I have said, because the meaning which it is suggested that these words conveyed to the hearers is very much the same as that which I have just stated; and, as it seems to me, the words might reasonably have been understood to mean by the hearers that which I have just stated. The words of the innuendo are as follows: "The meaning of the said words was that the plaintiff was a blackmailer and had brought an unfounded action against the defendant, had been guilty of an indictable offence or offences, and of endeavouring to obtain moneys by means of threats from the defendant, and was further guilty of a misdemeanour in supporting his claim by giving false evidence, and had so admitted in his evidence given upon oath before the said court." Now, taking those last words, "And was further guilty of a misdemeanour in supporting his claim by giving false evidence, and had so admitted in his evidence given upon oath before the said court," I think that the hearers might well have understood that that was the imputation which was being made by Mr. Samuel upon Mr. Marks, especially when one has regard to the concluding words of par. 2 complained of: "My counsel said it was upon his (meaning the plaintiff's) own evidence." It certainly suggests there that that evidence was untrue evidence given on oath by the plaintiff. Now, having said that, I have pointed out that we should not refuse a new trial upon this point taken by Mr. Isaacs, and I now proceed to deal with the reasons why I think that there ought to be a new trial here. I have no doubt but that in this action Grantham, J. did not for one moment intend to tell the jury that if they arrived at the conclusion that it was a case in which the plaintiff and the defendant respectively were abusing one another, and that the plaintiff was the beginner, there was an end of the action. I do not think that the learned judge meant to tell the jury anything of the sort. But unfortunately the learned judge did not, in my opinion, explain to the jury what were the issues

which they really had to try in the action. It seems to me that if he left matters with the jury in such a way that they might very well have supposed that if they thought this was a case of cross imputations, made by the plaintiff and the defendant one against the other at a public meeting, no action would lie, and that it did not matter whether the imputations made by the defendant and the plaintiff were true or were false. I cannot help saying that the jury may very well have thought that this was the view of the law intended to be put before them by the learned judge. The learned judge did not in fact explain to them at all what the issues were. More than once in the course of the trial when the plaintiff wished to bring before the court and jury what happened at the arbitration at which this imputation was first made, for the purpose of showing that there could be no ground whatsoever for the defendant believing in the truth of any such allegation as that this was a blackmailing action or an action brought by the plaintiff which he supported by false evidence, the learned judge told the jury that he thought these matters ought not to be gone into, and refused to allow the plaintiff to go into the matters any further. The learned judge pointed out that that which the defendant alleged—that is, that his counsel had said this and said that—was perfectly true. It seems to me that there again, although the learned judge knew himself perfectly well what the issues were and what was relevant and what was not, the jury may very well have supposed that the learned judge thought the evidence showed that the defendant could not possibly have believed in the truth of the statements he made which were complained of by the plaintiff. Under these circumstances it seems to me that, although the jury practically on the invitation of the learned judge stopped the case, yet we ought not to allow this verdict to stand. The result is there will be a new trial. The costs of this application and in the court below will abide the result of the new trial.

STIRLING, L.J.—I am of the same opinion. In the first place, as regards the point that was raised by Mr. Rufus Isaacs that the action was not maintainable at all, it seems to me that that cannot be relied on. It is impossible, I think, to come to the conclusion that the words set out in the second paragraph of the statement of claim were not such as the persons hearing them might fairly interpret as imputing an indictable offence to the plaintiff. If that be so, the action is maintainable, and the question must be asked of the jury as to the sense and meaning which ought to have been put upon them. Therefore the question comes to this, whether there ought to be a new trial. Upon that, I agree with what my Lord has said. I think that the jury in this case acted upon the suggestion which was made by the learned judge in the court below, that it was merely a case of recriminations between two persons, who neither of them exactly meant what they said. It is a misfortune, it seems to me, that the learned judge did not explain, as he naturally would have done if he had given a more formal summing up, the issues which the jury were called upon to try, and ask them for a formal verdict. I agree with what my Lord has said, that, under the circumstances, the

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best course is for the case to go back and be tried out.

COZENS-HARDY, L.J.—I agree, and I have nothing to add.

Application allowed.

Solicitors for the plaintiff, *Morris, Coode, and Co.*

Solicitors for the defendant, *Dale, Newman, and Hood.*

Tuesday, April 19.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

HAMILTON v. SEAL. (a)

APPLICATION FOR NEW TRIAL.

Practice—Costs—Application for judgment or new trial—Costs of successful applicant—Discretion of court.

Where an application is made to the Court of Appeal for judgment or a new trial on appeal from a judgment and verdict at a trial before a judge and jury, on the ground of misdirection or otherwise, and such application is opposed by the other side, but a new trial is granted, although there is no absolute rule applicable to all such cases, and the court has a discretion either to give or refrain from giving, or to reserve the costs of the successful application to abide the result of the new trial, yet, in the absence of special circumstances, *prima facie* the costs of the successful application ought to be borne by the party who opposed it.

The order made in *Bray v. Ford* (73 L. T. Rep. 609; (1896) A. C. 44) is not to be considered as an order laying down any general rule upon the point, but merely as an order in that particular case.

AN application was made by the defendant in this action for judgment or new trial, on appeal from a verdict and judgment at the trial of the action before Grantham, J. and a special jury, the ground of the application being that there had been a misdirection by the learned judge.

The court having ordered a new trial, the question arose whether the costs of the successful application ought to abide the result of the new trial, or whether the defendant ought to have his costs in any event.

Scott Fox, K.C. and Thorn Drury for the defendant.—Although an order was made in *Bray v. Ford* (73 L. T. Rep. 609; (1892) A. C. 44) that the costs of the application there to the Court of Appeal for a new trial ought to abide the result of the new trial, yet there is no general rule to that effect. And in *Fletcher v. London and North-Western Railway* (65 L. T. Rep. 605; (1892) 1 Q. B. 122) the application for a new trial was allowed with costs.

Kemp, K.C. and F. M. Abrahams, for the plaintiff, *contra*.—[VAUGHAN WILLIAMS, L.J.—It is stated in the Annual Practice 1904, p. 548, that where the new trial is granted on the ground of misdirection the court will, as a general rule, order the costs of the application to abide the event of the new trial, and *Bray v. Ford* (*ubi sup.*) and *Jones v. Richards* (15 Times L. Rep. 398) are referred to. There is no reason for

departing from the rule here, if there is any general rule. We will consult our colleagues as to what is the general rule.]

VAUGHAN WILLIAMS, L.J.—We have consulted with the other members of the court, and it seems that in practice the order that was made in *Bray v. Ford* (73 L. T. Rep. 609; (1896) A. C. 44) in the House of Lords has not been considered as an order laying down any general rule, but merely as an order made in that particular case. Beyond that, it seems that the Court of Appeal has, in dealing with these common law cases, generally dealt with them upon the basis that there is no absolute rule applicable in all cases, but the court has a discretion, and that it will in the exercise of its discretion either give or refrain from giving or reserve the costs. We have to exercise that discretion to-day; and, speaking for myself, although I cannot find that there is any general rule which is to be applied in these cases, I am entitled to say, and I do say, that, so far as I am concerned, in the absence of special circumstances in any particular case, if there is an appeal which asks for a new trial, and that is successful, then in my judgment, if the other side has opposed the granting of the new trial, the costs of the successful appeal ought *prima facie* to be borne by those who opposed it quite irrespective of the results. That is my view, and, in the absence of any rule to the contrary, I shall act upon it. In this case there has been an application for a new trial, and a new trial has been granted. It was opposed; and the party who moved for it, and obtained it notwithstanding the opposition, should have his costs. The defendant, therefore, must have his costs of the application. The costs of the first trial must abide the result of the second trial subject to any direction which may be given by the judge.

STIRLING and COZENS-HARDY, L.JJ. concurred.

Application allowed.

Solicitors for the applicant, *Seal and Edgelow*.
Solicitor for the respondent, *H. Ellis*.

Tuesday, March 29.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re CARR'S TRUSTS; CARR v. CARR. (a)

APPEAL FROM THE CHANCERY DIVISION.

Lunatic—Application of property for maintenance of—Jurisdiction of Chancery Division—Lunacy Act 1890 (53 & 54 Vict. c. 5), s. 116.

Where a person of unsound mind not so found, who was detained in an asylum abroad, was absolutely entitled to certain trust property in this country, and directions were desired as to her maintenance thereout, the Court of Appeal (acting under the jurisdiction in Chancery), upon an undertaking by the trustees to bring the trust property into court, ordered that the interest thereof should, during the lifetime of the lunatic, or until further order, be paid to the lunatic's sister, who was one of the trustees, she undertaking to apply the same for the maintenance of the lunatic.

Decision of Joyce, J. reversed.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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By a marriage settlement, dated the 10th June 1829, the survivor of the husband and wife was empowered to appoint the trust funds by will among the children of the marriage.

On the 21st Dec. 1859 the wife died.

By his will, dated the 24th April 1880, the husband appointed that the trustees of the settlement should stand possessed of the trust funds upon trust as to the sum of 4500*l.* for his daughter Caroline Emily Carr, subject, however, to the following proviso, that the trustees should stand possessed of the sum of 4500*l.* thereinbefore appointed to the testator's daughter upon trust for investment as therein mentioned, and should during the period of twenty-one years from the testator's death apply the income of the sum of 4500*l.* or of the investments thereof for the benefit of his daughter in such manner as the trustees should in their or his discretion think fit, his intent and meaning being that the trustees should have absolute discretion either to apply the income of the sum of 4500*l.* or any part thereof immediately for the purposes aforesaid, or pay the same or any part thereof at such times and in such manner and way as they might think fit into the hands of the daughter, if they in their uncontrolled judgment were of opinion that the daughter was able to manage her own affairs.

On the 10th Dec. 1882 the testator died.

Caroline Emily Carr was a person of unsound mind, not so found by inquisition. In 1878 she had been placed by her father in an institution for persons of unsound mind in Germany, pursuant to a certificate duly signed by a physician, and she had been detained there ever since.

The trustees of the settlement had applied the whole of the income (except a sum of 164*l.* 18*s.* 5*d.*) of the investments representing the 4500*l.*—which now consisted partly of India Stock and partly of a mortgage—in the maintenance and for the benefit of Caroline Emily Carr during the period of twenty-one years from the death of her father, the testator.

The period of twenty-one years having expired, an originating summons was taken out on behalf of Caroline Emily Carr by a next friend against the trustees of the settlement and a son of the testator (as representing the persons who might ultimately be entitled to the fund on one possible construction of the settlement and will), asking for a declaration that she was absolutely entitled to the fund and for directions as to her maintenance out of the income, and as to the application of the residue of the income and of so much (if any) of the capital as the court should think fit for her comfort and benefit.

The summons also asked that, if necessary, the trusts, so far as regarded the 4500*l.*, might be administered by the court.

There was evidence of the unsoundness of mind of Caroline Emily Carr, and that she was not likely to recover. There was also evidence to the effect that personal service upon her of a summons or other proceedings in Lunacy would cause violent excitement and inflict upon her deep and enduring distress; and that, if the names of her sisters and the next friend, or any of them, appeared on any such proceedings, her excitement and distress would be intensified, and she would begin to distrust them, and the consequences would be most disastrous so far as her

health and peace of mind and comfort were concerned.

The summons came on to be heard before Joyce, J. sitting in chambers, when his Lordship made a declaration that, according to the true construction of the settlement and will, Caroline Emily Carr was absolutely entitled to the trust fund, but the learned judge, being of opinion that, having regard to sect. 116 of the Lunacy Act 1890, the application for maintenance would more properly be dealt with under the jurisdiction in Lunacy, did not think fit to make any order with respect thereto, except to sanction the payment of a sum of 39*l.* made by the trustees for that purpose.

From that decision Caroline Emily Carr by her next friend now appealed.

Micklem, K.C. (with him Harry Greenwood) for the appellant.—It is most desirable that if possible no service in Lunacy should be made upon this lady, as the evidence shows she would be seriously disturbed if she became aware that proceedings under that jurisdiction were being taken on her behalf. If, as I submit, the Chancery Division has jurisdiction to make the order now asked for, and the lady could thus be saved the service in Lunacy, the case is an exceptionally proper one for the exercise of that jurisdiction, and it would be of immense advantage to her. The court will be in effect administering the trusts. A person lawfully detained out of England as a lunatic is not a person "lawfully detained as a lunatic" within sect. 116, subsect. 1 (c), of the Lunacy Act 1890:

Re Watkins, 74 L. T. Rep. 504; (1896) 2 Ch. 336.

In that case Lindley, L.J. suggested the proper method of getting over the difficulty which occurred there. The jurisdiction of the Chancery Division is clear from several cases. The most recent is

Re Tuer's Will Trusts, 54 L. T. Rep. 910; 32 Ch. Div. 39.

Earlier cases were

Re Brandon's Trusts, 41 L. T. Rep. 755; 13 Ch. Div. 773;

Vane v. Vane, 34 L. T. Rep. 477; 2 Ch. Div. 124.

Re Bligh, 41 L. T. Rep. 570; 12 Ch. Div. 364.

In an unreported case very similar to the present, which came recently before Kekewich, J., that learned judge made an order such as is asked for here. But Joyce, J. declined to follow that case for the reason that he was of opinion that the application for maintenance would more properly be made under the jurisdiction in Lunacy. [VAUGHAN WILLIAMS, L.J. referred to *Re Barlow's Will* (57 L. T. Rep. 95; 36 Ch. Div. 287), which case, his Lordship remarked, had been discussed very recently and distinguished in *Didisheim v. London and Westminster Bank* (82 L. T. Rep. 733; (1900) 2 Ch. 15).]

L. F. Potts, for the respondents, the trustees of the settlement, referred to

New York Security and Trust Company v. Keyser, 84 L. T. Rep. 43; (1901) 1 Ch. 666.

The COURT (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.), without delivering any formal judgments, ordered that the order of Joyce, J. should be discharged so far as it declined to give any directions for the maintenance, comfort, and benefit of Caroline Emily

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Carr. And the trustees by their counsel undertaking to transfer into court the India Stock, and to deposit in court the mortgage deed and other title deeds in their hands relating to the mortgage security, and Mary Eleanor Carr, a sister of Caroline Emily Carr (who was one of the trustees), undertaking to apply the money to be received by her under this order and the schedule thereto for the maintenance, comfort, and benefit of Caroline Emily Carr, it was ordered that the trustees do pay to Mary Eleanor Carr the balance of income in their hands up to the date of transfer, and the future income from the mortgage as and when the same should be received by them until further order. General liberty to apply was reserved. The schedule directed that the interest as it accrued upon the stock during the life of Caroline Emily Carr or until further order should be paid to Mary Eleanor Carr.

Appeal allowed.

Solicitors for all parties, Carr, Scott, Smith, and Gorringe.

Nov. 20, 21, 23, 24, 1903, and Feb. 22, 1904.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

Re BEAUCHAMP; Ex parte BEAUCHAMP. (a)

APPEAL IN BANKRUPTCY.

Bankruptcy — Bankruptcy notice — Address of creditor — Power of Court of Bankruptcy to go behind judgment — Form of judgment — Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g), s. 7, sub-s. 3 — Bankruptcy Rules 1886 to 1890, Appendix, form 6.

The fact that a judgment may be irregular or wrong in form is not a sufficient reason for the Court in Bankruptcy to exercise its power to go behind the judgment. The judgment is conclusive unless the consideration can be questioned.

It is not sufficient for a creditor who issues a bankruptcy notice to give in the notice an address at which he can be heard of; it must be an address at which the debt can be paid or secured or compounded for, and of a place at which the creditor is to be found during the seven days limited by the notice, whether the address is of the residence or place of business of the creditor.

If the address given in the notice is such an address at the date of the service of the notice, the occasional absence of the creditor from the place, even for a whole day, will not render the notice inefficient, unless the absence is such as to deprive the debtor of a reasonable opportunity of paying or securing or compounding for the sum due.

It would not make any difference that the address was the temporary home of the creditor, who had no permanent home; or that his absence occurred on the last day of the seven.

But if the creditor, after the service of the notice, abandons his place of address, so that it ceases to be a place where at reasonable times he, or some authorised agent on his behalf, can be found to receive payment of the debt, or to deal with the question of security, the bankruptcy notice will cease to be efficient.

(a) Reported by W. O. BISS, Esq., Barrister-at-Law.

Re Stogdon (73 L. T. Rep. 279; (1895) 2 Q. B. 534) considered.

In July 1901 an action for libel was commenced, the defendant being described in the writ and the pleadings as "a married woman." At that date a decree nisi had been made for the dissolution of the defendant's marriage, and in Nov. 1901 the decree was made absolute.

On the 30th Oct. 1902 the libel action was tried, and a verdict was found for the plaintiff with 5000l. damages, and judgment was entered accordingly.

In June 1903, on the application of the defendant, the Court of Appeal ordered a new trial unless the plaintiff consented to the damages being reduced to 1500l. The plaintiff consented, and the judgment was on the 19th July amended accordingly, but the date of the 30th Oct. was not altered. The judgment as drawn up was in the ordinary form of a judgment against an unmarried woman.

The 1500l. not having been paid, the plaintiff, on the 28th July, served a bankruptcy notice on the defendant claiming payment of the 1500l., with interest from the 30th Oct. 1902, the address of the creditor being given at an hotel in London, where she was then staying, and where she was in the habit of staying, but she did not permanently retain a room there.

On the 4th Aug., the last of the seven days limited for compliance with the notice, the creditor left the hotel at 10.15 a.m., leaving no address. She went to Newhaven and thence to France, and did not return to England till the end of September.

The debtor not having complied with the bankruptcy notice, on the 24th Aug. the creditor presented a bankruptcy petition against her, and a receiving order was made.

Held, that, as at the date of the trial the defendant had been divorced and a judgment could have been obtained against her creating a personal debt, the fact that she was described in the writ and pleadings as a married woman, and the judgment was drawn up in the form applicable to an unmarried woman, was a matter of form only, and the Court of Bankruptcy had no power to go behind the judgment.

Held also, that an objection that interest was claimed from the 30th Oct. 1902 instead of the 19th July 1903 was concluded by the judgment.

Held also, that the address given in the notice was sufficient, and that the creditor did not abandon it when she left the hotel.

APPEAL by the debtor against a receiving order in bankruptcy made against her by Mr. Registrar Giffard on the petition of Mrs. Watt.

On the 7th May 1901 a decree nisi was made for the dissolution of debtor's marriage on the ground of her adultery with Mr. Watt.

On the 25th July 1901 Mrs. Watt commenced an action against the debtor for libel, and in the writ and pleadings the defendant was described as "a married woman."

On the 25th Nov. 1901 the decree nisi was made absolute.

On the 30th Oct. 1901 the trial of the libel action took place and the jury found a verdict for the plaintiff with 5000l. damages, and judgment was given accordingly. The judgment as entered was headed with the title of the action, in which

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the defendant was described as "a married woman," and it was adjudged "that the plaintiff recover against the defendant 5000*l.* and her costs to be taxed."

An application was made by the defendant to the Court of Appeal for a new trial on the ground (*inter alia*) that the damages were excessive, and on the 17th June 1903 the Court of Appeal ordered that there should be a new trial unless the plaintiff would consent to the damages being reduced to 1500*l.* The plaintiff having consented, the judgment was amended by substituting 1500*l.* for 5000*l.*, the original date of the judgment, the 30th Oct. 1902, not being altered.

The judgment as drawn up was in the usual form of a judgment against an unmarried woman, and not in the form of a judgment against a married woman in respect of her separate estate as settled by the Court of Appeal in *Scott v. Morley* (57 L. T. Rep. 919; 20 Q. B. Div. 120).

An appeal by the debtor to the House of Lords against this judgment was pending.

The 1500*l.* was not paid, and on the 28th July the plaintiff served a bankruptcy notice on the defendant in form No. 6 of the Bankruptcy Rules 1886 and describing the debtor as unmarried, requiring payment of the sum of 1769*l.* 10*s.* 9*d.* as the amount due for principal, interest, and costs on a final judgment obtained by her against the debtor in the King's Bench Division, dated the 30th Oct. 1902, amended by order of the Court of Appeal dated the 17th June 1903. Interest was claimed from the 30th Oct. 1902.

In the notice the plaintiff was described as "of Hans-crescent Hotel, in the county of London." She was at that time staying at the hotel, and was in the habit of staying there whenever she came to London, but she did not continuously keep a room there.

On the morning of the 4th Aug. 1903, the last of the seven days limited by the bankruptcy notice, the plaintiff left the hotel at 10.15 in a motor-car and went to Newhaven and thence to Dieppe, leaving no address, though she had told her solicitors where she was going. She did not return to England until the end of September.

The defendant not having complied with the bankruptcy notice, the plaintiff, on the 24th Aug. 1903, presented a bankruptcy petition against her, and on the 31st Oct. a receiving order was made, and the debtor appealed.

Herbert Reed, K.C. and *Frank Mellor* for the appellant.—The creditor of a married woman has now two rights if she commits a tort. He can bring an action against her alone under sect. 1, sub-sect. 2, of the Married Women's Property Act 1882, when only her separate estate will be affected, or he can bring an action in the ordinary way against both husband and wife:

Seroka v. Kattenburg, 54 L. T. Rep. 649; 17 Q. B. Div. 177;

Earle v. Kingscote, 83 L. T. Rep. 377; (1900) 2 Ch. 585.

Here the action was brought against the married woman alone, seeking to make her liable as to her separate estate, and it is not competent for the plaintiff to make her a bankrupt, as she has sued her in respect of her separate property. A married woman cannot be committed for her default in paying a sum for which judgment has been recovered against her by virtue of sect. 1,

sub-sect. 2, of the Married Women's Property Act 1882. That Act only makes the separate estate of the married woman the debtor, not the married woman herself:

Scott v. Morley, 57 L. T. Rep. 919; 20 Q. B. Div. 120.

The only judgment, therefore, to which the plaintiff was entitled was one in the form settled in *Scott v. Morley* (*ubi sup.*). The fact that a judgment is useless in that form is no reason for altering it:

Softlaw v. Welch, 81 L. T. Rep. 64; (1899) 2 Q. B. 419, 424.

A married woman cannot be made a bankrupt on a judgment in the form in *Scott v. Morley* (*ubi sup.*), and, whatever the form of the judgment against her may be, it can only have the effect of a judgment against her separate estate:

Re Lynes, 68 L. T. Rep. 739; (1893) 2 Q. B. 113;
Re Frances Handford and Co., 80 L. T. Rep. 125;
(1899) 1 Q. B. 366, 570.

No distinction is drawn in *Scott v. Morley* (*ubi sup.*) between an action in contract and in tort. Before the passing of the Married Women's Property Act 1882 it had been held that a married woman was not personally liable in an action in contract or in tort, her separate estate being alone liable:

Wainford v. Heyl, 33 L. T. Rep. 155; L. Rep. 20 Eq. 321, 324.

This judgment is in the ordinary form of a judgment against an unmarried woman, although it is against a defendant described in the action as a married woman. It is therefore wrong in form, and the plaintiff is not entitled to proceed under it. The Court of Bankruptcy can go behind a judgment and inquire whether there is a liability on which a bankruptcy petition can be founded. The fact that the defendant became discover after the commencement of the action makes no difference, as the object of the action when commenced was to bind her separate estate. On the application for a new trial the only questions for the Court of Appeal were whether the judge had misdirected the jury and whether the damages were excessive; the form of the judgment was not before the court. The judgment can only take effect under the Married Women's Property Act, and therefore a *fi. fa.* could not issue upon it. A further objection to the receiving order is that interest is claimed on the 1500*l.* from the 30th Oct. 1902, the date of the judgment in the action, but there was no judgment for 1500*l.* until the 19th July, when the judgment was altered by the master. The 1500*l.* is claimed under the judgment of the Court of Appeal. The plaintiff did not at once consent to the reduction of the damages, and pending her consent there was no judgment. There was no antecedent debt as in *Fisher v. Dudding* (3 Man. & G. 238). A further objection is that the creditor was not at the address given in the bankruptcy notice for the seven days from the service of the notice. If the debtor late on the seventh day had desired to pay the debt she would not have found the creditor there, and would not have been able to discover where the creditor was. The nonpayment of the debt, therefore, within the seven days did not constitute an act of bankruptcy:

Re Stogden, 73 L. T. Rep. 279; (1895) 2 Q. B. 534.

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It is not sufficient that the creditor could have communicated with the creditor's solicitor. When the creditor left the hotel she must be taken to have abandoned her temporary residence there.

Muir Mackenzie, for the creditor, was called on with reference to the last point only.—If there has been any irregularity it has caused no injustice, and therefore the proceedings are not invalid:

Bankruptcy Act 1883, s. 143.

There is no provision in the Act that the address of the creditor must be stated in the bankruptcy notice; it is only contained in form No. 6 in the appendix to the Bankruptcy Rules. The objection is technical, and ought not to succeed when no injury has resulted to the debtor. She has not been in any way prejudiced or misled, and made no attempt to pay, secure, or compound for the debt:

Re Murrieta, 3 Man. 35, 39;

Re Low; *Ex parte Gibson*, 72 L. T. Rep. 450; (1895) 1 Q. B. 734.

The address given in *Re Stogden* (*ubi sup.*) was really no address at all. The creditor did not reside at the club he gave as his address, and was out of England during the whole of the seven days limited by the notice for the payment of the debt. Here the address given was the only permanent address the creditor had, and she left the address to which she was going with her solicitors. She was at the address for a reasonable time, and was not bound to be there for the whole of the seven days.

Reed, K.C. in reply.—This is not a technical objection; it may be of great importance to the debtor to be able to find the creditor on the last of the seven days. In *Re Howes* (67 L. T. Rep. 213; (1892) 2 Q. B. 628) Bowen, L.J. said: "Bankruptcy proceedings are of a peculiar character. They involve quasi penal consequences to the debtor, and it is essential that all those forms, the object of which is to prevent injustice, should be strictly followed." The onus is on the creditor to show he has complied with the forms and the substance of the Act and rules. The address must be the true address—that is, one at which the creditor can be ordinarily found, not merely heard of. If a London man having a shooting box in Scotland, which he only visited during the shooting season, gave that as his address in a bankruptcy notice it would not be sufficient. The address must be one at which the creditor is personally present, or at which, if he is absent, the creditor can ascertain the time of his return or present whereabouts. It must be an effective address, not only at the date of the issue of the notice, but also at the date of the service, and during the whole of the seven days.

Cur. adv. vult.

Feb. 22.—VAUGHAN WILLIAMS, L.J. read the judgment of the court as follows:—This is an appeal against a receiving order made against a divorced wife, who at the time of the making of the order was a single woman. The objections raised are three. First, that there is no judgment debt effectual as against the Court of Bankruptcy, which does not regard estoppel binding the debtor, but has a right to inquire into the real debt. Secondly, it is objected that there is no act of bankruptcy, because the act of bankruptcy

relied on, which is failure to comply with a bankruptcy notice, is invalidated by the fact, as alleged, that the notice contained no such address of the judgment creditor as was intended by the Act should be given. Thirdly, it was objected that the bankruptcy notice was bad, because the amount of the judgment as therein stated was wrong by reason of including interest prior to the date when the Court of Appeal amended the judgment by reducing the damages from 5000*l.* to 1500*l.* As to the first point, undoubtedly the Court of Bankruptcy has the power on the hearing of a bankruptcy petition to go behind the judgment and to inquire into the consideration for the judgment debt, not only at the instance of the trustee, but also at the instance of the judgment debtor himself. This power is founded on sect. 7, sub-sect. 3, of the Bankruptcy Act 1883, which gives the Court of Bankruptcy, on the hearing of a bankruptcy petition, a discretion for "any sufficient cause" to dismiss the petition. But, in my judgment, the fact that the judgment may be irregular or wrong in form is no sufficient reason for going behind the judgment and dismissing the petition. The action in the present case is an action for a tort committed by a woman during coverture; it is for a libel published by her while she was a married woman. Now, by the common law, independently of the Married Women's Property Act 1882, a married woman was liable to be sued for a wrong committed by her, and the husband, strictly speaking, was not liable to be sued at all for such tort. His only liability was to be sued jointly with her, because of the universal rule that the wife during coverture cannot be either a sole plaintiff or a sole defendant; and it was decided in *Capel v. Powell* (11 L. T. Rep. 421; 17 C. B. N. S. 743) that a husband who has obtained a divorce is not liable to be joined in an action of tort for a tort committed by his wife during coverture. It is manifest, therefore, that in the present case, in which the defendant at the date of the trial and judgment had been divorced, she alone remained liable for the tort, and the amendments, if any, which were required in the writ or pleadings went merely to the form and not to the substance of the cause of action. The case is very different from the case of a breach of a contract entered into by a wife during coverture. In such a case coverture is a plea in bar and not in abatement, and the cause of action given by the Married Women's Property Act 1882 and the remedy thereon are new, being created by Act of Parliament; whence it follows that, if the husband dies or obtains a divorce, this will not affect the statutory cause of action or the remedy thereof, but the remedy will remain a remedy against the wife's separate property, and the judgment in such an action will not create a personal debt from her, and therefore will not support a bankruptcy notice under the Bankruptcy Act 1883, s. 4, sub-s. 1 (g). It is true that in the present case we have not to deal with the setting aside of a bankruptcy notice, because the judgment in form creates a personal debt; but if in substance the action had been one in which no judgment could have been obtained creating a personal debt by the wife, I am disposed to think there would have been sufficient cause to dismiss the petition. But in the present case no such question arises. It is

plain that the objection to the judgment, if any, is one of form only, and that the power of the Court of Bankruptcy to go behind a judgment is a power to inquire into the consideration and not into the form of the judgment. The judgment, to my mind, is conclusive unless the consideration can be questioned. The first objection therefore fails. The third objection—that is to say, the “interest” objection—is also concluded by the judgment. The Court of Bankruptcy cannot, I think, question the discretion of the court in such a matter. The only remaining objection is the objection founded on the insufficiency of the address given by the judgment creditor in the bankruptcy notice. The objection is based upon the judgments of the Court of Appeal in *Re Stogdon* (*ubi sup.*). Now in that case the judgment creditor, who was out of England at the time the notice was served, and so continued during the seven days that it was running, inserted in the bankruptcy notice as his address “White’s Club, St. James’, S.W.”; and the Court of Appeal decided that the bankruptcy notice was bad, holding that the notice must describe the creditor as of an address where the sum claimed can be paid to him or secured or compounded for, not merely where he could be heard of, and that the address of “White’s Club” was not under the circumstances such an address; and the question which we have now to decide is whether the address given by Mrs. Watt is such an address as is required by the Act, having regard to the decision in *Re Stogdon*. Now, what are the facts? Mrs. Watt appears to have been in the habit for some time of staying at the Hans-crescent Hotel whenever she came to London, but she did not continuously keep a room there. Sometimes she left an address to which her letters could be sent, sometimes she did not. At the date of the issue of the bankruptcy notice she was not in fact at the Hans-crescent Hotel; she seems to have come there on the evening of the 28th July, so that the seven days mentioned in the notice would not run out till the end of the 4th Aug. She left the hotel on the morning of the 4th Aug. in a motor-car, and went to Newhaven and thence to Dieppe; she did not return to England till the end of September, and she went on the 30th Sept. to the Hans-crescent Hotel. She left on the 4th Aug. no address to which her letters could be sent, and in fact they were not sent after her. In order to see whether this address fulfils the conditions laid down in *Re Stogdon*, one must ascertain what is the principle of that decision; and it is the more necessary to do so because it will govern the practice of the Bankruptcy Court hereafter. It is plain that it is not sufficient for the creditor merely to give an address where he can be heard of, but it must be an address where he can be paid, or where by agreement the debt can be secured or compounded. Now what does this mean? Suppose a creditor gives as his address his home where he permanently lives. Is he bound to remain at home all day, or never go out without leaving word where he proposes to go, but, for the matter of that, might not succeed in going? This is impossible. What then are the necessary conditions of the address? I think that the address must be of a place where the creditor is to be found during the seven days, and this is so whether such address is of the residence or of the place of business of the

creditor; and I think that, if the address given in the bankruptcy notice is such an address at the date of the service of the notice, occasional absence of the creditor from such place, even for a whole day, will not render the bankruptcy notice inefficient, unless the absence is such as to deprive the debtor of a reasonable opportunity of paying or securing or compounding for the sum due according to the terms of the notice. And I do not think that it would make any difference that the address was the temporary home of the creditor who happened to have no permanent home, or that the absence relied on as depriving the bankruptcy notice of its efficiency happened to occur on the last day of the seven. On the other hand I think that, if the creditor, after the service of the notice, abandoned his place of address, so that it ceased to be a place where at reasonable times the creditor could be found (or some authorised agent on his behalf) to receive payment of the judgment debt, or to deal with the question of security, the bankruptcy notice would cease to be efficient. It was urged in the present case that when Mrs. Watt started on her journey to the Continent she abandoned her temporary address, and ceased to have any address where she, or any agent authorised to act on her behalf in the matter, could be found. My brethren think that, having regard to the practice of residing at the Hans-crescent Hotel, and that her letters would be likely to be delivered there after her departure, this contention on behalf of the debtor fails in fact; and I do not think I ought to differ from them on a question of fact; so this appeal will be dismissed with costs. I wish to add that the decision of the Court of Appeal in *Re Stogdon* seems to me, so far as the observations contained in the judgments are concerned, to be difficult of practical application. Perhaps it might be considered whether the rules and forms might not be somewhat altered.

The court gave the debtor leave to appeal to the House of Lords, and stayed proceedings under the receiving order in the meantime, on her undertaking to present her petition of appeal within fourteen days.

Solicitors: *M. Abrahams, Sons, and Co.*; *Charles Russell and Co.*

Feb. 18 and 23.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

GORDON v. GORDON. (a)

Divorce—Person in contempt—Appeal—Right to hearing—Married woman—Separate estate—Restraint in anticipation—Jurisdiction to order payment of costs—“Proceeding instituted”—Married Women’s Property Act 1893 (56 & 57 Vict. c. 63), s. 2.

A decree nisi for the dissolution of a marriage on the ground of the wife’s adultery directed that the child of the marriage should remain in the custody of the husband until further order, and should not be removed out of the jurisdiction of the court. On the same day an order, was made ex parte in chambers that the child should be forthwith delivered to the husband. At that time the wife was abroad with the child.

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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After the decree nisi had been made absolute she returned to England with the child, and was for the first time served personally with the orders with reference to the custody of the child. She then took out a summons asking that the decree nisi and the ex parte order might be varied and the custody of the child given to her. During the hearing of the summons the wife gave an undertaking not to remove the child out of the jurisdiction of the court.

On the 10th March 1903 the summons was dismissed and the wife was ordered to pay the costs out of her separate property, notwithstanding that it was subject to a restraint on anticipation, and she was also ordered to deliver the child to the husband forthwith. It was then discovered that she had sent the child out of the jurisdiction two or three days before the 10th March and had since gone abroad herself, and she had remained abroad with the child ever since. On the 12th March an order was made for her committal for contempt of court and directing a writ of attachment should issue against her.

The wife gave notice of appeal from so much of the order of the 10th March as directed the costs to be paid out of her separate estate, and it was contended that the court had no jurisdiction to make it.

Held, that the rule that a person who is in contempt cannot be heard, *prima facie* applies to voluntary applications on his part, to cases where he is asking for something and not to cases in which all he seeks is to be heard in matters of defence; that the appellant objected to the order on the ground that there was no jurisdiction to make it; and its legality ought to be determined, and therefore the appeal must be heard.

Held also, that the summons was not a "proceeding instituted" by the married woman within sect. 2 of the Married Women's Property Act 1893, but an application in the divorce suit, and there was no jurisdiction to order her to pay the costs out of her separate estate which was subject to a restraint on anticipation.

APPEAL against an order of the President (Sir F. Jenne) that certain costs should be paid out of the separate property of Margaret Gordon, notwithstanding that it was subject to a restraint on anticipation.

On the 25th Nov. 1901, on the petition of the husband, a decree nisi was pronounced for the dissolution of the marriage of M. Gordon (the present appellant) and her husband, and it was ordered that the only child of the marriage should remain in the custody of the husband until further order; but it was directed that the child should not be removed out of the jurisdiction without the sanction of the court. The child was, however, then with the appellant, who was abroad. The same day an order was made *ex parte* in chambers directing that the child should be forthwith delivered up and should remain in the custody of the husband until further order of the court.

On the 2nd June 1902 the decree nisi was made absolute, and in August the respondent was married to the co-respondent.

In Oct. 1902 the appellant returned to England, bringing the child with her, and was for the first time served personally with the orders with reference to the custody of the child, and on the

15th Oct. she took out a summons entitled in the suit calling on the husband to show cause why so much of the decree nisi as ordered that the child should remain in the custody of the husband until further order of the court and the order of the 25th Nov. 1901 should not be varied, and in lieu thereof that the custody of the child should be given to her. She afterwards by her counsel gave an undertaking not to remove the child out of the jurisdiction without the permission of the court.

On the 10th March the President dismissed the summons (89 L. T. Rep. 73; (1904) P. 141), and ordered that the respondent "do pay to the petitioner his costs of and incident to the summons, such costs to be payable out of the respondent's separate property, notwithstanding that such property is subject to a restraint on anticipation." He further ordered that the child should be forthwith delivered up by the appellant to the husband, and that it should remain in the custody of the husband until further order; and that such child should not be removed out of the jurisdiction of the court without its sanction. This order was entitled in the divorce suit. When an attempt was made to serve this order on the respondent, it was discovered that she had gone away with the child.

On the 12th March 1903 the President made an order pronouncing the appellant "to be contumacious and in contempt for breach of and non-compliance with her undertaking . . . not to take the child out of London," and he ordered her to be attached for such contempt.

On the same day another order was made that the respondent do stand committed to Holloway Prison for her contempt in not complying with the order of the 25th Nov. 1901 directing that the child should not be removed out of the jurisdiction of the court without its sanction, and the next day a writ of attachment was issued against the respondent and a warrant granted for her arrest, but, as she had remained abroad with the child, she had not been arrested.

On the 12th May 1903 she gave notice of appeal against so much of the order of the 10th March as ordered payment of costs out of her separate property, notwithstanding that it was subject to a restraint on anticipation.

In opposition to the appeal an affidavit was made by the husband's solicitor, in which he said: "Notwithstanding the undertaking of the respondent not to remove the said child out of the jurisdiction of the court, and in defiance thereof, the respondent, two or three days before the decision of the court, surreptitiously sent the child out of the country, and on the day the court gave judgment she herself left England, and she has since remained abroad with the said child and has been joined by the co-respondent, and they are living abroad with the said child."

That affidavit was not contradicted.

Duke, K.C. and Priestley, K.C., for the petitioner, took the preliminary objection that, the respondent being in contempt, the court would not hear the appeal until she had purged her contempt.

Bargrave Deane, K.C. and Methold for the respondent.—The fact that a person is in contempt does not preclude him from appealing against an order which is irregular, though he

could not be heard to make any application of his own. He may appeal from the order which places him in contempt:

King v. Bryant, 3 My. & Cr. 191;
Wilson v. Bates, 3 My. & Cr. 197;
Fry v. Ernest, 9 L. T. Rep. 321.

Here the appellant contends that the court has no jurisdiction under sect. 2 of the Married Women's Property Act 1883 to make this order as to costs. In a note to *Chuck v. Cremer* (1 Coop. temp. Cott. 205) a large number of cases are collected with reference to the right of a person in contempt to be heard. They show he may defend himself against an irregular order, and among them are:

Green v. Green, 2 Sim. 394;
Barker v. Dawson, 1 Coop. 207;
Parry v. Perryman, 1 Coop. 207;
Ricketts v. Mornington, 7 Sim. 200;
Re Brady, 1 Moll. 254;
Hawkins v. Hall, 1 Beav. 73;
Anon v. Lord Gort, 1 Hog. 77;
Morrison v. Morrison, 4 Haro. 590;
Plumbe v. Plumb, 3 Y. & C. Ex. 622;
Cattel v. Simons, 5 Beav. 396; 6 Beav. 304.

Besides which the following later cases are important:

Ex parte Chadwick, 15 Jur. 597;
Chatterton v. Thomas, 36 L. J. 592, Ch.;
Futrope v. Kennard, 3 L. T. Rep. 687; 2 Giff. 110.

In *Barker v. Dawson* (*ubi sup.*) Lord Cottenham said that there was a wide distinction between a case where the order alleged to be irregular was obtained prior to the contempt, and where it was obtained subsequent to the contempt. That where it was obtained prior to the contempt, and was not the order which placed the party in contempt, the rule was that the contempt must be cleared before the party could make any application to the court. But he never would extend the rule to a case where the order, sought to be set aside on the ground of irregularity, was made subsequently to the contempt. Such an extension of the rule would place the party in contempt too much at the mercy of his adversary. The affidavit of the petitioner's solicitor shows that here the contempt was committed two or three days before the order appealed from was made. But there is no distinction between an order made before and an order made after the contempt. Although the order is invalid, the trustees of the settlement cannot safely pay the income to the appellant. There is a proper punishment for the contempt, and pressure ought not to be put on the appellant by the existence of an invalid order.

Duke, K.C. and *Priestley, K.C.* for the petitioner.—While a person is in contempt with reference to a particular order he cannot be heard to contest that order until he has purged the contempt:

Chuck v. Cremer (*ubi sup.*).

[*VAUGHAN WILLIAMS, L.J.* referred to *Barnardo v. Ford* (67 L. T. Rep. 1; (1892) A. C. 326).] As a rule, a litigant who is in contempt cannot take any step of his own in the action or cause in which he is in contempt:

Garstin v. Garstin, 4 Sw. & Tr. 73;
Cavendish v. Cavendish, 15 W. R. 182;
Curtis v. Curtis, 5 Moo. P. C. 252, 256;
Howard v. Newman, 1 Moll. 221, 222.

This case does not come within any of the exceptions to the general rule. The contention here is not that the court had no jurisdiction to make the order, but that under the circumstances it ought not to have been made, and that is not really a question of jurisdiction. [*VAUGHAN WILLIAMS, L.J.* referred to *Ex parte Fernandez* (4 L. T. Rep. 324; 10 C. B. N. S. 3).] That was a proceeding by way of *habeas corpus*, and the right to challenge imprisonment is different from a right to appeal in a suit. If an attempt was made to enforce this order, the appellant or the trustees could raise the question as to its validity. This objection that the appellant is in contempt may be the only way of obtaining the delivery up of the child, and the court will not readily assist the appellant in disobeying the order. Although it is not expressly stated in the order of the 12th March that the appellant is in contempt with reference to the order of the 10th March, yet that order had been in fact disobeyed, and the contempt continues up to the present time. In *Garstin v. Garstin* (*ubi sup.*) and *Cavendish v. Cavendish* (*ubi sup.*) there had been no adjudication that the party was in contempt, yet the court refused to hear him. *Wilson v. Bates* (*ubi sup.*) only applies to the facts of that case, and does not deal with any general principle. There may be a distinction where the order which it is contended is irregular is made subsequently to the contempt:

King v. Bryant (*ubi sup.*).

But that is not the case here. In Lord Chief Baron Gilbert's *Forum Romanum*, p. 102 (*vide Daniell's Chancery Practice*, 7th edit., vol. 1, p. 724), it is said: "It is to be observed, as a general rule, that the contemnor, who is in contempt, is never to be heard, by motion or otherwise, till he has cleared his contempt and paid the costs." This is confirmed by *Hewitt v. McCartney* (13 Ves. 560) and *Lord Wenman v. Osbaldeston* (2 Bro. P. C. 276). The onus is on the appellant to show that one of the exceptions to the general principle applies to this case, and that has not been done.

VAUGHAN WILLIAMS, L.J.—A preliminary objection has been taken to this appeal—namely, that the appellant is in contempt, and that therefore the appeal ought not to be heard. The appeal is only against so much of the order of the 10th March 1903 as directs that the costs incident to a summons in chambers taken out by the appellant and adjourned into court should be payable out of her separate property, notwithstanding that such property is subject to a restraint on anticipation. The contempt which is relied upon as debarring the appellant from appealing against that part of the order is thus set forth in the affidavit of Sir George Lewis: "Notwithstanding the undertaking of the respondent not to remove the said child out of the jurisdiction of the court, and in defiance thereof, the respondent, two or three days before the decision of the court, surreptitiously sent the child out of the country, and on the day the court gave judgment she herself left England." The undertaking was given antecedently to the hearing of the summons in court, and the question which we have to determine is whether the objection that the appellant is in contempt ought to prevail. I think it ought not to prevail. We have heard

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a great deal about cases which were decided in the Courts of Chancery and of the rules and principles which were laid down by various judges, including Lord Cottenham, in reference to this matter of contempt, and when it should and when it should not debar a would-be appellant, or applicant, from being heard. The greater part of the cases are set out in the notes to *Chuck v. Cremer* (*ubi sup.*), but I do not think it is necessary for me to go through those cases. I think that there are general principles which apply to this case, and which are not really affected by the decisions to which our attention has been particularly called. What I mean is that, taking it generally, it has not been disputed in the discussion before us that this rule that a person who is in contempt cannot be heard, *prima facie* applies to voluntary applications on his part, to cases where he comes and asks for something, and not to cases in which all that he is seeking is to be heard in respect of matters of defence. I do not for one moment suggest that it is every matter of defence which entitles a person in contempt to be heard; for instance, if an order has been made in the exercise of the discretion of the court, and someone who is oppressed, or thinks himself oppressed, by that order appeals, saying that the court has exercised its discretion wrongly, that person if he is in contempt cannot be heard to say anything of the sort until he has purged his contempt. *Garstin v. Garstin* (*ubi sup.*) is an instance of that kind. But when you come to the case of an order which it is suggested may have been made without jurisdiction, if, upon looking at the order one can see that that really is the ground of the appeal, it seems to me that such a case has always been treated as one in which the court will entertain the objection to the order, though the person making the objection is in contempt. It was admitted, and could not be otherwise than admitted, that if the objection was to the very order which had created the contempt and the objection was one of the character which I have described, the fact that the person taking the objection was in contempt would not deprive him of the right to be heard. I do not propose to consider the rule laid down by Lord Cottenham in *Barker v. Dawson* (*ubi sup.*), for the reason that the order of events here, as stated in Sir George Lewis' affidavit, was different from that with reference to which Lord Cottenham laid down the rule that a person in contempt could not be heard. In the present case the contempt was committed before, not after, the order appealed from, and his rule has, therefore, no application to the present case. That being so, the simple point which we have to decide now is this: Here is an order, the objection to which is obviously of a character which does not depend upon an exercise of the discretion of the court. It is said that it is unlawful to make such an order in respect of the separate property of a woman which is subject to a restraint on anticipation—that is to say, unlawful for the court by which the order was made and on the occasion on which it was made—and it is said that we ought not to look at the order because this lady, this divorced wife, is in contempt. In my judgment that is not so. Having regard to the nature of the objection, in my opinion the present appellant is merely coming here to say: "This order which

has been made against me is an illegal order, and it appears to be so upon the face of the order itself." That being so, I am of opinion that no rule has been brought to our notice which should prevent her from being heard. I wish only to add that, supposing this order is in fact an illegal order, and we were to refuse to hear the appellant now, it by no means follows that there would not be any opportunity hereafter of questioning the order. But be that how it may, I think that, having regard to the fact that the objection is to the legality of the order, it would not be right to allow an order to be enforced without first determining the question of its legality. I think, under these circumstances, we ought to hear the appeal.

STIRLING, L.J.—I also think that the appeal ought to be heard. The counsel for the husband have relied very much on the decision of Lord Cottenham in *Chuck v. Cremer* (*ubi sup.*). If I thought our decision involved a departure from what was there laid down by Lord Cottenham, I should desire to consider the matter further, but when the sequence of events is ascertained it appears to me that the present case is not identical with *Chuck v. Cremer*. In that case the order of events was this: The defendant moved that an injunction granted *ex parte* might be dissolved; his application was unsuccessful, and he gave notice of motion by way of appeal. Previously to the notice of the appeal motion being given, an attachment was issued against the defendant for not having put in his answer. Upon the motion being opened, it was objected that the defendant was in contempt, and could not be heard. The Lord Chancellor gave effect to the objection, but he said: "That a party was entitled to be heard if his object was to get rid of the order, or other proceeding which placed him in contempt, and he was also entitled to be heard for the purpose of resisting or setting aside for irregularity any proceedings subsequent to his contempt." Here, according to the affidavit which the husband has himself put forward, the contempt began two or three days before the order in question was made. Therefore, if we allow the appeal to be heard, we shall in no way contravene what Lord Cottenham there said. Here the question is not merely one of irregularity in the order, but one of want of jurisdiction in the court. Having regard to that, I entirely agree that the appeal ought to be heard.

COZENS-HARDY, L.J.—I agree. Until recently no court had jurisdiction, to direct the payment of costs out of the separate estate of a married woman subject to restraint on anticipation; but the Married Women's Property Act 1893 has by sect. 2 in terms enacted that in certain cases the court shall have jurisdiction from time to time to direct payment of costs out of the separate estate of a married woman which is subject to a restraint on anticipation. This is plainly a limited jurisdiction, and the only object of this appeal, as I understand it, is to raise the contention that this is not one of the limited class of cases in which that jurisdiction is given to the court by sect. 2 of the Act. That being so, I entirely agree with my learned brethren that the preliminary objection ought to be disallowed. But I desire to limit my judgment to a case in which the appellant contends that the order complained of

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is outside the jurisdiction of the court, as distinguished from the case of an order which, although it is within the jurisdiction of the court, ought not, it is said, to have been made. So far as I can see, there is no principle opposed to the view which we are taking, nor do I think that there is any authority against it. Speaking for myself, I have been unable to discover what principle, if any, is at the root of the distinction, which has been taken in some of the cases cited to us, between contempt committed before and contempt committed after the making of the order which it is sought to set aside.

Bargrave Deane, K.C. and Methold for the appellant.—There was no jurisdiction to make this order for the payment of costs out of the appellant's separate estate subject to a restraint on anticipation. It does not come within sect. 2 of the Married Women's Property Act 1893, which gives power to make such an order only "in any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf." That means an action or proceeding in the nature of an action initiated by a married woman as plaintiff; and does not include any motion or step made or taken by a married woman in an action in which she is defendant:

Hood-Barrs v. Cathcart, 71 L. T. Rep. 11; (1894) 3 Ch. 376.

An appeal by a woman from a judgment in an action in which she is defendant is not a "proceeding instituted" within the meaning of that section:

Hood-Barrs v. Heriot, 76 L. T. Rep. 299; (1897) A. C. 177.

This summons was a step in the divorce suit, and was not an action or proceeding taken by the appellant.

Duke, K.C. and Priestley, K.C. for the petitioner.—When the summons was taken out the decree nisi had been made absolute, and the divorce suit was at an end. The summons ought not to have been entitled in the suit. The court has a statutory jurisdiction with reference to the custody of children independently of divorce proceedings under sect. 4 of the Matrimonial Causes Act 1859 (22 & 23 Vict. c. 61). That provides that an application for the custody of children may be made by petition after a final decree. It is an independent proceeding, and there is nothing to show by whom such petition may be presented. The question litigated on this summons was whether the petitioner was the father of the child, and that is a matter outside the divorce proceedings. The summons was therefore a proceeding initiated by the appellant:

Nunn and Co. v. Tyson, 85 L. T. Rep. 123; (1901) 2 K. B. 487.

VAUGHAN WILLIAMS, L.J.—I have not the slightest doubt that this summons was a step in the divorce suit, and that it did not initiate any new litigation. Under these circumstances it is plain, having regard to the decisions in *Hood-Barrs v. Cathcart* (ubi sup.) and *Hood-Barrs v. Heriot* (ubi sup.), and the other cases, that there is no jurisdiction to make this order for the payment of costs out of this lady's separate property which is subject to a restraint on anticipation. I do not think it is necessary for me to say any more. It is admitted that costs cannot be

ordered to be paid out of funds as to which a married woman is restrained from anticipation unless those costs come within the words of sect. 2—that is, unless they are costs of a proceeding initiated by the married woman. I am of opinion that this summons was not initiated by the married woman, but was a mere step in the previous litigation.

STIRLING, L.J.—I am of the same opinion. Two orders were made by the Divorce Court on the 25th Nov. 1901. The first was the decree nisi in the suit by which, after the provisions with reference to the dissolution of the marriage, it was ordered that the only child of the marriage "do remain in the custody of the petitioner until further order of the court, but it is directed that such child be not removed out of the jurisdiction of the court without its sanction." The other order of the 25th Nov. 1901 was that the child be "forthwith delivered up to and do remain in the custody of the petitioner until further order of the court." Both orders were of a temporary nature, "until further order." Afterwards, on the 15th Oct. 1902, the wife took out a summons asking that those orders should be varied. The question we have to decide is this: whether within the meaning of sect. 2 of the Married Women's Property Act 1893 this was a proceeding "instituted" by the wife. It has been held by the House of Lords as well as by this court that, as Lord Herschell said in *Hood-Barrs v. Heriot* (76 L. T. Rep. 299; (1897) A. C. 179), these words refer "to an action or some other litigation initiated by the married woman." Can it, then, be said that this summons was "an action or some other litigation initiated by the married woman"? I think not. It seems to me to be simply a continuation of the litigation which had been commenced by the husband by the institution of the suit for the dissolution of the marriage, in which from the very first the question of the custody of the child was a subject of litigation, and was not finally determined by the two orders to which I have referred.

COZENS-HARDY, L.J.—I am of the same opinion. It seems to me that, both in form and in substance, this application by the appellant was made by her in the suit of *Gordon v. Gordon*, and was not an independent proceeding initiated by her.

Solicitors: *Dangerfield and Blythe*; *Lewis and Lewis*.

Thursday, March 10.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

BRITISH HOME AND HOSPITAL FOR INCURABLES v. ROYAL HOSPITAL FOR INCURABLES. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Charitable gift—Ambiguity—Uncertainty of object—Erroneous recital in codicil.

A testatrix by will made in 1897, among other legacies to charitable institutions, bequeathed to the British Home for Incurables, Streatham, S.W., mentioning accurately the name of its secretary and address of its office, 250l. By codicil made in 1902, after reciting twice incor-

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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rectly that she had given by will 500l. to the British Home for Incurables, Streatham, S.W. . . . and, amongst others, to St. M.'s Orphanage, Bayswater, 100l., she revoked all the legacies, "and instead thereof" bequeathed 500l. each to the Royal Home for Incurables, Streatham, S.W., and to St. M.'s Orphanage.

The legacy of 500l. was claimed by the Royal Hospital for Incurables and by the plaintiff institution, founded in 1861 by the name of the British Home for Incurables, and in 1899 incorporated by Royal Charter by its present name.

Held, that, having regard to entries in a book kept by the testatrix containing particulars of her charitable contributions, she distinguished the two institutions as the "Royal" and the "British," and, therefore, on the true construction of the codicil, the Royal Hospital for Incurables was entitled to the legacy.

Decision of Kekewich, J. (89 L. T. Rep. 495) reversed.

MARGARET ANN LOCHLAN, by her will dated the 19th July 1897, among other charitable legacies, bequeathed "to the British Home for Incurables, Streatham, S.W. (present secretary, R. G. Salmon, Esquire, 72, Cheapside, London, E.C.), two hundred and fifty pounds."

On the 11th Feb. 1902 the testatrix executed a codicil to her will which, so far as material, was in the following terms:

Whereas I have by my said will given the following legacies, subject to duty, *videlicet*, to the London Hospital in Whitechapel-road, London, E., 500l.; to the British Home for Incurables, Streatham, S.W., 500l.; to the British Home for Incurables, Streatham, S.W., 500l.; to St. Mary's Hospital, Cambridge-place, Paddington, W., 100l.; and to St. Matthew's Orphanage, Bayswater, London, W., 100l. Now I hereby revoke all the said legacies, and instead thereof I give 500l. each, subject to duty, to the Royal Home for Incurables, Streatham, S.W., and to St. Matthew's Orphanage aforesaid, to be paid to the treasurer or other proper officer of the respective institutions for the general purposes thereof.

The testatrix died on the 22nd Feb. 1902, and her will and codicil were proved by the executors on the 3rd April 1902, and they paid 500l. to the defendant institution, and the plaintiff institution then commenced an action claiming the 500l.

The plaintiff institution was founded in 1861 by the name of the British Home for Incurables. Since 1894 it had been situated at Streatham, S.W. Its secretary and office were correctly designated in the will. It was in Nov. 1899 incorporated by Royal Charter by the name of the British Home and Hospital for Incurables.

The Royal Hospital for Incurables was founded in 1854, and is situated at West Hill, Putney Heath.

There was evidence, which Kekewich, J. held admissible, to the effect that for the three last years of her life testatrix had subscribed to both societies under the respective names, as shown by her diary and the counterfoils of her cheque-book, of the "British Home" and the "Royal Home" or "Hos" (short for hospital) except during the year 1901, when she paid 3l. 3s. to the defendant institution and nothing to the plaintiff institution. In 1900 she subscribed 3l. 3s. to each, and in 1899 3l. 3s. to the plaintiff and 2l. 2s. to the defendant institution.

Kekewich, J. held that the British Home and Hospital for Incurables was entitled to the legacy, and from this decision the defendant institution appealed.

Warrington, K.C., Howard Wright, and Marten for the appellants.—The testatrix was accustomed, when referring to these institutions in her books, to call them "British" and "Royal," and therefore the use of the word "Royal" shows she intended the legacy for the defendant institution, although she made a mistake as to the address.

Stewart-Smith, K.C. and G. H. Devonshire for the plaintiff institution.—Between the date of the will and codicil a Royal Charter had been granted to this institution, and circulars announcing that fact were sent to all the subscribers, so that the testatrix might well have used the word "Royal" when referring to that institution. She refers to the legatee as the "Home," and the defendant institution is not called a "Home," and it is not at Streatham. The testatrix knew the proper address of both, and in her book of subscriptions describes the defendant institution as of Putney. In favour of the plaintiff institution is the word "Home" and the address as against the word "Royal" in favour of the other institution.

—Marten for the executors.

Warrington, K.C. in reply.

VAUGHAN WILLIAMS, L.J.—This appeal is a rehearing. The conclusion of Kekewich, J. is not a conclusion based upon the value which the learned judge put upon the testimony which was before him; it is merely a question of the inference to be drawn from a document and from undisputed facts. In such a case, even if we think there was strong ground for the conclusion at which the learned judge arrived, yet, if we think it is clear that there is strong ground for the other conclusion, our duty in a court of equity is to decide in accordance with the way in which we think the balance plainly lies, and my conclusion here is that having regard to this codicil the balance is in favour, and I think strongly in favour, of the Royal. Now, with regard to the words of the will itself, we must consider which shall prevail—the word "Royal" or the address. I wish to say here that in the argument presented to us by counsel for the plaintiff institution they rather contended that we had not to balance "Royal" against the address; that one had, in addition to the address in favour of the "British," the words "Home for Incurables," which, it was said, was appropriate to the "British" and not to the "Royal," the Royal being a hospital and not a home. As to that, I think an examination of the documents in this lady's own handwriting makes the matter quite conclusive, and shows quite conclusively that she called both these institutions "Home for Incurables"; and therefore I think that the right way of looking at this codicil is to ask oneself which is to prevail—the name "Royal" or the address "Streatham"? As I have said, not only does this lady in these documents speak of them and write of them both as being "Home for Incurables," but it is obvious that in her mind the distinction between the two is in the first name. The one is the "British" and the other is the "Royal." It seems to me that, if one tries to put oneself as far as possible in the

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state of mind and state of habit of this lady when dealing with these charities, it is impossible to avoid the conclusion that she distinguishes these institutions as being one the "British" and the other the "Royal." Now, that being so, I should on those grounds decide in favour of the "Royal." It seems to me extremely improbable that the testatrix would have made a mistake when she mentioned the "Royal"; and, whilst speaking on this point, I cannot help bearing in mind that the Royal was a name which, having regard to what she was doing, she was very little likely to have on her tongue, or to mention by unconscious cerebration, or to have mentioned at all, unless she was going to give the legacy; because it is to be remembered that she knew what her antecedent will was, and the name of the Royal would not be running in her head as an institution the legacy to which was to be revoked. One cannot see why she should have "Royal" running in her mind at all except for the purpose of giving a legacy to the Royal. Now, if that is the right conclusion, is there anything else to make one depart from it? I think not. If you look at the whole character of this codicil, it is obvious that she is making this codicil on this basis: "I will revoke my old legacies to these charities and will revoke some of them for the purpose of revoking them altogether and depriving the charities of the benefit, and I will revoke others for the purpose of increasing them." That being so, there is no reason in the nature of things why she should not have revoked the legacy to the "British" on the ground that she meant to revoke it altogether and not for the purpose of increasing it. If she really meant to increase it, it is an odd thing, to say the least of it, that the figure she mentions when she comes to give the legacies is identical with the figure of the legacy which she mentions in the revoking clause. Under these circumstances I must say I think that the balance is strongly in favour of the Royal, and that we ought to decide in favour of that institution.

SIRLING, L.J.—I am of the same opinion. I am unfortunate enough to differ from Kekewich, J. as to the construction that he places on the codicil, he approaching it without any regard to the evidence which has been given as to the mode in which this lady dealt with these two societies. The learned judge, as I read his judgment, appears to have placed great weight on the use of the word "aforesaid," which he treats as being, according to the true grammatical construction of the codicil, used in connection both with "the Royal Home for Incurables, Streatham, S.W.," and "the St. Matthew's Orphanage." I am unable to take that view. It seems to me that when you look to the fact that the gift is in these terms, "the Royal Home for Incurables, Streatham, S.W.," and to "St. Matthew's Orphanage aforesaid," the "aforesaid" naturally goes with St. Matthew's Orphanage in accordance with the construction of the grammatical meaning. No doubt the omission of the second "to" would make a great difference, but there the preposition is twice inserted—first, before the "Royal Home," and, secondly, before "St. Matthew's Orphanage." That seems to me to lie at the foundation of the learned judge's judgment as I read it, and on that point I am

unable to agree with him. Now, approaching the construction of the codicil, bearing in mind the facts which are in evidence, how does it stand? The testatrix gives by her will a legacy to the British Home for Incurables. She then recites, by a codicil made nearly five years afterwards, that she had given certain legacies, and, amongst others, one to "the British Home for Incurables, Streatham, S.W., 500l." The amount is incorrect, no doubt, but still she had given one to that institution. She proceeds: "I hereby revoke all the said legacies, and instead thereof I give 500l. each, subject to duty, to the Royal Home for Incurables, Streatham, S.W." The lady was perfectly well aware of the existence of the two institutions, one called in strictness "the British Home and Hospital for Incurables," and the other "the Royal Hospital for Incurables." She had been in the habit for years of giving donations to both; and we have in a memorandum-book in which she recorded her benefactions, occurring repeatedly and in successive lines, gifts to these two institutions. In the year 1899 she enters "British Home In." three guineas, and under "Royal In." two guineas. Exactly the same thing takes place in the year 1900; in which case it is "British Home Incurables," three guineas; "Royal ditto," three guineas; and in the last year in which there is an entry she began evidently "British Home for Incurables," and then that is written over by the name of another society, and then "Royal ditto" as before, so that it appears to me (and this is confirmed by the entry which she made on the counterfoil of the cheque) that she recognised the existence of these two societies, and yet in her own mind distinguished the one as "the British" and the other as "the Royal." Now, when we come to apply that knowledge to the construction of the codicil, it seems to me that the fact of reciting first the gift to the British and then giving a legacy to the Royal is very strong, and outweighs the fact that in the first place the address is at Streatham; and there is also the fact that she describes the Royal as "the Royal Home," it being strictly "the Royal Hospital for Incurables." I am unable, therefore, to agree with Kekewich, J. in the conclusion he came to, and think that the appeal ought to be allowed.

COZENS-HARDY, L.J.—I cannot bring myself to doubt that the distinction between these two charities, as indicated by the lady's own use of the name on the counterfoils and the books, was that the one was "the British" and the other was "the Royal." I draw the same conclusion from the codicil itself, where, having accurately described "the British," she revokes the legacy to "the British" and gives an increased legacy to "the Royal." It is true that the Royal is called "Home for Incurables," and is not called by its full title "Hospital for Incurables," but it is manifest from the books, to which Mr. Warrington has referred, that she repeatedly called the appellant charity "the Royal Home for Incurables" and not "the Royal Hospital for Incurables." There is only one more point, which is one that was made by Mr. Marten in his very clear address to us, that, although the word "Streatham" was wrong, "S. W." was quite right; and, if she had put "the Royal Home for Incurables," there would really have been no ambiguity. I respectfully

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differ from the view of the learned judge, and I think that the appeal should be allowed.

Solicitors: *Freshfields; Devonshire, Monkland, and Co.; Pemberton, Cops, Gray, and Co.*

Feb. 9 and 10.

(Before COLLINS, M.R., ROMER and
MATHEW, L.JJ.)

KILGOUR v. GADDES. (a)

APPLICATION FOR A NEW TRIAL.

Prescription—Easement—Right of way—Forty years' enjoyment—Two tenements held under same owner—Prescription by one tenant against another tenant of same owner—Prescription Act 1832 (2 & 3 Will. 4, c. 71), s. 2.

A tenant cannot, by enjoyment for a period of forty years, acquire a prescriptive right to an easement, such as a right of way, under sect. 2 of the Prescription Act 1832, as against another tenant of the same landlord.

APPEAL of the plaintiff from the judgment of Walton, J., upon further consideration after the trial of the action with a jury.

The plaintiff brought this action against the defendant claiming damages for trespass to land and an injunction.

The plaintiff and the defendant occupied adjoining houses in Longtown. The plaintiff was the assignee of a lease granted by Sir James Graham on the 13th July 1850 for the term of ninety-nine years; and the defendant was the assignee of a lease granted by Sir James Graham on the 10th Jan. 1850.

The reversions on these two leases were always vested in one and the same owner.

Between the two houses there was a passage over which the occupiers of both houses had a right of way to the back yards of their respective houses.

In the yard at the back of the plaintiff's house there was a pump. This yard opened into the said passage.

Until 1902 there was no fence separating the plaintiff's yard from the common passage, and the pump was as accessible from the back of the defendant's premises as from the back of the plaintiff's premises.

A dispute having arisen with regard to the use of the passage, the plaintiff in 1902 erected a screen and door which prevented the plaintiff from using the pump. The defendant broke the door, and thereby obtained access to the pump.

The plaintiff thereupon brought this action claiming damages and an injunction.

The defendant denied that the place where the pump was situate was the property of or in the possession of the plaintiff; and he claimed a prescriptive right to use the pump by user for forty years, under the Prescription Act 1832 (2 & 3 Will. 4, c. 71); and he counter-claimed a declaration of his right to use the pump, and damages, and an injunction.

The action was tried before Walton, J. with a jury. The jury found, in answer to questions left to them by the learned judge: (1) That the pump had been used as of right by the occupiers of the defendant's premises for forty years before

action; and (2) that it was so used at and before the grant of the defendant's lease.

The argument of the questions of law was reserved for further consideration, the plaintiff having leave to amend his reply by pleading specially, under sect. 5 of the Prescription Act, that the alleged servient tenement had been held under a lease during the whole period of forty years; the learned judge having power to decide all questions of law and fact subject to the findings of the jury.

The learned judge, upon further consideration, found that the pump was upon land included in the plaintiff's lease; and that there was no definite path or way at any time from the defendant's premises to the pump affording any apparent sign of the easement claimed. The learned judge, therefore, held that the defendant had not any easement by express or implied grant; but he held that the defendant had acquired a prescriptive right against the plaintiff by forty years' enjoyment, under sect. 2 of the Prescription Act, and gave judgment in the defendant's favour for damages and an injunction (89 L. T. Rep. 444).

The Prescription Act 1832 (2 & 3 Will. 4, c. 71) provides:

Sect. 2. No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Sect. 5. In all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this Act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any clause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

The plaintiff appealed.

L. Sanderson, K.C. and J. Lumb for the appellant.—The learned judge was wrong in holding that the defendant could claim a right of way under the Prescription Act. That right can be claimed under the Act only under sect. 2. To acquire a right under sect. 2, the enjoyment must be "as of right." A man cannot enjoy a right of way over his own land, and a tenant cannot enjoy as of right an easement over other land of his landlord. A man cannot prescribe for a right of way or other easement over his own land:

Large v. Pitt, Peake Add. Cas. 152.

Under the Act the enjoyment of an easement within sect. 2 must be "as of right," whether it has been for a period of twenty years or for the full period of forty years. This is made clear by the provisions of sect. 5 of the Act which prescribe the rules of pleading and of proof. The provisions of sect. 3, which relate only to light, do not use the words "as of right," and the right to light is made indefeasible by any enjoyment for twenty years unless it be under a written consent or agreement. The cases, therefore, which have been decided under sect. 3 have no application to a case within sect. 2. A right of way cannot be acquired by prescription for a term of years; it can only be acquired by or on behalf of the owner of the fee of one tenement against the owner in fee of another tenement. The possession of the tenant is in contemplation of law the possession of his landlord, and therefore one tenant cannot prescribe against another tenant of the same landlord:

Gayford v. Moffatt, L. Rep. 4 Ch. 133;

Timmons v. Hewitt, 22 L. Rep. Ir. 627.

The learned judge relied upon the judgment of Chitty, J. in *Harris v. De Pinna* (54 L. T. Rep. 38; 33 Ch. Div. 238). That case was decided upon the authority of two Irish cases:

Beggan v. McDonald, Ir. Rep. 11 C. L. 362; 2 L. Rep. Ir. 560;

Fahey v. Dwyer, 4 L. Rep. Ir. 271.

The former of these two cases is no authority for the decision in this case, because it was a case of two tenants holding under different owners in fee; and *Fahey v. Dwyer* (*ubi sup.*) was decided upon a misapprehension of *Beggan v. McDonald* (*ubi sup.*) and of *Frewen v. Philipps* (11 C. B. N. S. 449), which was a decision under sect. 3 of the Act as to the right to light. The judgment of Chitty, J. in *Harris v. De Pinna* (*ubi sup.*) is inconsistent with the case in the Court of Appeal of *Wheaton v. Maple and Co.* (69 L. T. Rep. 208; (1893) 3 Ch. 48), in which Lindley, L.J. clearly states the law to be that a right of way cannot be claimed by prescription for a term of years. That was the principle of the decision in *Bright v. Walker* (1 C. M. & R. 211; 40 R. R. 536), which was adopted by the Court of Appeal in *Wheaton v. Maple and Co.* (*ubi sup.*) The Prescription Act has only shortened the time of prescription, and prevented the claim to an easement by prescription from being defeated by proof of the origin of the user; it has not altered the mode in which prescriptive rights may be acquired, except in the case of light:

James v. Plant, 4 A. & E. 749; 43 R. R. 465.

Cavanagh for the respondent.—The learned judge rightly decided that the defendant had acquired the right claimed by prescription. There is no decision upon this point in the English courts, but there is an express decision in Ireland, in favour of the defendant's contention, in *Fahey v. Dwyer* (*ubi sup.*). In *Bright v. Walker* (*ubi sup.*) the observations upon this question were merely *obiter*; and in *Wheaton v. Maple and Co.* (*ubi sup.*) the actual decision was with regard to a right to light under sect. 3, the observations of Lindley, L.J., which have been relied on, being unnecessary to the decision. Although at common law such an easement as is here claimed could not be acquired by prescription, yet under sect. 2 of the Prescription Act it can be acquired. In sect. 2 the words "by any person claiming right thereto" refer only to the enjoyment for the shorter period of twenty years, and do not affect the last part of the section, which confers an absolute indefeasible right after enjoyment for forty years unless the enjoyment has been under a written consent or agreement. The provisions of sect. 3 are the same as those of the last part of sect. 2. Therefore a right of way can be acquired under any circumstances and for a term of years, by forty years' enjoyment, just as in the case of light:

Frewen v. Philipps (*ubi sup.*).

In *Harris v. De Pinna* (*ubi sup.*) Chitty, J. expressly held that under sect. 2 of the Act a tenant can, by enjoyment for forty years, acquire an easement against another tenant of the same landlord. Sect. 8 of the Act provides that, in the case of forty years' enjoyment, when the land is in lease the reversioner shall have three years after the determination of the tenancy within which to dispute the right, and that shows that the easement may be acquired by forty years' user which is good against all the world except the reversioner. Enjoyment as of right, in the first part of sect. 2, means only that the enjoyment must have been had openly and without any leave or licence:

Gardner v. Hodgson's Kingston Brewery Company, 88 L. T. Rep. 698; (1903) A. C. 229;

Tickle v. Brown, 4 A. & E. 369; 43 R. R. 358.

L. Sanderson, K.C. was not called upon to reply.

COLLINS, M.R.—The argument in this case has covered a very wide area, but the point when properly understood is a short one. The question is whether as between two termors under the same landlord a right of way by prescription can be acquired for the owner by the one termor against the other. I say "for the owner," because under the Prescription Act 1842 an easement of that kind must be acquired for the owner in fee. In this case, as I have pointed out, the tenants of the so-called dominant and servient tenements held under the same landlord. If that proposition is right, this prescriptive easement must under the Prescription Act be acquired for the owner of the fee. If that were not so, the anomalous result would follow that the tenant of the owner of land would acquire an easement by user of land for the owner of that land. That cannot be so. I have limited what I have said to the case of a right of way and similar rights. In this case we are not concerned with the case of a prescriptive right to light, which stands upon a totally different footing

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under the provisions of sect. 3 of the Prescription Act. We have here to deal with a right of way, and easements of that kind, under sect. 2 of the Act. Sect. 2 provides that: "No claim which may be made at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water . . . when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." On the words of that section it appears that the easement must in all cases have been enjoyed as of right, and that is made clear by the provisions of sect. 5, which prescribes the rules for pleading the right to easements of this kind and enacts that: "In all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done." That is a perfectly clear enactment that the enjoyment for the period of twenty years or of forty years must be as of right. The point was taken long since that sect. 5 applied to a claim for a prescriptive right to light, but it was held that it did not. As has been pointed out by Romer, L.J. in the present case, and almost in the same language as that used by Palles, C.B., in explaining why the occupier cannot acquire the right for the owner, the reason is that the enjoyment and user cannot be as of right. In *Timmons v. Hewitt* (22 L. Rep. Ir. 627, 635) Palles, C.B. said: "These extracts from the judgments in *Beggan v. McDonald* (Ir. Rep. 11 C. L. 362; 2 L. Rep. Ir. 560) appear to me to show that the case is no authority upon the question at present before us. Where the two tenements are held by termors under the same landlord, prescription does not apply; because, as pointed out by Lord Cairns, in *Gayford v. Moffatt* (L. Rep. 4 Ch. 135), 'the possession of the tenant of the demised close is the possession of his landlord; and it seems to me an utter violation of the first principles of the relation of landlord and tenant to suppose that the tenant, whose occupation of close A was the occupation of his landlord, could by that occupation acquire an easement over close B, also belonging to his landlord.' This doctrine was approved and acted upon by the Court of Common Pleas in this country in *Clancy v. Byrne* (Ir. Rep. 11 C. L. 355). If I am asked how it is

consistent with the Prescription Act, I answer that such user and enjoyment is not as of right within the meaning of the 2nd section. It is a user by a termor, who, if he acquire the right, must acquire it as incident to the land of which he is termor, and thus for the benefit of his reversioner. Such user cannot be as of right, unless a reversioner can in law by user acquire a right against himself." So stands the law upon the question. That seems to me to be conclusive of this case. There has been a long argument as to the possibility of a termor under one landlord acquiring a prescriptive right of way as against the termor under another owner of other land. That raises an interesting question. It has been decided in Ireland that such a right can be acquired. That is contrary to the view which has been expressed in this country, and is contrary to the cases of *Bright v. Walker* (1 C. M. & R. 211; 40 R. R. 536) and *Wheaton v. Maple* (69 L. T. Rep. 208; (1893) 3 Ch. 48), though the point was not absolutely necessary to the decision in those two cases. That question, however, has nothing whatever to do with the question in the present case. The judgment of Walton, J. in the present case is based entirely upon the authority of the judgment of Chitty, J. in *Harris v. De Pinna* (54 L. T. Rep. 38; 33 Ch. Div. 238). In that case it was a subsidiary point, but Chitty, J. expressed the opinion that an easement such as this could be acquired by prescription by one tenant of a landlord over land in the occupation of another tenant of the same landlord. When those observations of Chitty, J. are examined they seem to me to be based upon an unsound foundation. His opinion was based upon two cases decided in Ireland—*Fahey v. Dwyer* (4 L. Rep. Ir. 271) and *Beggan v. McDonald* (Ir. Rep. 11 C. L. 362; 2 L. Rep. Ir. 560). The case of *Beggan v. McDonald* was not an authority for any proposition of the kind. In that case it was decided that by uninterrupted enjoyment for a period of forty years a right of way might be acquired against a lessee whose lease had been in existence during the whole of that period, the dominant and servient tenements being held under different owners, though the period of three years after the termination of the lease had not expired and it was unknown whether the reversioner would during those three years exercise his right, under sect. 8 of the Act, of resisting the claim. That was a decision in a case in which there were different owners of the two tenements, and not a case of two termors under the same owner, and therefore is no authority that an easement can be acquired by prescription by one termor against another termor under the same owner. Then came the case of *Fahey v. Dwyer* (*ubi sup.*), the other case upon which Chitty, J. relied. That case does purport to be a decision as to the possibility of the acquisition of a prescriptive right of way by one tenant against another tenant of the same landlord. The headnote to that case is: "A prescriptive right of way may be acquired in respect of one tenement, by user for forty years, against another held for a term of years under the same landlord; and such right is not necessarily determined upon the expiration of the lease, when the tenant of the servient tenement continues in occupation upon the same terms as before." Upon examining that case we find that the decision was based upon a

misconception of the previous case of *Beggan v. McDonald* (*ubi sup.*). In delivering the judgment, Lawson, J. said: "We think that in this case the defendant is entitled to maintain the verdict which he has got. He has a right of way, which he has been in the enjoyment of, as of right, for a period of forty years, as found by the jury. I see no reason why the Prescription Act should not apply as between two tenants of adjoining lands. Mr. Gibson has argued that it cannot. That is met by the case of *Frewen v. Philipps* (11 C. B. N. S. 449) and the observations of Kindersley, V.C. in *Daniel v. Anderson* (7 L. T. Rep. 183). There is no reason why it should not apply as between two tenants so as to bind them, though the landlord should not be bound. But if there was any difficulty about the case, *Beggan v. McDonald* (*ubi sup.*) appears to remove it; for it decided that a period of forty years' enjoyment is absolute and indefeasible, and that *Bright v. Walker* (1 C. M. & R. 211) applies only to a twenty years' enjoyment." Therefore Chitty, J. based his opinion upon those cases. He was misled, in applying the case of *Frewen v. Philipps* (11 C. B. N. S. 449), by the headnote to the report into supposing that it decided that the fact that two tenements are occupied under distinct leases both held under the same landlord is not material, and that one tenant or lessee acquires, notwithstanding the unity of seisin, an easement as against the other. The case did not decide that, but only that under sect. 3 of the Act an indefeasible right to light can be acquired by twenty years' enjoyment, although both tenements belong to the same owner; that decision had nothing to do with the acquisition of a right of way or water, and did not decide that such a right could be acquired under the Act by one tenant against another tenant of the same owner. The case of *Beggan v. McDonald* (*ubi sup.*), as I have already explained, does not apply to the claim of an easement by prescription by one tenant against another tenant of the same owner. Therefore that case is not an adequate foundation for the conclusion at which Chitty, J. arrived; and for the reasons which I have given I cannot approve of that opinion. Then, in *Wheaton v. Maple* (*ubi sup.*), we find the rule laid down, and very clearly stated, by Lindley, L.J. He there deals with the possibility of tenants acquiring easements against each other by prescription, and says: "It is true that it has been said that, after an uninterrupted enjoyment of light for twenty years, a covenant not to interrupt will be presumed. But I am not aware of any authority for presuming, as a matter of law, a lost grant by a lessee for years in the case of ordinary easements, or a lost covenant by such a person not to interrupt in the case of light, and I am certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right. The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with anyone except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years. Although, therefore, a grant by a lessee of the Crown, commensurate with his lease, might be inferred as a fact, if there was evidence to justify the inference, there is no legal presumption, as distin-

guished from an inference in fact, in favour of such a grant. This view of the common law is in entire accordance with *Bright v. Walker* (*ubi sup.*), where this doctrine of presumption is carefully examined." That, indeed, deals with the question of implied grant, and not with the Prescription Act. In another part of his judgment, however, he does deal with the Prescription Act, and says: "I come now to the last question—viz., whether sect. 3 has conferred an easement as against the Crown's lessees. So far as mere language is concerned, and apart from the nature of the subject-matter with which the section is dealing, I should see no difficulty in applying sect. 3 to all English subjects, whether lessees of the Crown or other people; I should see no difficulty in reading 'absolute and indefeasible' as meaning absolute and indefeasible against all persons to whom the section is applicable. But if the section is so read, the consequence will necessarily be to create, by mere occupation and enjoyment, a class of easements which at common law could never have been acquired by prescription, but only by express agreement or grant. An easement for a term of years may, of course, be created by grant; but such an easement cannot be gained by prescription, and, not being capable of being so acquired, it does not fall within the scope of the statute 2 & 3 Will. 4, c. 71. The expression 'absolute and indefeasible,' as applied to easements of all kinds, coupled with the declared object of the Act, which is to shorten the time of prescription, shows that the easements dealt with were easements appendant or appurtenant to land, and which, when acquired, imposed a burden for ever on the servient tenement." This view of the statute was clearly expressed, soon after it was passed, in *Bright v. Walker* (*ubi sup.*), and, although some passages in Parke, B.'s judgment in that case have been criticised, and even dissented from, the broad view which underlies the judgment has never been disapproved." That is a clear authority for the proposition that, when the easement is not one of light, and the claim is made under the Prescription Act, the claim to an easement can be made in respect of the fee alone. That is a sufficient answer to the defendant's claim in this case. That opinion of the Court of Appeal is inconsistent with the view of Chitty, J. expressed in *Harris v. De Pinna* (*ubi sup.*). I am therefore of opinion that the decision of Walton, J. was wrong, and that this appeal must be allowed.

ROMER, L.J.—I am of the same opinion. In *Wheaton v. Maple* (*ubi sup.*) it was pointed out that under the Prescription Act an easement could not be acquired for a term of years. It must, with regard to both the dominant and servient tenement, be acquired in respect of the fee. In this case the easement is claimed under sect. 2 of the Act, and the enjoyment referred to in that section must be enjoyment as of right, and in that respect it is different from the easement of light dealt with by sect. 3 of the Act. Now, when such an easement as this is sought to be established, how can the enjoyment be said to be as of right when there is a common owner of the fee of both tenements? As was pointed out by Lord Cairns, in *Gayford v. Moffatt* (L. Rep. 4 Ch. 133), the occupation of the tenant is in law that of his landlord, and when the owner goes cr.

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adjoining land of his landlord, he does not do so as of right in respect of an alleged dominant tenement, the land being the freeholder's own land. Upon that short ground I think that this appeal must succeed.

MATHEW, L.J.—I am of the same opinion. The simple point raised on this appeal has not been satisfactorily answered by the respondent. That point is that there was a common owner of the two tenements, and that, therefore, the alleged easement could not be acquired. An easement at common law can only be acquired by prescription when the dominant and servient tenements belong to different owners. There must be enjoyment as of right in respect of the dominant tenement over the servient tenement. That rule of law has been clearly laid down in *Wheaton v. Maple* (*ubi sup.*). How can the enjoyment be as of right when both tenements are owned by the same person? Test the question by the case where it is said that there is a presumption of a lost grant. There cannot be a lost grant by the owner of the land to himself. That seems to me to be conclusive of the whole question. Under the Prescription Act it is said that there can be a statutory easement which could not be acquired at common law. There is, however, a distinction between an easement of this kind and an easement of light, which has been pointed out; and an easement of this kind cannot be acquired under the Act where there is common ownership of the two tenements. I agree that this appeal must be allowed.

Appeal allowed.

Solicitors for the appellant, *Ullithorne, Currey, and Jennings*, for *C. B. Hodgson*, Carlisle.

Solicitors for the respondent, *J. A. Broughton*, Carlisle.

Feb. 24 and 25.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

KAUFMAN v. GERSON. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract—Contract made in France—Duress and undue influence—Agreement not to prosecute—Contract not invalid in France—Validity of contract in England.

The courts of this country will not enforce a contract made in a foreign civilised country between persons domiciled in that country, if it has been obtained by coercion, whether moral or physical, even though the contract is valid and enforceable by the law of the country in which it was made.

APPEAL of the defendant from the judgment of Wright, J. at the trial of the action without a jury.

The plaintiff brought this action to recover from the defendant the sum of 134*l.* alleged to be due under an agreement.

The plaintiff had intrusted a sum of money to the defendant's husband, in France, to be used for a particular purpose in France. All the parties were then domiciled in France.

The defendant's husband appropriated the money to his own use instead of applying it to the purpose for which it had been handed to him.

His conduct was criminal according to the law of France, and the plaintiff threatened a prosecution.

Under the influence of threats made by the plaintiff, and in order to prevent the prosecution of her husband and to protect the good name of her children, the defendant, who had property of her own, signed an agreement in Paris, upon the terms that there should be no prosecution of her husband, by which she agreed that she would by instalments spread over three years pay the plaintiff the amount which her husband had misappropriated.

An expert in French law, whose evidence was not contradicted, gave evidence that such an agreement was not invalid by the law of France either upon the ground that it was made in order to stifle a criminal prosecution or upon the ground that it was obtained by duress or undue influence.

The defendant by various instalments paid to the plaintiff the sum of 80*l.*, leaving a balance of 134*l.* due under the agreement.

The defendant having come to reside in England, the plaintiff brought this action to recover the balance of 134*l.*

The defendant set up a counter-claim claiming repayment of the money which she had paid under the agreement.

The action was tried before Wright, J., without a jury, and the learned judge gave judgment in favour of the plaintiff: (88 L. T. Rep. 691).

The defendant appealed.

Montague Shearman, K.C. and Eustace G. Hills for the appellant.—The learned judge was wrong in holding that this contract can be enforced in the courts of this country. This contract will not be enforced by English courts, because it was made for the purpose of interfering with the course of justice, and also because it was obtained by moral pressure amounting to coercion or duress. The general rule is that a contract which is valid by the law of the country in which it is made is held to be valid in the courts of this country, but there are exceptions to that rule:

Robinson v. Bland, 1 Wm. Black. 257; 2 Burr. 1077;

Biggs v. Lawrence, 3 T. R. 454; 1 R. R. 740.

If a contract made in a foreign country and valid by the law of that country is contrary to what the law of this country deems to be a general principle of morality, the courts of this country will not enforce it:

Re Missouri Steamship Company, 61 L. T. Rep. 316; 42 Ch. Div. 321;

Roussillon v. Roussillon, 42 L. T. Rep. 679; 14 Ch. Div. 351.

A contract which is obtained by coercion of any kind, whether by violence or by unfair moral pressure, is deemed by English law to be contrary to general moral principles and will not be enforced, wherever it was made:

Santos v. Midge, 3 L. T. Rep. 155; 6 C. B. N. S. 841; 8 Id. 861;

Grell v. Levy, 9 L. T. Rep. 721; 16 C. B. N. S. 73;

Hope v. Hope, 8 De G. M. & G. 731;

Quarrier v. Colston, 1 Phillips, 147; 65 R. R. 351.

It is clear upon the evidence that this contract was obtained from the defendant by such moral pressure as to amount to coercion; and the courts

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

of this country will not enforce a contract obtained by coercion, wherever it was made.

Lush, K.C. and Israel Davis for the respondent.—The decision of the learned judge was right. The courts of this country will enforce a contract which is valid according to the law of the country where it was made and was to be performed, unless it violates some principle of morality which is accepted by all civilised countries:

Re Missouri Steamship Company (ubi sup.).

This contract is not within that exception. A contract to stifle a criminal prosecution clearly does not come within that exception. A contract such as this, which is said to be a blackmailing contract, is not such an immoral contract as is meant in that exception. There was no force or physical violence or any coercion of that kind, assuming that the courts of this country would not in any case enforce a contract so obtained. The learned judge has found as a fact that there was not any coercion which was immoral and such as to prevent the contract being enforced in the courts of any civilised country. The courts in France would enforce this contract, and therefore it cannot be said to be a contract so immoral that the courts of no civilised country would enforce it. Coercion, if it can be so called, by threats to institute a criminal prosecution is not immoral in that sense:

Jones v. Merionethshire Permanent Benefit Building Society, 65 L. T. Rep. 685; (1892) 1 Ch. 173.

The courts do not refuse to enforce contracts not to prosecute upon any general moral considerations, but because it is a rule of English law that such contracts will not be enforced:

Williams v. Bayley, 14 L. T. Rep. 802; L. Rep. 1 H. L. 200.

The question is not whether this is a contract which can be enforced by the law of this country. If the French law takes a different view of public policy in matters of this kind from that which is taken by the English law, the courts of this country will give effect to a French contract which is not contrary to the public policy of that country. If the French courts will enforce the contract as not being contrary to public policy, the courts in England will not refuse to enforce it upon the ground that it is contrary to public policy as understood in the English courts. In France the courts would not hold this to be an unfair and invalid contract, and therefore the English courts will not refuse to enforce it. The alleged illegality or immorality must be such as to be contrary to the laws of all civilised countries; such that it would be contrary to the law of natural justice to enforce the contract, as is the rule in the case of foreign judgments:

Story on Conflict of Laws, sects. 245, 258, 7th edit.; Dicey's Conflict of Laws, pp. 32, 766.

[ROMER, L.J. referred to Westlake on Private International Law, sect. 215, 3rd edit.] The defendant secured a benefit by entering into this contract; she thereby acquired the liberty to remove with her property to this country. According to the law of France there was community of goods between her and her husband, and her property could have been made liable for his debts. The defendant has acted upon this contract for a long time after it

was made, and therefore she cannot now set up this defence:

Ormes v. Beadel, 3 L. T. Rep. 344; 30 L. J. 1, Ch.

Montague Shearman, K.C. was not called upon to reply. He intimated that the appellant's counter-claim would not now be pressed, but without prejudice to the right to insist upon it if the plaintiff appealed to the House of Lords.

COLLINS, M.R.—This is an appeal by the defendant from the judgment of Wright, J., and it undoubtedly raises a very important question. The appellant, who is the wife of E. Gerson, was induced, as the learned judge has found, by threats of a criminal prosecution in France against her husband to give an undertaking to the plaintiff to pay to him the money which her husband had misappropriated. During the series of years which followed the making of the agreement, the defendant paid various sums to the plaintiff amounting to 80*l.*, leaving a balance unpaid to the amount of 134*l.* The plaintiff and the defendant both being in England, the plaintiff has sued the defendant here to recover that balance. Two points have been taken on behalf of the defendant. The first, that the agreement was bad because it was an agreement to stifle a criminal prosecution; and the second, that the agreement cannot be enforced in this country because it was obtained by duress or undue influence. The learned judge, after hearing the evidence of a witness who was an expert in French law, came to the conclusion upon the first point that according to the law of France there is nothing wrong about an agreement for valuable consideration to stifle a criminal prosecution; and that as the contract was made in France between parties resident in France, and was intended to be performed in France, the defence that the contract was bad because it was an agreement to stifle a prosecution was not a ground upon which the courts in England ought to stay its hand. The other point is that the circumstances under which this agreement was made were such that the courts in England ought not to enforce it, because the defendant had been coerced by threats into making it. That point raises first the question of fact, whether the defendant has established that the agreement was obtained by coercion. It seems to me that the learned judge has found that it was so obtained. He says: "Gerson appropriated part of the money to his own use instead of applying it in buying skins. His conduct was criminal in France, and a prosecution was threatened. In order to avoid a prosecution and to protect the good name of Gerson's children, his wife, the present defendant, under the influence of Kaufman's threat and at his instance, agreed in writing to make good by instalments out of her own property the amount of the defalcation, on the express terms that there should be no prosecution on the part of Kaufman." When we look at the evidence given by the defendant at the trial, it appears to be perfectly clear that it was under threats of a criminal prosecution that she agreed to sign the undertaking to pay. It is said that there are two answers to the suggestion that this contract cannot be enforced in an English court. The first answer is that the defendant and her husband were domiciled in France and were married without a settlement and under the

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French law as to community of goods of husband and wife, and that therefore the wife was civilly liable with her husband for his debts. However that may be, it is obvious that the plaintiff was not content with that remedy and sought to obtain more from her, and that by exercising the strongest possible moral pressure he sought to get more security from her, and that she, yielding to that pressure, was constrained into giving the guarantee which it is now sought to enforce, and paid money under it. It is quite obvious from the correspondence that under continued threats of a prosecution of her husband she made the payments which she did make, until she was finally driven by the proceedings in this action to set up the defence which she has now set up. I think that the real point in this case is whether an agreement obtained under such circumstances can be enforced in an English court. I will not deal with the first point raised on behalf of the defendant, that any contract to interfere with the course of justice cannot be enforced in the courts of this country. The law of France appears to be different from English law upon that question, and I am not prepared to say that, if such a contract is a good contract in France, it might not be enforced in the courts of this country. I am not prepared to say now that it cannot be enforced, but it is not necessary to give a final opinion upon that point in the present case. I come then to the real point in this case upon which I propose to decide this appeal. It is said that by the law of France an agreement obtained by moral pressure can be enforced in that country. Wright, J., in his judgment, deals with that question, and, although he clearly thought that some pressure had been exercised, yet he came to the conclusion that the agreement could be enforced in France, and that it could, therefore, also be enforced in the courts of this country. He said: "The second ground on which the contract in the present case is impeached is that it was obtained by the undue influence or duress of a threat to prosecute the husband for crime. If this objection is to be regarded as based on considerations of public policy, the same answer applies as in the case of the first objection. It seems, however, to be more in the nature of an objection to the proof of consent of the defendant to the contract, a consent induced by duress or undue influence being by English law treated as no consent. If this be the correct view, it would seem that the law of the country in which the contract is made and is to be performed, and in which the parties are domiciled, ought to prevail unless there is such duress as must be considered to avoid the contract under any but unreasonable and uncivilised institutions of law—a description which would be applicable to such a case as that of consent obtained, *e.g.*, by physical torture, or by the use of drugs, but which cannot properly be applied to this case." The whole point of the learned judge's judgment upon that part of the case is contained in the last few lines of that passage. The learned judge admits that, if the contract was obtained by physical violence, it could not be enforced in the courts of this country, whatever the view of the courts of the other country might be. What can it matter what may be the form of coercion used? It is coercion just the same whether it is

physical or moral. Why was it not coercion to threaten to dishonour her and her children by prosecuting her husband? But it is contended that unless the principle is one which is universally applied and recognised by the law of all civilised countries, under which the courts of those countries would refuse to enforce such a contract, we are not entitled to apply it in an English court to a contract enforceable in a foreign court, and that therefore, when it is shown that another civilised country does not accept that principle, an English court is debarred from applying it to a foreign contract. The authorities do not bear out that proposition. In Story on Conflict of Laws, sect. 258, the rule is stated as follows: "The second class of excepted contracts comprehends those against good morals, or religion, or public rights. Such are contracts made in a foreign country for future illicit cohabitation and prostitution . . . and, in short, all contracts which in their own nature are founded in moral turpitude and are inconsistent with the good order and solid interests of society. All such contracts, even though they might be held valid in the country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or of even natural justice, are allowed to have their due force and influence in the administration of international jurisprudence." In the English courts the principle is that a party who seeks a remedy must come with clean hands; and, if a suitor has to aver something which upon grounds of public morality ought to debar him from obtaining the assistance of the court, he is not entitled to obtain relief upon the ground that the courts of the other country would allow him to sue in such a case. The passage in Westlake on Private International Law, sect. 215 (3rd edit.), which was referred to by Romer, L.J., states: "Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here, notwithstanding that it may have been valid by its proper law. The plaintiff in such a case encounters that reservation in favour of any stringent domestic policy with which alone any maxims for giving effect to foreign laws can be received. . . . The difficulty in every particular instance cannot be with regard to the principle, but merely whether the public or moral interests are essential enough to call it into operation; and where a breach of English law is not contemplated this is necessarily a question upon which there is room for much difference of opinion among judges." In the present case the point is whether a contract obtained by such moral pressure is one which an English court will enforce. In my opinion it is a universal principle of the courts of this country that they will not enforce any contract which has been brought about by coercion. That rule is not inconsistent with any authority which has been cited. It is clearly consistent with many of the cases and with what has been said by the judges in some of the cases, especially by Turner, L.J., and I think also by Knight-Bruce, L.J. in *Hope v. Hope* (8 De G. M. & G. 731). In *Roussillon v. Roussillon* (42 L. T. Rep. 679; 14 Ch. Div. 351) Fry, J. acted upon a similar principle. Upon the broad principle which I have stated, I am of opinion that the

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law in this country is such that the appellant is entitled to the protection of an English court in refusing to enforce a contract obtained in the way in which this contract was obtained. This appeal must, therefore, be allowed and judgment be entered for the defendant.

ROMER, L.J.—I am of the same opinion. In my opinion the principle of law which is applicable to this kind of case is succinctly and accurately stated by Mr. Westlake in the passage which has been read by the Master of the Rolls. The only question, then, is as to the application of that principle to the facts of the present case. What are the facts of this case? Shortly stated, the facts are that the plaintiff extorted this contract from the wife by threats of a criminal prosecution against the husband, the threatened proceedings being of such a kind that, if taken, they would ruin the husband and also socially disgrace the wife and children. The plaintiff seeks in this action to enforce the contract which was so obtained. To enforce such a contract would be to do something conflicting with the essential moral interests of the community. This court cannot properly be asked by the plaintiff in this case to assist him in enforcing an agreement so arrived at. It has been suggested that the defendant affirmed the contract after the improper pressure and its effects had been removed. As to that, I will only say that it was neither pleaded nor proved. I agree, therefore, that this appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. The policy of the English courts in such a case as this is that a litigant is not permitted by unfair or unjust means to arm himself with a right which the law does not allow to be enforced in these courts. What were the means employed by the plaintiff to obtain this agreement? The facts show that moral torture, and nothing less, was applied to the wife in order to obtain it. It seems to me, therefore, that it would be a violation of the principles applied in the English courts if we were to allow such a contract as this to be enforced. Then it was suggested that this contract was made long ago and has been since acted upon; but the case is just the same now as if this defence had been raised before anything was paid under it. There is no evidence at all of any ratification by the defendant. The pressure was steadily maintained by the plaintiff down to the year 1902. There is no evidence that the defendant affirmed the contract, and it was not attempted in the court below to show that she had done so. I agree that the appeal must succeed.

Appeal allowed.

Solicitors for the appellant, *Dixon, Weld, and Dixons.*

Solicitors for the respondent, *Leggatt, Rubinstein, and Co.*

April 12 and 13.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

ANDREW v. FAILSWORTH INDUSTRIAL SOCIETY. (a)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—Accident arising "out of" employment—Injury by lightning—Risk incidental to particular employment—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), s. 1.

A bricklayer employed upon the construction of a building exceeding 30ft. in height was killed by lightning when working upon a scaffolding at a height of 23ft. from the ground.

Evidence was given that a man working in that position incurred a risk substantially greater than the normal risk of being struck by lightning, and the County Court judge found that the accident arose "out of" the employment.

Held (dismissing the appeal), that the County Court judge had properly found that the accident arose "out of" the employment.

APPEAL of the defendants from the award of the County Court judge at Oldham in proceedings for compensation under the Workmen's Compensation Act 1897.

The plaintiff was the widow of a workman who was killed by lightning in the course of his employment by the defendants.

The deceased workman was a bricklayer who was employed upon a building exceeding 30ft. in height which was being constructed by means of a scaffolding.

The deceased was working upon the scaffolding at a height of about 23ft. above the level of the ground when he was struck by lightning and killed.

The plaintiff claimed compensation under the Workmen's Compensation Act 1897. The defendants contended that the accident did not arise "out of" the employment.

At the hearing before the County Court judge an expert witness, who was an engineer and electrician, gave evidence on behalf of the plaintiff to the following effect:

I have been told of the place and circumstances in which the deceased man was working. He was on a scaffold 23ft. from the ground. I consider that a very exposed position. The main fact is the elevation above the earth. Another factor is that he would constitute a well-defined point at which a discharge would be more likely to occur. Buildings and other erections afford a protection over a space which diminishes as you ascend vertically. If you draw a line at an angle of 45 degrees from the highest point of an erection to the earth, persons within that cone are protected, and it is therefore clear that, as you ascend, the zone of safety diminishes. I consider that a man working on an elevated scaffold runs an appreciably greater risk from that fact.

The County Court judge gave his decision as follows:

The question is, Did the accident arise out of the employment? It no doubt arose in the course of the employment, but that is not sufficient; it must also arise out of the employment. It seems to me that that is not a question of law; it is a question of fact, and in

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each case the judge has to consider the facts, and say, as a question of fact, did it arise out of the employment. No doubt, if there is no evidence at all upon which a judge could come to that conclusion, he must find for the respondents; but, if there is evidence upon which he can reasonably come to the conclusion that the accident arose out of the employment, then he is entitled to find for the applicant. The words "arising out of the employment" may be looked at in two ways. Mr. Elliott says the accident must arise out of the work which the man was doing, and he says that, if there is no connection between the work and the accident, then it does not arise out of the employment. I am bound to say that I cannot agree with that. Though it may not be connected with or have any relation to the work the man was doing, yet if in point of fact the position in which the man was doing the work, and the place he must necessarily occupy whilst doing the work, are a position and place of danger which caused the accident, it may fairly be said that it arose out of the employment, not because of the work, but because of the position. Let me put an illustration, though illustrations are not always much good. Take the case of a mariner in a ship at sea: a storm gets up and the vessel founders and the man's life is lost. It is not because he was doing any particular work at any particular time on the ship, but because his location was a dangerous location. The place and the circumstances constitute it a dangerous employment, and if, owing to a storm, a mariner is drowned at sea, it would be impossible to say that the accident did not arise out of the employment. In this case, therefore, if I come to the conclusion that, as a matter of fact, the position in which the man was working was dangerous, and that in consequence of the dangerous position the accident occurred, I could fairly hold that the accident arose out of the employment. Now, was it a dangerous position? Was the man exposed to something more than the normal risk which everybody, so to speak, incurs at any time and in any place during a thunderstorm? We know that lightning is erratic, and possibly no position and circumstances can afford absolute safety. But if there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that that extra danger to which the man is exposed is something arising out of his employment; and if in consequence of that extra danger a fatality occurs, I am entitled to say that the section applies and the applicant is entitled to recover. I have had some evidence on the point, and the evidence, especially that of Dr. Garrard, seems to me to entitle me properly to come to the conclusion that in this case under the circumstances there was a substantial, abnormally increased risk, owing to the position in which the man had to work; and, in accordance with the principles before stated, which I think should govern the case, I find that the accident did arise out of the employment, and I give judgment for the widow for 300l.

The defendants appealed.

A. Powell, K.C. and Adshead Elliott for the appellants.—There was no evidence upon which the County Court judge could properly find that the accident arose "out of" the employment in this case. An accident arising "out of" the employment must be one which arises out of the work upon which the workman is employed; it must be a risk incidental to that work, and a risk normally incidental to the employment. It must be a risk which might not improbably occur in such an employment as that in which the workman is engaged. This accident was owing to an act of God, and it no more arises "out of" the

employment than an accident caused by the wrongful act of a fellow-servant. In the Scotch case of *Falconer v. London and Glasgow Engineering Company* (3 Fraser, 564) Lord Trayner said: "A servant engaged in a factory and struck by lightning in the course of his employment would have no claim to compensation under the Act. There must be some connection between the accident and the employment." That case was referred to in *Armitage v. Lancashire and Yorkshire Railway Company* (86 L. T. Rep. 883; (1902) 2 K. B. 178), where it was held that an accident which happened to a workman through the tortious act of a fellow-workman did not arise "out of" the employment.

C. A. Russell, K.C. and H. Holman Gregory, for the respondent, were not called upon to argue.

COLLINS, M.R.—This seems to me to be a particularly clear case. The apparent difficulty has been dealt with in the remarkably lucid judgment of the learned County Court judge. It seems to me that I can say nothing to improve or to enlarge upon that judgment, and I will adopt it. I will refer to one passage of that judgment in which the judge exposes the fallacies of the argument on behalf of the defendants. He said: "If I come to the conclusion that, as a matter of fact, the position in which the man was working was dangerous, and that in consequence of the dangerous position the accident occurred, I could fairly hold that the accident arose out of the employment. Now, was it a dangerous position? Was the man exposed to something more than the normal risk which everybody, so to speak, incurs at any time and in any place during a thunderstorm? We know that lightning is erratic, and possibly no position and circumstances can afford absolute safety. But if there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that that extra danger to which the man is exposed is something arising out of his employment; and if in consequence of that a fatality occurs, I am entitled to say the section applies and the applicant is entitled to recover." I certainly think that it would be impossible to frame a more accurate direction to a jury than that judgment of the County Court judge. Having so directed himself, the judge applied himself to the facts in order to see whether the accident did arise out of the employment, and he did find that the accident arose out of the employment. I say, therefore, that this case is singularly free from difficulty, and that there is no ground for this appeal. It is true that being struck by lightning has been referred to by judges in some of the cases as a typical instance of an accident which does not arise out of the employment. They did so, no doubt, because that is a risk which is very seldom incidental to an employment, and in using that illustration they eliminated the condition that it is a risk incidental to the particular employment. That illustration, therefore, cannot be strained so as to apply to a case like this, where the risk of being struck by lightning is in fact incidental to the particular employment.

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I am clearly of opinion, therefore, that this appeal fails and must be dismissed.

ROMER, L.J.—I agree.

MATHEW, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants, *W. Hurd and Son*, for *Chapman and Brooks*, Oldham.

Solicitors for the respondents, *Field, Roscoe, and Co.*, for *G. P. Fripp*, Oldham.

Wednesday, April 13,

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

DYER v. SWIFT CYCLE COMPANY LIMITED. (a)
APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—Employment—"Factory"—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), s. 7 (2).

The Workmen's Compensation Act 1897, by sect. 7 (2), provides that "factory" has the same meaning as in the Factory and Workshop Act 1901, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Act of 1901 is applied.

By sect. 105 (2) of the Factory and Workshop Act 1901 certain provisions of the Act are to "have effect as if any building which exceeds thirty feet in height, and in which more than twenty persons, not being domestic servants, are employed for wages, were included in the word 'factory.'"

Held (allowing the appeal), that a building of the description specified in sect. 105 (2) of the Factory and Workshop Act 1901 is not a "factory," within the meaning of the Workmen's Compensation Act, merely because some provisions of the Act of 1901 are applied thereto.

APPEAL of the defendants from the award of the judge of the City of London Court in proceedings for compensation under the Workmen's Compensation Act 1897.

The plaintiff was injured by accident arising out of and in the course of his employment by the defendants, and claimed compensation under the Workmen's Compensation Act.

The plaintiff was employed on the London premises of the defendants at Holborn Viaduct, where their bicycles were shown for sale and orders were received and repairs were executed.

The building exceeded 30ft. in height, and more than twenty persons, not being domestic servants, were employed therein for wages. There was no machinery or plant worked by steam, water, or other mechanical power upon the premises.

The Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides:

Sect. 7 (2). In this Act "factory" has the same meaning as in the Factory and Workshops Acts 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895, and every laundry worked by steam, water, or other mechanical power.

The Factory and Workshop Act 1901 (1 Edw. 7,

c. 22), which repealed and consolidated all the previous Factory Acts, provides:

Sect. 105 (2). The provisions of this Act with respect to notice of accidents and the formal investigation of accidents shall have effect as if (b) any building which exceeds thirty feet in height, and in which more than twenty persons, not being domestic servants, are employed for wages, were included in the word "factory," and as if . . . the occupier of the building were the occupier of a factory.

Sect. 149 (1). The expression "factory" means textile factory and non-textile factory, or either of those descriptions of factories.

The County Court judge held that, as the premises exceeded 30ft. in height and more than twenty persons, not being domestic servants, were employed therein for wages, the building was a "factory" within the meaning of the Workmen's Compensation Act 1897, and accordingly made an award in favour of the plaintiff.

The defendants appealed.

W. Addington Willis for the appellants.—The County Court judge was wrong in holding that the case came within the Workmen's Compensation Act. In this case in order to entitle the workman to compensation his employment must be on, in, or about a "factory" within the meaning of the Act. "Factory" is defined by sect. 7 (2) of the Act. This building was not a "factory" within the meaning of the Factory and Workshop Act 1901, which is now substituted for the earlier Factory and Workshop Acts. In the Act of 1901 "factory" is defined in sect. 149, and this building certainly does not come within that definition. Therefore, if it is a "factory" at all within the meaning of the Workmen's Compensation Act, it can only be so because some provision of the Factory and Workshop Act 1901 is applied thereto. But sect. 7 (2) of the Workmen's Compensation Act does not enact that every building or thing to which any provision of the Factory and Workshop Act is applied shall be a "factory"; it only enacts that certain specified buildings and things shall be factories in that case. This building does not come within the category mentioned in sub-sect. 7 (2) at all, and therefore is not a "factory" within the meaning of the Workmen's Compensation Act, although certain provisions of the Factory and Workshop Act 1901 are, by sect. 105 (2), applied thereto. It was not suggested in the County Court that the building was a "warehouse"; and it has been found as a fact that there was no machinery or plant therein worked by steam, water, or other mechanical power.

Cairns for the respondent.—The learned County Court judge rightly decided that this building was a "factory." The definition of "factory" in sect. 7 (2) of the Workmen's Compensation Act is now to be read as if it referred to the Factory and Workshop Act 1901 instead of to the earlier Factory Acts:

Stevens v. General Steam Navigation Company, 88 L. T. Rep. 542; (1903) 1 K. B. 890.

Sect. 7 (2) therefore enacts that "factory" has the same meaning as in the Factory and Workshop Act 1901. Now, sect. 105 (2) provides that certain provisions of that Act shall apply to a building of this description, and thereby extends the meaning of "factory" in that Act beyond the definition contained in sect. 149. This building,

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therefore, was a "factory" within the Act of 1901, and consequently a "factory" within the meaning of sect. 7 (2) of the Workmen's Compensation Act. This building was a "warehouse" within the meaning of sect. 7 (2) of the Workmen's Compensation Act. There was evidence that the building was used for storing bicycles and materials:

Watson v. Cotton, 5 C. B. 51.

W. Addington Willis was not called upon to reply.

COLLINS, M.R.—This is an appeal from the decision of the judge of the City of London Court in proceedings for compensation under the Workmen's Compensation Act 1897. The facts of the case were not in dispute. Upon the admissions of fact made by the parties the judge arrived at two conclusions—first, that there was no machinery or plant driven by steam, water, or other mechanical power upon the premises, and that therefore the case was not within the Act upon that ground; secondly, that as the building exceeded 30ft. in height, and more than twenty persons were employed therein, it was a "factory" within the meaning of the Act. The question, therefore, is whether the accident occurred to a workman who was employed in a "factory" within the meaning of the Act. If the workman was not so employed, his case must fail. It was contended at the hearing that by reason of machinery being used upon the premises the place was a "factory," but the judge has found that this was not so. Therefore so far the plaintiff did not succeed in showing that the place was a "factory" within the meaning of that Act. Another contention made on behalf of the plaintiff was adopted by the judge, which was that, although the place was not a "factory" within the definition in sect. 149 of the Factory and Workshop Act 1901, yet by referring to another section of that Act—sect. 105 (2)—it appeared that the place was a "factory" within the meaning of that Act. Sect. 105 (2) provides that "the provisions of this Act with respect to notice of accidents and the formal investigation of accidents shall have effect as if (b) any building which exceeds thirty feet in height, and in which more than twenty persons, not being domestic servants, are employed for wages, were included in the word 'factory' and as if . . . the occupier of the building were the occupier of a factory." The judge found that this building came within that provision, and held that therefore it was a "factory." But when that section is read carefully, it is clear that it distinctly negatives such a building being a "factory" within the meaning of the Act. It says that two specified provisions shall apply "as if" the building were a "factory," and that is tantamount to saying that the building is not a "factory" within the meaning of the Act. There is no doubt a provision that, for the purpose of giving notice of accidents and of investigating accidents, such a building shall be treated as a factory. The question is whether that provision can make the building a "factory" within the meaning of the Workmen's Compensation Act 1897. The definition of a "factory" in sect. 7 (2) of the Workmen's Compensation Act is: "'Factory' has the same meaning as in the 'Factory and Workshop Act 1901,' and also includes any dock, wharf, quay, warehouse,

machinery, or plant, to which any provision of the 'Factory and Workshop Act 1901' is applied. Now, it is admitted that this building is not within the definition of "factory" contained in the Act of 1901, and it is not one of those places which is specifically mentioned in sect. 7 (2). It is not one of that class of buildings which are within the category given in sect. 7 (2), and it is only buildings within that category which can be made factories within the Workmen's Compensation Act by reason of some provision of the Factory Act being applied thereto. That conclusively shows that the decision of the learned judge was wrong upon the point upon which he decided this case. The counsel for the respondent has endeavoured here to support that judgment upon another ground—viz., that this building was a "warehouse." But that case was not made before the County Court judge, and no evidence was given to support it. That point, therefore, cannot be raised now. The case must be dealt with upon the facts as they were before the County Court judge. This appeal therefore succeeds, and must be allowed.

ROMER, L.J.—I am of the same opinion. The onus was on the workman to show that his case came within the scope of the Workmen's Compensation Act 1897. He could only do that by establishing that the building in which he was employed was a "factory" within the definition contained in sect. 7 (2) of the Workmen's Compensation Act. When that definition is carefully looked at, it is clear that the workman did not establish that this building came within the definition at all, and I gather that the County Court judge really so held. But the County Court judge appears to have held that this building was a "factory" by reference to the provisions of sect. 105 (2) of the Factory and Workshop Act 1901. But, as has been pointed out by the Master of the Rolls, sect. 105 (2) does not provide that any building exceeding 30ft. in height in which more than twenty persons are employed is a "factory"; in effect it points out that such a building is not a "factory," and only directs that certain provisions of the Act shall apply thereto "as if it were included in the word 'factory,'" and those provisions have no relation whatever to the Workmen's Compensation Act 1897. The decision of the County Court judge was, therefore, wrong. The workman has failed to bring this case within the Workmen's Compensation Act, and this appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. The ground upon which the County Court judge decided this case was wrong; and there is no evidence upon which the contention that the building was a "warehouse" can be established.

Appeal allowed.

Solicitors for the appellants, *Gibbs, White, and Strong.*

Solicitors for the respondent, *Lovett and Liddle.*

CHAN. DIV.]

DE LA COUR v. CLINTON; TRECHMANN v. CALTHORPE.

[CHAN. DIV.]

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before JOYCE, J.)

Feb. 12, 15, 16, 17, 18, 19, and March 30.

DE LA COUR v. CLINTON; TRECHMANN v. CALTHORPE. (a)

Company — Prospectus — Untrue statements — Omission of contracts — Liability of directors — Directors' Liability Act 1890 (53 & 54 Vict. c. 64), s. 3 — Companies Act 1867 (30 & 31 Vict. c. 131), s. 38.

Upon the faith of the statements contained in a prospectus issued by the defendants and their co-directors, the plaintiffs became shareholders in a company.

The prospectus contained certain untrue statements, and also omitted to specify the dates and names of the parties to a certain contract that had been entered into by or on behalf of the company.

Held, as regards the untrue statements, that, even though they constituted material misrepresentations and remained untrue to the date of the notice of allotment, yet, the defendants having reasonable ground to believe that the statements were true, the plaintiffs were not entitled to compensation from the defendants under sect. 3 of the Directors' Liability Act 1890; and, as regards the omission to specify the dates and names of the parties to the contracts, that, the contracts being material to be known, the prospectus was to be deemed to be fraudulent on the part of the defendants within the meaning of sect. 38 of the Companies Act 1867, and that the plaintiffs were entitled to damages accordingly.

ACTIONS in which the plaintiffs were shareholders in the Standard Exploration Company Limited and the defendants directors thereof.

The plaintiffs in their respective actions claimed compensation for the loss sustained by the plaintiffs by reason of untrue statements contained in the prospectus of the Standard Exploration Company Limited, issued by the defendants, on the faith of which the plaintiffs subscribed for shares in the company; and a declaration that the said prospectus was fraudulent on the part of the defendants within the meaning of sect. 38 of the Companies Act 1867, and damages for the loss sustained by the plaintiffs by reason of their having been induced to subscribe for the said shares on the faith of such prospectus.

The actions were in respect of the same prospectus as that which was the subject of the action of *McConnel v. Wright* (88 L. T. Rep. 431; (1903) 1 Ch. 546).

The facts will be found sufficiently and conveniently set forth in his Lordship's judgment.

Hughes, K.C., H. Powell, K.C., and W. Higgins for the plaintiffs.

Haldane, K.C., Gore-Browne, K.C., and W. H. Cozens-Hardy for the defendants.

Cur. adv. vult.

JOYCE, J.—These are actions against two directors of the Standard Exploration Company by two persons each of whom subscribed for fifty shares in the company on the faith of a

prospectus dated the 12th May 1899. They allege that such prospectus contained material misstatements, by which they were induced to take the shares, and was fraudulent in law under sect. 38 of the Companies Act 1867 by reason of the omission to specify therein the dates and names of the parties to certain contracts, and upon this ground they claim to have an inquiry in the appropriate form as to damages and payment of the amount to be thereby ascertained. No charge of actual fraud is made or suggested against either of the defendants. They may have been careless or negligent, but there is no imputation upon their personal integrity or honour; their only liability, if any, is under the statutory provisions of the Directors' Liability Act 1890 and the section I have mentioned of the Act of 1867. There is no doubt that each of the plaintiffs was induced to subscribe for his shares by the perusal of the prospectus, and did so upon the faith of the statements which it contained taken as a whole. The company was formed for various objects, which were obviously of a highly speculative nature, and included trafficking upon the Stock Exchange. Each of the plaintiffs, I think, took his shares as a speculation. The financial failure of the company was not in any sense due to any matter misrepresented in the prospectus. It was brought about in the year 1901 by the calamitous result of enormous speculations, in particular in Lake View shares, and the date of the winding-up order is the 16th Jan. of that year. The plaintiffs, however, made no complaint, nor had it occurred to either of them that he had any ground of action against the defendants until he was sought out by a so-called association of shareholders or the solicitors who advised or managed this association. The statements of claim, which are practically identical in their terms, allege several misstatements in the prospectus; but, having regard to what has taken place in a former action of *McConnel v. Wright* (88 L. T. Rep. 431; (1903) 1 Ch. 546), only two of such misstatements were actually discussed and insisted upon before me. They were, first and principally, what is the subject of the allegation in par. 4 (B) of the statement of claim in reference to the establishment of a share department for the acquisition and disposition of shares, and so on, with a statement that the directors had already acquired large holdings in various promising companies, including the following, particularly the London and Globe and others there named, and that, "Taken at this day's market quotations these shares already show a profit more than sufficient to pay a dividend of 10 per cent. on the total capital of this company for the current year"; and, secondly, the statement which is the subject of the same paragraph of the statement of claim, under sub-clause D, which is to the effect that "Contracts dated the 12th May 1899 have been entered into by the company for the acquisition from each of the companies and the liquidators thereof of the properties above-mentioned under the head of 'Properties to be acquired' for a total consideration of 775,000 fully-paid-up shares." In respect of each of these alleged misstatements, each of the plaintiffs claims to be entitled to relief under the Directors' Liability Act. It was also contended that the prospectus was to be deemed to be fraudulent under the 38th section of the Act of 1867, by reason of the omission

(a) Reported by SYDNEY DAVEY, Esq., Barrister-at-Law.

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to specify in it the dates and parties to the three contracts first particularly mentioned in par. 5 of the statement of claim. As to the alleged misstatements, it will be convenient to deal first with the one secondly mentioned—namely, par. 4 (D) of the statement of claim. Now, the statement in the prospectus was that, "Contracts dated the 12th May 1899 have been entered into by the company for the acquisition from each of the companies and the liquidators thereof of the properties above-mentioned under the head of 'Properties to be acquired' for a total consideration of 775,000 fully-paid-up shares," and inspection of copies of these contracts was offered at the offices of the solicitors of the company. The real fact was, however, that of those 775,000 shares, 40,000—namely, those which formed the consideration for the acquisition of 5000 fully-paid-up deferred shares in the Austin Friars Syndicate—were, in pursuance of an agreement dated the 27th Oct. 1898, transferred or issued, not directly to the owners of the shares or to the companies or the liquidators thereof, but to the nominees of the London and Globe, which company had previously, and with a view to the formation and establishment of the Standard Company, bought up these shares upon advantageous terms for the benefit of the Standard Company. The London and Globe were the avowed promoters of the Standard Company, as appears by the prospectus, and it has been suggested that, notwithstanding the statement in the prospectus that there were no promoter's profits in any shape or form whatever, the London and Globe Company did, by reason of this transaction, indirectly obtain a secret profit or advantage. Upon investigation and consideration of the facts in reference to this transaction, I am convinced that there is no foundation for this suggestion. In my opinion, the misstatement, such as it is, was not made intentionally, but was an accidental inaccuracy, which in no way ought to have influenced or did influence either of the plaintiffs in subscribing for shares in the company. If the precise facts as to the acquisition of these deferred shares in the Austin Friars Syndicate had been set forth with perfect exactness they would not, in my opinion, have been calculated to deter, and would not have deterred, either of the plaintiffs from taking shares. I have not the slightest doubt that each of the plaintiffs would have subscribed for his fifty shares, and risked his 50*l.* in the concern all the same. That is to say, I hold this misstatement not to have been material, or, in other words, that the plaintiffs have not sustained any loss or damage by reason of this untrue or inaccurate statement in the prospectus. The principal misstatement which is alleged, and which I will next consider, is under the heading of "Share Department," and is to the effect that in furtherance of the object of the company the directors have already acquired large holdings in various promising companies, including British America, Le Roi, and London and Globe, and so on. Now, having regard to what took place in the Court of Appeal in the case of *McConnel v. Wright* (*ubi sup.*) already mentioned, I was not asked upon this occasion to decide or consider any question with respect to the company's holding—that is, the Standard Company's holding—in British America shares. But the real contest was in reference to the shares, roundly 200,000 in

number, in the London and Globe, which admittedly were referred to in this paragraph of the prospectus, and which are the subject of a minute under date the 25th May 1899 in the directors' minute-book of the London and Globe. That minute is as follows:—"Resolved: That the allotment of 199,993 shares in this corporation at par to the Standard Exploration Company be, and is, hereby confirmed. The distinctive numbers being "so and so. It is curious that the date of this minute is referred to in the judgment of the judges of the Court of Appeal as being the 27th May, two days later than it really was. Upon the 25th May 1899, if not before, these shares were acquired by the Standard Company. But this was two days after the plaintiff De La Cour received notice of the allotment of the fifty shares which he subscribed for, and four days after the plaintiff Trechmann received the similar notice in respect of his fifty shares; for the application of the plaintiff De La Cour for shares is dated the 18th May, and the notice of allotment the 22nd May, and the application of the plaintiff Trechmann is dated the 17th May, and the notice of allotment to him the 20th May. Each of the plaintiffs lived in the country, and presumably would receive his notice of allotment upon the day after it bore date. The form of the minute of the 25th May suggests that there had been a previous allotment, either informal or otherwise questionable, for some reason or other. For my own part, I think that Mr. Whitaker Wright, under the power which a previous minute conferred upon him, had in some way affected to make this allotment, but it being suggested, and not without reason, that his power to allot did not authorise any allotment except to shareholders in the London and Globe, it was thought advisable to have a formal confirmation of the allotment to the Standard Company. It was proved before me that the minute-books of the two companies concerned were ill-kept; important business was often done in fact, and given effect to in the account-books of the company, without any entry concerning it appearing in the minute-books. Now, the London and Globe Company were the promoters of the Standard, and issued the prospectus, thereby stating, as the fact was, that the directors of the London and Globe were authorised to offer, and did offer, the shares of the Standard for subscription on the terms of that prospectus, one of which was, in effect, that the Standard Company had acquired a holding of (in round numbers) 200,000 shares in the London and Globe. Three of the directors of the London and Globe were also directors of the Standard. There had been a general understanding all along that the Standard should have these shares, and that they were reserved for that company; and under the circumstances it is difficult to see how it would have been possible, after the allotment of the shares of the Standard, for the London and Globe to resile from the position that the Standard had or must have these 200,000 shares in the London and Globe. In my opinion, upon the evidence before me, it was practically certain upon the 23rd, and even upon the 21st May 1899, that these London and Globe shares would be, if they had not already been, acquired, or at least, that the acquisition of these shares was practically secured, and such acquisition was certainly perfected on the 25th May, if not before. I cannot

think that the allotment of these 200,000 shares to the Standard at par was any breach of duty on the part of the directors of the London and Globe, although the shares that had been issued of that company were then saleable at a premium. As Lord Davey observes at p. 480 of the Appeal Cases, 1902: "I am not aware of any law which obliges a company to issue its shares above par because they are saleable at a premium in the market. It depends on the circumstances of each case whether it will be prudent, or even possible to do so, and it is a question for the directors to decide," and I may add that in this particular case the London and Globe were the promoters of the Standard, and had a direct pecuniary interest in the formation and success of that company. In such an action as this—that is to say, under the Directors' Liability Act—it is an essential factor that the plaintiff should prove substantial damage, the measure of which is well settled to be the difference between the price paid by the plaintiff for his shares and their real value at the date of the allotment being posted to or reaching him, and as a matter of convenience the date is taken to be that of the day after the posting of the notice of allotment. See judgment in *Cackett v. Keswick*, affirmed by Court of Appeal (87 L. T. Rep. 11; (1902) 2 Ch. 456). Now in the case of *McConnel v. Wright* (*ubi sup.*), which was an action by another shareholder against another director, in respect of the very prospectus in question here, it was held by the Court of Appeal upon similar, but not the same, materials as are before me, that there was a material misrepresentation in the prospectus with respect to the acquisition of the Standard Company's holding in the London and Globe, and that, having regard to such misrepresentation and to the subsequent liquidation, there was sufficient evidence of substantial damage to the plaintiff. Under the circumstances, I do not consider myself free to decide otherwise in the present case, though I am perhaps not technically bound to do so. Therefore, out of deference to the Court of Appeal, I hold that there was a material misrepresentation in the prospectus with reference to the acquisition of the London and Globe shares, and that there is sufficient evidence of damage to each of the plaintiffs by reason of such misrepresentation, although at the same time I think I am bound, in justice to the defendants, to say that I probably should have come to a different conclusion if I had been at liberty to follow my own opinion. Now, with reference to the several other companies mentioned in the prospectus under the head of "Share Department," it is probably not very material to consider when the shares or holdings in them were actually acquired. I think it is sufficient to say that the plaintiffs have not satisfied me that the holdings in such companies were not all acquired by the date upon which the respective notices of allotment were posted to the plaintiffs. It was decided in the case of *Ship v. Crosskill* (22 L. T. Rep. 355; 10 Eq. 73) that if a statement in a prospectus, although untrue at the time the prospectus was issued, be true at the time of the application for shares, the applicant cannot maintain an action for damages in respect of misrepresentations by such untrue statement, and I am not aware that this decision has ever been questioned. And it would probably be held that the same result

would follow if the statement in question was true at the date of the notice of allotment. Assuming, however, as was held in *McConnel v. Wright* (*ubi sup.*), that these shares in the London and Globe had not been acquired on the 23rd or 21st May 1899, and, in fact, were not acquired before the 25th of that month, the question arises whether the defendants believed, and had reasonable ground for believing, that these shares had been acquired, or that their acquisition was so secured as to justify the statement in the prospectus so far as the London and Globe shares were concerned. The question is not whether the defendants exercised extreme caution and thoroughly investigated the truth of all the several statements of the prospectus, whether they were capable and experienced financiers, whether they were wise or foolish, or what were the motives which influenced them in becoming directors; but simply whether they had reasonable ground for believing that these London and Globe shares had been acquired by the Standard Company. Upon consideration of the defendants' own evidence and that of the other witnesses called on their behalf, I think, upon the whole, it would be wrong to conclude that the defendants had not reasonable ground for believing the statements in the prospectus under the head of "Share Department," the correctness of which is questioned by the plaintiffs, and in particular as to the holding of 200,000 shares in the London and Globe, to be true. If I am right in this the defendants are excused from all liability under the Directors' Liability Act. But, unfortunately for the defendants, this does not dispose of the whole case. There remains the question of non-compliance with the provisions of sect. 38 of the Companies Act 1867. It is contended that the prospectus must be deemed to be fraudulent by reason of the omission to state therein the dates and the names of the parties to various contracts. [His Lordship specified the contracts referred to, including an agreement dated the 27th Oct. 1898 between the London and Globe Finance Corporation Limited and the Standard Exploration Company Limited, and continued:] Now, in order to entitle the plaintiffs to establish any liability on the defendants in respect of the omission to specify any of these contracts, it must be shown, among other things, that the contracts were material to be known, although the Act requires only the dates and parties to be stated, and that the plaintiff had not notice of them; or, in other words, that the plaintiff took his shares upon the faith of there being no such contract, and without having by a valid agreement waived the right he would otherwise have had under the section. Further, no plaintiff can recover unless it be shown that he has sustained damage by taking the shares on the faith of the prospectus. This is an essential factor. In other words, it must be shown that the real value of the shares on the day when he received the notice of allotment was less than the sum which he paid for them. Now, again, in dealing with this part of this case I am not free, I think, to act on my own opinion, whatever it may be, but am compelled to follow the decision of the Court of Appeal upon this same prospectus in *McConnel v. Wright* (*ubi sup.*). Their Lordships then held that the agreement of the 27th Oct. 1898 was a material contract, and that by reason of its omission the

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prospectus was to be deemed to be fraudulent. I do not see my way, upon such a question as this—viz., the materiality of the contract—to decide otherwise than in accordance with the Court of Appeal. In other words, I am compelled to hold that the date and names of the parties to the agreement of the 27th Oct. 1898 ought to have been specified in the prospectus; and further, as I assume, the Court of Appeal must have considered that such omission was not validly waived by the waiver clause in the application for shares coupled with the statement upon the same subject in the prospectus. I have already said that I must follow the Court of Appeal in its decision, that, having regard to the subsequent winding-up, and the few days' delay in the acquisition of the London and Globe shares, there was sufficient evidence to show that the plaintiffs had sustained loss or damage entitling them to relief, although what the real value of the shares was at the time of allotment appears to me to be wholly unascertained. The result is, therefore, that in this court there must be judgment for each of the plaintiffs in terms which I will state on the ground of the omission to specify the date and names of the parties to the agreement of the 27th Oct. 1898. As to the other contracts, I think that the plaintiffs either had notice of them or waived their rights under the 38th section of the Act of 1867. I think they did not subscribe for or take their shares upon the faith of there being no such contracts.

The form of order in the action of *De la Cour v. Clinton* was as follows: "Declare that the prospectus of the Standard Exploration Company limited in the pleadings mentioned must be deemed fraudulent on the part of the defendant within the meaning of sect. 38 of the Companies Act 1867 by reason of it not having specified the date of and names of the parties to the contract dated the 27th Oct. 1898, and the court doth order and adjudge the same accordingly. And the court doth order that an inquiry be made what sum by way of compensation ought to be awarded to the plaintiff for the loss or damage suffered by him by reason of his having taken fifty shares of 1l. each in the same company on the faith of such prospectus, having regard to the price paid by him for the said fifty shares and the real value of such shares on the 23rd May 1899 (the day after the date of the allotment)."

The form of order in the action of *Trechmann v. Calthorpe* was the same as above, except that the day after the date of allotment was the 21st May 1899, not the 23rd May 1899.

Solicitors for the plaintiffs, *Lesser and Danger*.
Solicitors for the defendants, *Burn and Berridge*.

KING'S BENCH DIVISION.

March 29, 30, and April 13.

(Commercial Court, before BIGHAM, J.)

BASSE AND SELVE v. BANK OF AUSTRALASIA. (a)
Bank—Credit against production of documents—Certificate of analysis—Fraudulent misrepresentation—Duties and liabilities of bank.

A bank was authorised to advance a sum against production of documents. The mandate was as

(a) Reported by W. TREVOR TUSTON, Esq., Barrister-at-Law.

follows: "Negotiate drafts of A. O. at sight on D. Bank (Berlin) London agency p. 800l. account B. S. (against) bill of lading, policy of insurance and certificate analysis from Dr. H. (for) 100 tons cobalt ore analysis not less than 5 per cent. protoxide shipped by steamer (to) Europe. Credit expires."

A. O. intended to ship worthless ore, and in the bill of lading it was described as "P.M. 2680 bags containing 100 tons cobalt ore." A policy of insurance was also effected.

A sample of sound ore was submitted for analysis, which analysis the bank refused to accept, as the certificate did not refer to the bill of lading goods.

A. O. then marked the sample as the bill of lading quantity was described.

The analyst gave a second certificate, which was as follows: "Sample of cobalt ore marked 'P.M. 2680 bags representing 100 tons' received from you on the 12th July gave the following results: 4.14 per cent. cobalt, equal to 5.27 per cent. cobalt protoxide in the dry ore; 9.25 per cent. moisture.

On producing the second certificate the bank paid A. O. 800l.

Subsequently A. O. was convicted of obtaining that money by fraudulent misrepresentation.

Held, that the certificate on its face was regular and came within the meaning of the mandate, and there was no duty on the bank to see to the sampling. The bank was entitled to assume that the analyst had acted skilfully in making the analysis.

ACTION to recover from the defendants 800l. for damages for breach of duty in not acting in accordance with instructions, and, alternatively, for having negligently performed their duty to the plaintiffs.

The facts appear in the considered judgment.

Rufus Isaacs, K.C. and A. B. Cane for the plaintiffs.

J. A. Hamilton, K.C. and R. W. Coventry for the defendants.

Uster Bank v. Synnott (1871, 5 Ir. Rep. Eq. 595), Woods v. Thiedemann (1 Hurlst. & Oolt. Exch. Rep. 478), and Ireland v. Livingstone (27 L. T. Rep. 79; L. Rep. 5 H. L. 416) were referred to.

BIGHAM, J.—This action is brought by the plaintiffs to recover from the defendants a sum of 800l., paid by the plaintiffs to the defendants upon a consideration which is said to have wholly failed; or, in the alternative, to recover the like sum as damages for breach of contract. The facts are as follows: The plaintiffs are manufacturers carrying on their business in Prussia. The defendants are an English banking company with an agency in Sydney, N.S.W. In May 1902 the plaintiffs agreed to buy of a correspondent of theirs at Sydney named Oppenheimer 100 tons of cobalt ore at 8l. per ton. The ore was to be shipped by steamer to Europe and was to be paid for by cash against shipping documents in Sydney. The shipping documents were to consist of (1) the bill of lading, (2) a policy of insurance, and (3) a certificate of analysis by a local chemist named Helms showing at least 5 per cent. protoxide. This contract having been made, it became necessary for the plaintiffs to find a means by which Oppenheimer could get payment in Sydney

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in exchange for the documents. They accordingly put themselves into communication with their bankers in Berlin—the Deutsche Bank. This bank has no branch in Sydney, and therefore, by letter dated the 14th May 1902, they in their turn gave instructions to the defendant bank in London to open the credit required. The letter is in the following terms:

Berlin, May 14, 1902.—Bank of Australasia, London, E.C., 4, Threadneedle-street.—Dear Sirs,—Our friends Messrs. Basse and Selve, Altena, inform us that they have instructed the firm A. Oppenheimer at Sydney by mail of the 4th April to ship for them 100 tons cobalt ore at 8l. per ton by steamer to Europe, and they now wish to open a credit by cable in favour of A. Oppenheimer, Sydney, for the above shipment. The credit shall be available until the 15th June next against production of the following documents for 100 tons cobalt ore—viz. (1) B/lading in full set, and (2) insurance policy, per steamship to Europe; (3) certificate of analysis by the chemist Dr. Helms showing an analysis of at least 5 per cent. protoxide. We therefore beg to request you by the present to instruct your Sydney branch by cable to negotiate Mr. A. Oppenheimer's sight drafts upon our London agency up to the extent of 800l., say, eight hundred pounds, if accompanied by the documents specified overleaf, drafts and documents not to be issued later than the 15th June, and provided that the certificate of the chemist Dr. Helms shows the analysis required before. If possible we would suggest that your telegram to Sydney be kept in about the form stated on the inclosure, but, of course, we do not wish to influence you should you have different cable arrangements with your branches as long as all particulars are observed. The reason why we suggest a certain form for your cable is because the inclosed one has been approved of by our clients. We should feel obliged if you would forward us a true copy of the cable which you have dispatched to Sydney, and request you to apply for your cable expenses to our London office.—We are, dear Sirs, yours faithfully, DEUTSCHE BANK.

The inclosed form was as follows:

Bank of Australasia, London, E.C. Telegram to your London office. Negotiate the sight drafts of . . . upon the Deutsche Bank (Berlin) London agency up to the amount of . . . drawn for account of . . . accompanied by the following documents . . . for . . . shipped by steamer to Europe available until . . . under advice to payee. A. Oppenheimer 800l. Basse Selve, B/lading full set. Insurance policy. Certificate of analysis from Dr. Helms. 100 tons cobalt ore, analysis not less than 5 per cent. protoxide, June 15.

On the same day the Deutsche Bank wrote to the plaintiffs, advising them of what they had done. The letter is as follows:

Berlin, May 14, 1902.—Messrs. Basse and Selve, Altena.—We received your favour of the 13th, and note therefrom that you declare your agreement with the essential points in the framing of the telegram to our correspondents in Sydney with regard to crediting the firm A. Oppenheimer, Sydney, for a shipment of 100 tons cobalt ore at 8l. per ton per steamer to Europe. As you write us there should be mentioned in the telegram by means of which the said credit in Sydney is opened that the certificate should be made out by Dr. Helms in Sydney, and that the ore must show a contents of 5 per cent. protoxide according to the chemical formula CoO . (it was not intended, we presume, that this prescription is to be introduced into the telegram, it would probably not be understood at all by our correspondents); on the other hand, prescriptions regarding the humid contents of the ore should not be given. Furthermore, we noted from our telephonic conversation of to-day that the credit should be framed as valid until

the 15th June of this year. We have consequently, in conformity with this, written to-day to the Bank of Australasia, London, requesting them to telegraph their branch in Sydney—the telegram to Sydney goes, as usual, for your account and risk—to negotiate the drafts drawn upon our London agency by the firm A. Oppenheimer, Sydney, up to the amount of 800l. at sight, eight hundred pounds sterling, accompanied by—(1) Bill of lading full sets of 100 tons cobalt ore, shipped per steamer to Europe; (2) insurance policy; (3) certificate by Dr. Helms of a contents of at least 5 per cent. protoxide in the ore, drafts and documents not to date later than the 15th June of this year. We have also requested the Bank of Australasia, London, to send us an exact translation of the relative telegrams, and will send you same immediately on receipt. For the cabling expenses, as well as for the resulting drafts of Mr. A. Oppenheimer, Sydney, in consequence of this credit we reserve to ourselves to debit you under advice. You yourselves will, as you have confirmed to us to-day by telephone, cable Mr. A. Oppenheimer about this—i.e., that the above credit with the Bank of Australasia, Sydney, is opened, and inform him that he should hand in the drafts and the requisite documents to the said bank.—We are, &c., DEUTSCHE BANK.

On the 16th May the defendant bank accordingly telegraphed to their Sydney branch, and wrote to the Deutsche Bank, sending a copy of the telegram. The letter is as follows:

Bank of Australasia, 4, Threadneedle-street, London, E.C., May 16, 1902.—The Deutsche Bank, Berlin.—Dear Sirs,—In accordance with your request by letter of 14th instant, we have dispatched a telegraphic message (using our cypher code as required) to our branch at Sydney, translating as follows: "Negotiate drafts of A. Oppenheimer at sight on Deutsche Bank (Berlin) London agency p. 800l. account. Basse Selve (against) bill of lading, policy of insurance and certificate analysis from Doctor Helms (for) 100 tons cobalt ore analysis not less than 5 per cent. protoxide shipped by steamer (to) Europe. Credit expires on June 15." This message has been sent on the understanding that it is entirely at your risk in all respects, and that we are not liable for the consequences of any delay, mistake, or omission which may happen in its transmission. As requested by you, 4l. 10s. for the cost of our telegram shall be collected from your London agency. Our Sydney branch will advise Mr. Oppenheimer in the usual course.—Your obedient servant, W. O. USSHER, pro Manager.

The telegram which is set out in this letter constituted the mandate to the defendants, and it is for carelessly parting with the money to Oppenheimer without properly attending to the terms of the mandate that the action is brought. In the following July (to which date the credit in the meantime had been extended) Oppenheimer sent alongside a ship at Sydney a quantity of cobalt ore, and obtained for it a bill of lading dated the 21st July, in which the parcel was described as "P.M. 2680 bags containing 100 tons cobalt ore." He also took out a policy of insurance on the goods. On or about the 12th July he left with the chemist Helms a packet of ore with instructions that it should be analysed. This sample Helms accordingly analysed, and on the 17th July handed the certificate to Oppenheimer. It is as follows:

Dr. Helms, M.A., F.C.S., Consulting and Analytical Chemist, 8, Bridge-street, Sydney, July 17, 1902.—Adolphus Oppenheimer, Esq., Box 1229 G.P.O.—Dear Sir,—The sample of cobalt ore received from you on the 12th July gave the following results: 4.14 per cent.

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cobalt, equal to 5.27 per cent. cobalt protoxide in the dry ore; 9.25 per cent. moisture.—Yours faithfully, A. HELMS.

Furnished with these three documents—the bill of lading, the policy, and the certificate—Oppenheimer on the 22nd July went to the defendant bank and asked for his money, 800*l*. The bank manager examined the documents and pointed out to Oppenheimer that there was nothing on the face of the certificate to connect it with the goods mentioned in the bill of lading, and he refused to pay the money until the certificate was put right. Oppenheimer then returned to Helms and marked the sample packet “P.M. 2680 bags representing 100 tons,” and asked Helms for a fresh certificate, which Helms accordingly gave him. The fresh certificate is in the following terms:

Dr. Helms, M.A., F.C.S., Consulting and Analytical Chemist, 8, Bridge-street, Sydney, July 17, 1902.—Adolphus Oppenheimer, Esq., Box 1229 G.P.O.—Dear Sir,—The sample of cobalt ore marked “P.M. 2680 bags representing 100 tons” received from you on the 12th July gave the following results: 4.14 per cent. cobalt, equal to 5.27 per cent. cobalt protoxide in the dry ore; 9.25 per cent. moisture.—Yours faithfully, A. HELMS.

With this second certificate Oppenheimer again visited the bank. The bank manager expressed himself satisfied; took the documents; obtained from Oppenheimer his draft at sight on the Deutsche Bank for 800*l*., and gave to Oppenheimer that amount, less the bank's charge for the business—a small sum of a quarter or a half per cent. In due course the bill was forwarded to London, and on the following 30th Aug. it was paid by the Deutsche Bank no doubt with money provided for the purpose by the plaintiffs. Very shortly after parting with the money the defendants in Sydney discovered that Oppenheimer had been guilty of a trick. The ore which had been sent down to the ship was worthless, whereas the sample which he had taken to Helms, and which was supposed to represent the bulk, was good, and answered to the requirements of his contract with the plaintiffs. On the 15th Aug. the defendants by cable advised the Deutsche Bank of the fraud. Subsequently Oppenheimer was prosecuted in Sydney for obtaining the 800*l*. from the defendants by fraudulent misrepresentation, and being convicted was sentenced to eighteen months' imprisonment. The ore was never put on board ship; it was not worth the cost of carriage. Thus the plaintiffs, who have paid 800*l*., have received nothing for their money. They now seek to make the defendants responsible for the loss, on the ground that in paying the money to Oppenheimer in exchange for the false certificate they failed or neglected to observe the terms of their mandate. The defendants resist the claim on three grounds. First, they say that they have properly performed the orders given to them; secondly, they say there is no privity of contract between themselves and the plaintiffs—in other words, they contend that their employers were the Deutsche Bank and no one else; and, thirdly, they say that the plaintiffs have repaid the 800*l*. with full knowledge of all the facts and cannot, therefore, now recover back the amount. It is only necessary for me to deal with the first of these contentions, for I think the defendants are entitled to succeed upon it. What was the mandate to the defendants? It was to pay to

Oppenheimer 800*l*. in exchange for certain documents which Oppenheimer was to bring to them. Oppenheimer was intrusted by the plaintiffs to obtain these documents. It was he who was to get the bill of lading from the shipowner; it was he who was to get the insurance policy from the underwriter; and it was he who was to get the certificate of analysis from Dr. Helms. With this part of the business the defendants had nothing whatever to do; their duties did not begin until Oppenheimer brought the documents to them. What those duties then were is, in my opinion, quite plain. The defendants were in the first instance to see that they dealt with the right man; this they had to do at their own peril. If they had parted with the money to someone who was not in fact the man indicated in the mandate they could not, I think, have required the plaintiffs to repay the amount; and it would not have mattered how careful they might have been in making their inquiries. But once they were in touch with the right man the defendants' only remaining duty was to see that the documents which he brought purported on their face to be the documents described in the mandate. It was no part of their duty to verify the genuineness of the documents; the duty was not cast upon them of making inquiries at the office of the ship's agent as to whether the goods had, in truth, been received on board; nor were they to examine the contents of the packages to see whether they were right; nor were they to communicate with Dr. Helms in order to ascertain whether he had properly made the analysis mentioned in the certificate. The plaintiffs' mandate amounted in business to a representation to the defendants that upon all such matters they might rely on Oppenheimer, and the legal effect of such a representation is now to preclude the plaintiffs from questioning the validity of any apparently regular documents which Oppenheimer might tender. If this is so, then the only question left on this part of the case is whether the documents were apparently regular. It is admitted by the plaintiffs that the bill of lading and the policy of insurance were apparently regular, but an objection is made on this score to Helms' certificate. It is said that it professes to show merely the test of the contents of a sample packet with a mark upon it, and does not purport to show a test of the bill of lading of 100 tons of ore. This, I think, is a fanciful objection. Large quantities of produce are necessarily tested by means of samples. Such samples are drawn either by the servants of the owner of the goods or (as it seems) by the servants of the analyst, and if the samples are carefully and skilfully drawn they generally fairly represent the bulk. But in this case it would be no part of the bank's duty to see to the sampling or to ascertain that it was fairly done. The bank were entitled to assume that it was so, just as they were entitled to assume that the analyst had acted skilfully in making the analysis. The certificate is, in my opinion, regular on its face, and comes within the meaning of the mandate under which the bank were acting, and the bank in taking it acted carefully and properly.

Judgment for defendants.

Solicitors: for the plaintiffs, *Ashurst, Morris, Crisp, and Co.*; for the defendants, *Budd, Johnson, and Jecks.*

Supreme Court of Judicature.

COURT OF APPEAL.

Saturday, March 5.

(Before COLLINS, M.R., ROMER and
MATHEW, L.JJ.)

BOULTON AND OTHERS v. HOULDER BROTHERS
AND CO. AND OTHERS. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

*Practice—Discovery—Production of documents—
Marine insurance—Underwriters' right to dis-
covery and production—Action by underwriters
against assured to recover over-payments.*

*In an action by underwriters to recover the
amount of overcharges which they had paid to
the assured in respect of claims upon policies
of marine insurance, which overcharges they
alleged had been obtained by means of false
and fraudulent accounts:*

*Held (allowing the appeal), that the underwriters
were entitled to have as full discovery from the
assured as they would have been entitled to in
an action brought against them upon the
policies.*

APPEAL of the plaintiffs from the order of
Bucknill, J. made at chambers.

This action was brought by a number of under-
writers against the defendants to recover the
amount of alleged overcharges made in claims
under policies of marine insurance underwritten
by the plaintiffs; and also to recover damages for
conspiracy to defraud the plaintiffs.

The defendants were Houlder Brothers and
Co., Houlder Brothers and Co. Limited, C. F.
Hartridge, C. K. Etheridge, W. O. Beard, James
Littlefield and Co., A. G. Inrig, Inrig and
Chester, the Globe Electrical Company, and the
Queen's Dock Electric Works Limited.

The plaintiffs had underwritten a large number
of policies upon steamers, the insurances being
effected by Houlder Brothers and Co. in their own
names.

Houlder Brothers and Co. were the managing
owners of the steamers, and made many claims
under the policies of insurance and had received
payment from the underwriters.

The plaintiffs alleged that some of these claims
were fraudulent; that the defendants, other than
Houlder Brothers and Co., had made out exces-
sive claims for repairs, and that Houlder Brothers
and Co. had supported those claims by means of
false accounts for the purpose of defrauding the
underwriters. The plaintiffs alleged that they
had in consequence paid amounts much larger
than the repairs had really cost, and they
claimed repayment of the overcharges.

Some of the steamers in respect of which
claims were made were owned by single-ship
companies. These companies went into voluntary
liquidation for the purpose of amalgamation into
one company—the Houlder Line Limited.

The Houlder Line Limited were not made
parties to this action.

Houlder Brothers and Co., while denying
liability, paid a large sum of money into court,

which they alleged to be sufficient to satisfy the
plaintiffs' claim.

An order was made, on the application of the
plaintiffs, that the defendants should give par-
ticulars of the payment into court.

Particulars were given, but they did not suffi-
ciently show in respect of which policies and
underwriters the payment into court was made.

An affidavit of documents was made on behalf
of the defendants, on the 11th Jan. 1904, in which
it was sworn that the defendants Houlder
Brothers and Co. and Houlder Brothers and
Co. Limited had formerly in their possession as
managers of certain single-ship companies certain
specified policies of insurance; that all the said
policies had in April 1903, pursuant to an order
of Buckley, J., been deposited in court and sub-
sequently handed over to the liquidator of the
said companies; that the said policies were in
the exclusive possession and custody and control
of the said liquidator as such; and that the
defendants were not able to produce the said
policies; and that the defendants, who formerly
constituted the firm of Houlder Brothers and
Co., had in their possession solely as directors of
the Houlder Line Limited, and not otherwise,
certain specified policies which were the property
of and in the possession, custody, and control of
that company.

On the 18th Jan. 1904 the master made an
order that the defendants Houlder Brothers
and Co., Houlder Brothers and Co. Limited,
and C. F. Hartridge should within six weeks
from the 2nd Dec. 1903 file their affidavit of dis-
covery; and that the defendants should produce
the several policies for inspection by the plaintiffs
and their solicitors within one week on usual
notice, subject to any order of Buckley, J. as to
any documents in the custody of the court or of
the liquidator.

The defendants Houlder Brothers and Co.
Houlder Brothers and Co. Limited, and C. F.
Hartridge appealed, and Bucknill, J., at chambers,
made an order that the order of the master
should be varied "by limiting the discovery to the
policies in the possession or control of the defen-
dants as such, excluding those which are in the
possession of the liquidator and Houlder Line
Limited."

The plaintiffs appealed, with leave.

*Rufus Isaacs, K.C., Sims Williams, and T.
Mathew* for the appellants.—In this action the
plaintiffs are entitled to the fullest possible dis-
covery—that is, they are entitled to the same large
order for discovery as they would be entitled to
in an action brought against them as underwriters
upon the policies of insurance. The right of
underwriters to the largest measure of discovery
is well settled by a series of cases extending over
a long period:

Janson v. Solarte, 2 Y. & C. 127; 47 R. B. 374;

Rayner v. Ritson, 6 B. & S. 888;

*China Traders Insurance Company v. Royal
Exchange Assurance Company*, 78 L. T. Rep. 783;
(1898) 2 Q. B. 187;

*China Transpacific Steamship Company v. Com-
mercial Union Assurance Company*, 45 L. T.
Rep. 647; 8 Q. B. Div. 142;

*West of England Bank v. Canton Insurance Com-
pany*, 2 Ex. Div. 472;

*London and Provincial Insurance Company v.
Chambers*, 5 Com. Cas. 241.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.
Vol. XC., 2331.

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The reason of the rule is that the underwriters are necessarily in ignorance as to all matters connected with the ship, whereas the shipowner knows or has the means of knowledge, and the underwriters are entitled to rely on the good faith of the assured. Underwriters, therefore, are entitled to discovery not only of all documents in the possession of the assured, but also of all documents of which the assured can get possession by any reasonable means. The same principle must apply to the present action, in which the underwriters are seeking to recover overcharges which, relying on the good faith of the assured, they have paid without inquiry, and their position is the same as if they were resisting a claim upon the policies:

Boulton v. Houlder Brothers and Co., 9 Com. Cas. 75.

Inspection of the indorsements upon the policies will enable the plaintiffs to ascertain whether the sum which the defendants have paid into court is sufficient to repay all the overcharges which they have paid.

J. A. Hamilton, K.C., Bremner, and G. Hay Morgan for the respondents.—The order made by the learned judge was quite right. The rule applicable to actions upon policies against underwriters is not applicable to a case of this kind. This is not an action upon a policy of marine insurance. It is an action in which the plaintiffs allege fraud and conspiracy, and the plaintiffs are not entitled to this discovery. The rule applicable to actions upon policies of marine insurance has never been applied in any other kind of action; that practice is strictly confined to the particular class of actions:

Henderson v. Underwriting and Agency Association, 64 L. T. Rep. 774; (1891) 1 Q. B. 557;

Thomson v. Weems, 9 App. Cas. 671;

Cory v. Patton, 26 L. T. Rep. 161; L. Rep. 7 Q. B. 304;

Twissell v. Allen, 5 M. & W. 337.

The defendants have no power to produce the documents in the possession of the liquidator or of Houlder Line Limited; and they cannot be ordered to produce those which are in their possession only as agents for others:

Williams v. Ingram, 16 Times L. Rep. 451.

Sims Williams in reply.

COLLINS, M.R.—This is an appeal from the order of Bucknill, J. on a claim for discovery by the plaintiffs. There is this peculiarity about the case, that the plaintiffs in this case are underwriters, and they are seeking to recover from the defendants sums which they say they have overpaid to the defendants, who were the assured of these underwriters. It is the fact and it is common ground now that the defendants, being the assured of these underwriters, did demand and receive from the underwriters sums in respect of damage to ships insured by them in excess of the sums really due from these underwriters. Now, the case is complicated in this way. The persons who received these sums and claimed them under policies effected by them with the underwriters were themselves agents for certain companies, and were also partly acting for themselves, and if in those proceedings on those policies the underwriters had resisted the claims or had thought it

desirable to investigate the claims against them, there is no doubt whatever, and it is common ground and it has not been disputed in this case, that those underwriters would then have been entitled to the fullest possible discovery which is now asked for in this case. That is common ground, and that discovery would, according to a long series of cases, have imposed the obligation on the part of the person suing the underwriters to produce, or, failing their ability to produce, to give reasons thoroughly satisfactory to the court on oath explaining their inability to do so, those documents which were not in their own custody, or which were in their custody merely as agents for other persons. They would have had to account for the inability to produce them or they would have to satisfy the court that they had taken the utmost possible means in their power to enable them to give to the underwriters all information with respect to them and appertaining to them. That would have been the obligation had these underwriters for any reason sought to sift and investigate the liability asserted by the assured in suing upon the policies. The underwriters, dealing with the assured not only as honourable men but as men whose servants and agents were not likely to make mistakes in their own favour, did not demand the discovery which they were entitled to, and they paid without further investigation claims which were made against them, and it turns out now that those claims were largely, or at all events to a considerable extent, in excess of the sums which were due. In that state of things the underwriters who have so paid became aware of the fact that they had been called upon to pay, and had paid, large sums which really represented losses that had not occurred—that is to say, that they had been called upon to pay sums which were largely in excess of the damages that had been sustained by the assured. Under those circumstances they have brought an action to recover that excess, and in form have alleged a fraudulent conspiracy to exact from the underwriters sums in excess of those which were really due. Being now the plaintiffs in an action, they demand the same discovery, and no other, that they would have had from the same persons had they been the defendants sued by those persons, and the only reason they did not get it before is because, to use a neutral term, owing to the misstatements of the assured they were really to forego their unquestioned right of getting this discovery from the assured in the first instance. They say now that they are not to be placed in a worse position as to their right to discovery because they forewent their right to demand it when the claim was made by the assured; that it was through the conduct of the assured that they have been obliged now to put themselves into the position of plaintiffs to get back from the assured that which never ought to have been paid them, and which was paid them on their misrepresentations. Then it was contended for the defendants that the court ought not to give in an action for conspiracy a right of discovery which is only given in an action of marine insurance, and ought not to extend that inspection to the plaintiffs. I say that we ought to do so, because in substance this really is an action on a policy of marine insurance. It is, as I have pointed out, entirely brought about by the defendants that the position of the

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parties has been changed and shifted from plaintiff to defendant. It seems to me that where that change has taken place and is to be imputed only to the misstatements made by the assured to the underwriters, the underwriters, in a proceeding to repair that fault, ought not to be in a worse position than that in which they would have been if but for the misrepresentation of the plaintiffs they had been allowed to sift and had sifted the case according to their rights. Therefore it seems to me that I am not really extending the principle which lies at the bottom of these matters at all. I am treating the case as one bringing into suit the rights as between assessor and assured. It does not matter, it seems to me, for that purpose which of the parties is plaintiff or defendant. The relation between underwriter and assured is such that this discovery is the due of the underwriter against the assured. The reasons for it have been repeatedly given by various judges, and we have had the authorities cited to us going back for a long time. Mr. Hamilton sought to insist that it was merely some special provision owing to the fact that at one stage in the cases an order for consolidation was required and that certain terms were introduced upon the giving of that order. Now, it may be perfectly true that that was the occasion which gave the courts the opportunity of enforcing this particular obligation upon persons suing underwriters, but it was not the ground of that intervention at all. It was the opportunity of putting into practice a principle derived from the fact of a special relation between assured and underwriter. Originally in the courts of equity to which the underwriter formerly had to go for discovery, and subsequently as a matter of course in the courts of common law, there has been adopted and recognised this large discovery incident to the contract of insurance. That being so, it seems to me there is no dangerous extension whatever in applying in this case, which is a litigation between assured and underwriter, the principle of this discovery, which is the right of the underwriter when he is sued by the assured. Now, the reason why this larger discovery is sought in this case is that many of the documents, the policies of insurance in particular, are said to be in the custody of the defendants only as agents for other persons, although they are themselves interested, and some of them are in the custody of the liquidator of some of the companies. I am clearly of opinion, for the reasons I have given, that the plaintiffs here are entitled to this discovery. The particular form which it ought to take is a matter of some nicety, and therefore we shall leave the form of the order to be drawn up between the parties and settled by one of us if necessary; but it certainly ought to embrace a statement on oath by the defendants as to what steps they have taken to put themselves in a position to produce these documents to the plaintiffs, or, failing to produce them, to give them such information as to them as they can obtain by all reasonable exertions on their part. It appears clear to my mind that the plaintiffs here are entitled to the same measure of discovery that they would have been entitled to if they had been defendants in an action brought by the assured against the underwriter. That relief I think they are entitled to, and therefore I think that this appeal must be allowed.

ROMER, L.J.—I have felt considerable doubts in this case, and I cannot say that those doubts are wholly removed; but my brethren are clearly of opinion that the whole practice with regard to policies of marine insurance referred to in the authorities, as, for example, in the case of *West of England District Bank v. The Canton Insurance Company* (*ubi sup.*), can be and ought to be applied in this case as against the defendants. That being so, I shall not differ from them. My doubt arises owing to the fact that in this case the defendants appear to have effected the policies on behalf of certain limited companies who are not parties to the action, and that this action is one for damages for a fraud alleged to have been committed by the defendants. I am, however, very pleased to think that, on the merits of this case, apart from technical objections, there is no good reason, so far as appears why these policies should not be produced by those who have the actual custody of them; and I think, moreover, that if the defendants do their best there is every reason to hope that they can in fact get them produced, and certainly the production of these documents is most important to the plaintiffs in this action.

MATHEW, L.J.—I am of the same opinion. As at present advised I think that there should be an order for the production of these documents, and also that the defendants must show by affidavit what exertions they have made to produce documents which they are unable to produce, and state what they know as to the contents of such documents and the indorsements thereon. This case is an important one, as it appears to be necessary to reiterate a well-established rule upon the subject. It is an essential term of a contract of insurance that the underwriters shall be fairly treated, not only with reference to the inception of the risk, but also in carrying out the contract. That has very often been laid down and has been constantly acted upon. Effect is given to that rule by the practice as to discovery of ship's papers, under which the assured suing upon a policy is made to give such very drastic discovery. It is suggested that the case is quite different when the underwriter sues the assured, but it seems to me that the contract being the same the underwriter is entitled to the same information. The defendants then contend that, as they are being sued for improper conduct and conspiracy, they ought not to be ordered to give this discovery. Then they say that, in respect of the companies in liquidation, they were only managers and cannot now do anything without the consent of the liquidator. That must be explained. Unless there is some very good reason to the contrary, the liquidator ought to permit the policies to be produced. I agree, therefore, that this appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *Lewis and Lewis.*

Solicitors for the respondents, *W. A. Crump and Son.*

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HARMAN v. AINSLIE.

[CT. OF APP.]

March 9, 10, and 11.

(Before COLLINS, M.R., ROMER and
MATHEW, L.JJ.)

HARMAN v. AINSLIE. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Landlord and tenant—Lease—Forfeiture—Proviso for re-entry—"Commit any breach of covenants to be performed"—Breach of covenant not to underlet without consent.

In a lease containing covenants by the lessee to pay rent, rates, and taxes, to repair, to repair within three months after notice, not to use the premises except for a specified purpose, and not to assign or underlet without the consent of the lessor, there was a proviso for re-entry "if the lessee shall commit any breach of the covenants hereinbefore contained and on his part to be performed."

Held (reversing the judgment of Wright, J.), that the proviso for re-entry applied to a breach of the covenant not to assign or underlet without the consent of the lessor.

APPEAL of the plaintiff from the judgment of Wright, J. at the trial of the action without a jury.

The plaintiff brought this action to recover possession of a house under a proviso for re-entry contained in the lease of the premises.

By a lease, dated the 8th July 1885, S. Popple-dorf demised the house in question to E. C. Alderman for the term of twenty-one years from the 24th June 1885 at the yearly rent of 60l.

The lease contained covenants on the part of the lessee to pay the rent reserved; to pay all rates and taxes; to repair and keep in repair; that it should be lawful for the lessor to enter and inspect the premises and to give written notice of any want of repair; that the lessee would repair within three months after such notice; not to use or suffer the said premises or any part thereof to be used for any art, trade, or business whatsoever except the trade of an outfitter without the licence or consent in writing of the lessor; to insure; and to deliver up the premises and fixtures in such good repair and condition at the expiration or sooner determination of the term "as shall be consistent with the due performance of the several covenants hereinbefore contained."

There was also a covenant as follows:

That the said lessee shall not nor will during the term hereby granted assign, underlet, or part with the possession of the said premises or any part thereof, or do or commit any act or thing whereby or by means whereof the said premises or any part thereof may be assigned or otherwise disposed of or the possession thereof parted with to any person or persons whomsoever for the whole or any part of the said term (except the letting part of the said messuage or dwelling-house as offices or lodgings) without the consent in writing of the lessor first had and obtained for that purpose, such consent, however, not to be unreasonably withheld in case of a proposed assignment to a respectable and responsible person.

Then followed a proviso for re-entry in these terms:

Provided always that if the said yearly rent of 60l. or any part thereof shall be unpaid for the space of forty-two days whether the same shall have been legally

demanded or not, or if the said lessee shall commit any breach of the covenants hereinbefore contained and on his part to be performed, then and in either of the said cases the said lessor may re-enter upon the said premises or any part thereof in the name of the whole and immediately thereupon this demise shall absolutely determine.

Then there was a covenant by the lessor that:

"The said lessee paying the said rent and observing and performing all the covenants hereinbefore contained" should have quiet possession of the premises.

It was provided that the expression "lessor" should include the heirs, executors, administrators, and assigns of the lessor and all persons claiming through the lessor; and that the expression "lessee" should include the executors, administrators, and assigns of the lessee.

With the consent of the lessor the lease had been assigned to one Comber, and subsequently became vested in the defendant. The plaintiff was the grantee of the reversion upon the lease.

The plaintiff alleged that the defendant had committed a breach of the covenant not to suffer the premises to be used for any business other than that of an outfitter without the consent of the lessor, and also a breach of the covenant not to underlet without the consent of the lessor.

The action was tried before Wright, J. without a jury. The learned judge held that the defendant had not broken the first covenant, but that he had broken the covenant not to assign; he further held that the proviso for re-entry did not apply to breaches of negative covenants, and gave judgment for the defendant: (88 L. T. Rep. 770).

The plaintiff appealed. On the hearing of the appeal the plaintiff did not contend that there had been a breach of the covenant as to user of the premises.

Younger, K.C. and J. Samuel Green for the appellant.—The learned judge was wrong in holding that the proviso for re-entry in this lease must be construed as applying only to breaches of the negative covenants contained in the lease, and not to breaches of the affirmative covenants. It has never been expressly decided that the word "perform" in such a proviso for re-entry as this, cannot apply to breaches of negative covenants. There are, however, dicta in many cases, some in favour of the appellant's contention and some in favour of the respondent's. In the latest case, *Barrow v. Isaacs* (64 L. T. Rep. 686; (1891) 1 Q. B. 417), Lord Esher, M.R. expressed the opinion that the word "perform" would apply to a covenant not to assign without the lessor's consent; and Kay, L.J. said: "Another point made was that that proviso for re-entry refers only to the breach of affirmative and not of negative covenants. This is founded on certain *obiter dicta* in *Hyde v. Warden* (37 L. T. Rep. 567; 3 Ex. Div. 72). Speaking for myself, I should think that an extremely narrow construction if the word "perform" only had been used. "Perform" has not necessarily an active meaning. We say that a man performs his duty by not answering revilings, by being silent when he ought not to speak, and by many other abstentions from acting as well as by active proceedings." In *Croft v. Lumley* (6 H. of L. Cas. 672), in the House of Lords, many of the judges expressed an opinion that the word "perform" can apply to negative

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

covenants, more especially *Martin, B. Timms v. Baker* (49 L. T. Rep. 106) is also in favour of the plaintiff's contention. In the cases relied upon by the defendant there are no doubt expressions of opinion that the word "perform" will not apply to negative covenants, but they were unnecessary to the decisions in those cases; and those opinions are contrary to the opinions expressed in the House of Lords and in the latest case in the Court of Appeal. Those cases are:

Doe v. Marchetti, 1 B. & Ad. 715; 35 R. R. 420;
West v. Dobb, 20 L. T. Rep. 737; L. Rep. 5 Q. B. 460;
Hyde v. Warden, 37 L. T. Rep. 567; 3 Ex. Div. 72;
Evans v. Davis, 39 L. T. Rep. 391; 10 Ch. Div. 747.

Reading this lease as a whole, and fairly construing it, the words "on his part to be performed" seem to be used only for the purpose of referring to covenants on the part of the lessee, and the intention clearly is that the lessor may re-enter if the lessee "commit any breach of the covenants hereinbefore contained" entered into by the lessee. If the lessor has not reserved a right of re-entry for breach of the covenant not to assign, he has no effective remedy at all for breach of that covenant. The covenant not to assign without the lessor's consent is not strictly what is called a negative covenant, for it involves the doing of something by the lessee—that is, the obtaining of the consent of the lessor. The whole intent and substance of the provisions in the lease must be looked at, and not merely the strict form:

Duke of St. Albans v. Ellis, 16 East, 352; 14 R. R. 361;
Clegg v. Hands, 62 L. T. Rep. 502; 44 Ch. Div. 503;
Metropolitan Electric Supply Company v. Ginder, 84 L. T. Rep. 816; (1901) 2 Ch. 799;
Manchester Ship Canal Company v. Manchester Racecourse Company, 84 L. T. Rep. 436; (1901) 2 Ch. 37;
Mason v. Corder, 7 Taunt. 9; 17 R. R. 427.

Hume Williams, K.C. and *R. J. N. Neville* for the respondent.—The judgment of the learned judge was perfectly right, and in accordance with the authorities and the true construction of this lease. It has been well settled for a long period that clauses of forfeiture contained in leases must be most strictly construed. It must clearly appear that the proviso for re-entry or condition was meant to include, and does include, the covenant for breach whereof the right to re-enter is claimed. In this lease the right to re-enter is given only if the lessee commits a breach of covenants to be "performed" by him, and the lease contains covenants both of a negative character and of an affirmative character. It is clear, therefore, that the proviso refers only to covenants which are to be "performed"—that is, covenants by which the lessee has bound himself to do something. There is a long series of authorities which show that the word "perform," in a proviso for re-entry, does not apply to negative covenants:

Doe v. Marchetti, 1 B. & Ad. 715; 35 R. R. 420;
Doe v. Stevens, 3 B. & Ad. 299; 37 R. R. 429;
Doe v. Godwin, 4 M. & S. 265; 16 R. R. 463;
West v. Dobb, 20 L. T. Rep. 737; L. Rep. 5 Q. B. 460;

Hyde v. Warden, 37 L. T. Rep. 567; 3 Ex. Div. 72;
Evans v. Davis, 39 L. T. Rep. 391; 10 Ch. Div. 747.

In *Croft v. Lumley* (6 H. L. Cas. 672) the words "observed and kept," as well as the word "performed," were used, and the former words do apply to a negative covenant; and in *Barrow v. Isaacs* (64 L. T. Rep. 686; (1891) 1 Q. B. 417) the word "observe" was used as well as the word "perform." The dicta in *Barrow v. Isaacs* (*ubi sup.*) must not be taken to have overruled the long line of previous authorities to the contrary. The covenant here in question is clearly a purely negative covenant, and is not made an affirmative covenant by the fact that it is a covenant not to do something without the lessor's consent:

Clegg v. Hands, 62 L. T. Rep. 502; 44 Ch. Div. 503.

A negative covenant does not imply an affirmative covenant:

Doe v. Guest, 15 M. & W. 160.

In the covenant for quiet enjoyment in this lease the words used are "the lessee observing and performing all the covenants hereinbefore contained." That shows that the distinction was clearly understood, and that the parties intended the proviso for re-entry to apply only to affirmative covenants, and not to negative covenants, to which the word "observe" properly applies. It is to be presumed that the parties intentionally omitted the word "observe" from the proviso for re-entry. The two negative covenants in this lease are not "usual" covenants, and a proviso for re-entry on breach of those covenants is not a "usual" condition:

Re Anderton and Milner's Contract, 63 L. T. Rep. 332; 45 Ch. Div. 476.

That would be a good reason why this proviso was not so drawn as to apply to those negative covenants. The provisions of the Conveyancing Acts as to relief have not done away with the old rule that a proviso for re-entry must be most strictly construed in cases like this, where no relief can be given under those Acts:

Villiers v. Oldcorn, 20 Times L. Rep. 11.

The lessor is not without an effective remedy in respect of this covenant, for he can obtain an injunction to restrain a threatened assignment:

McEacharn v. Colton and others, 85 L. T. Rep. 594; (1902) A. C. 104.

This breach of covenant was waived by acceptance of rent by the landlord with knowledge of the breach:

Miles v. Tobin, 17 L. T. Rep. 432.

This point was taken before *Wright, J.*, but he did not deal with it at all, being in favour of the defendant on the other point.

Younger, K.C. in reply.—The lessor could not obtain an injunction in respect of an assignment which had been already made; and an action for damages would be quite ineffective as a remedy.

COLLINS, M.R.—This is an appeal from the decision of *Wright, J.*, and the question is whether the plaintiff, the lessor, has a right to eject the defendant under the terms of a particular lease on the ground that there has been a forfeiture based upon a breach of one or two of the covenants. This action is brought by the assignee of the

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reversion against an assignee of the term, and there were two grounds alleged of forfeiture, the one a breach of the covenant not to use the premises except for a particular purpose, and the other a breach of the covenant not to sublet. Now, the matter before us has been narrowed down to the question of what are the rights of the parties on the basis of a breach of the covenant not to sublet. With respect to the covenant not to carry on certain trades, the defendant admitted that this had been done, but he contended that, by reason of a permission given to his predecessor, the original lessee, it was no breach of the covenant, and on that point Wright, J. has held in his favour, and Mr. Younger (without quite admitting that Wright, J. was right on that matter) did not urge the appeal before us on that point. Therefore the discussion before us has been limited to what the rights of the parties are in the event of there being a subletting without consent. Now, the main point decided by Wright, J. is that, on the terms of the particular covenant not to sublet in this lease, and the terms of the proviso for re-entry, the proviso was inapplicable to such a covenant by reason of its being a negative covenant. That is the ground upon which Wright, J. decided this case, and that is the principal ground of the appeal. Now, of course that question depends on the wording of the deed itself, and therefore I must consider it in some detail. The lease was made on the 8th July 1885 between the original lessee, one Mrs. Poppleadorff, and the lessee E. C. Alderman, and it witnesses that in consideration "of the rent and covenants hereinafter reserved and contained on the part of the said lessee to be paid, observed, and performed, the said lessor doth hereby demise"; and proceeds: "And also yielding and paying in the event of and immediately upon the said term being determined by re-entry under the powers hereinafter contained a proportionate part of the said rent immediately upon the said term being determined by re-entry under the powers hereinafter contained." Then come the covenants to pay rent, taxes, and so on. Then follows: "And also will throughout the said term at his and their own expense without being thereunto required well and sufficiently repair, maintain," and so on; and also that the lessor may inspect to see whether reasonable repairs have been carried out; "And further that the said lessee shall not nor will during the said term hereby granted use or suffer the said premises or any part thereof to be used for any act trade or business whatsoever excepting the trade of an outfitter without the licence or consent in writing of the said lessor for that purpose first obtained"; "And moreover that the said lessee shall not nor will during the term hereby granted assign underlet or part with the possession of the said premises or any part thereof or do or commit any act or thing whereby or by means whereof the said premises or any part thereof may be assigned or otherwise disposed of or the possession thereof parted with to any person or persons whomsoever for the whole or any part of the said term (except the letting part of the said messuage or dwelling-house as offices or lodgings) without the consent in writing of the said lessor first had and obtained for that purpose such consent, however, not to be unreasonably withheld in the case of a proposed assignment to a respect-

able and responsible person; and also will at the expiration or sooner determination of the said term deliver up to the said lessor the said premises and all fixtures and additions thereto in such good and substantial repair and condition as shall be consistent with the due performance of the several covenants hereinbefore contained." Then comes the proviso: "Provided always that if the said yearly rent of 60*l.* or any part thereof shall be unpaid for the space of forty-two days whether the same shall have been legally demanded or not or if the said lessee shall commit any breach of the covenants hereinbefore contained and on his part to be performed then and in either of the said cases the said lessor may re-enter upon the said premises or any part thereof in the name of the whole and immediately thereupon this demise shall absolutely determine." Then follows this covenant by the lessor: "And the said lessor doth hereby covenant with the said lessee that the said lessee paying the said rent and observing and performing all the covenants hereinbefore contained shall and may peaceably and quietly hold and enjoy," and so on. Now we come to the point which turns upon what is the effect of this proviso, having regard to the fact that the covenant is negative. It is contended, and has been held by Wright, J., that, the proviso being in these terms, "If the said lessee shall commit any breach of the covenants hereinbefore contained and on his part to be performed," these words "on his part to be performed" make it impossible to give effect to the proviso when that which is the subject-matter of the alleged breach is the assigning or subletting without consent; that that class of breach is a breach which cannot be described as a performance or a "breach of the covenants hereinbefore contained and on his part to be performed." It is said that one cannot "perform" a negative covenant, and on that ground Wright, J. has decided this case. Now, that law goes very far back in our history, and the root of it is a statement in Coke upon Littleton, which is cited in a note to a case which has been relied upon for the respondent here—*Doe v. Marchetti* (1 B. & Ad. 715; 35 R. R. 420)—in these terms: "A man is bound to perform all the covenants in an indenture. If all the covenants be in the affirmative, he may generally plead performance of all, but if any be in the negative, to so many he must plead specially, for a negative cannot be performed." Now, that is the basis of a ruling which has never been, so far as I know, the subject of any express decision; but it has been the subject of numerous dicta in various cases, and we have had all the cases cited, and they are now open before us. To my mind, there has been no decision upon the point, and certainly no decision in favour of the view contended for by Mr. Hume Williams. The basis is this dictum, which is no doubt one of high authority; but it is limited in its terms to the case of a pleading: "A man is bound to perform all the covenants of an indenture," and in the context "perform" involves an operation, that the performance is to carry out the obligation, positive or negative; "If all the covenants be in the affirmative he can generally plead performance of all, but if any be in the negative to so many he must plead specially, for a negative cannot be performed." In that very sentence he uses "perform" in the sense that it

is giving effect to the obligation; that effect may be given by not doing that which he has undertaken not to do. It seems to me that the confusion that has arisen, the difficulty which has been felt with regard to this matter, really turns upon a confusion between the obligation accepted and the thing that is to be done in order to perform the obligation. When one speaks of a covenant to be performed and of performing the covenant it is in the sense of fulfilling a duty. The bargain is to perform the covenant, whether the performance be by abstaining from doing something or by doing something. It is used in that sense in several of the cases that we have had to consider, and it is used in that sense in this passage, which is the very foundation of the whole matter: "A man is bound to perform all the covenants in an indenture." It starts with that, and in that context it means carry out the obligation whether it be negative or affirmative; but when the occasion of pleading performance arises this dictum, which was given, of course, when the rules of pleading were very technical, says if a man wants to plead performance of a negative covenant he must plead specially, for a negative cannot be performed. Now, that is the basis of the whole matter. Then we follow it through the numerous decisions cited and commented upon by the learned counsel, but the nearest thing to a decision—in fact I think the only case that is claimed as a decision by Mr. Hume Williams in his favour on this matter, this very case of *Doe v. Marchetti* (*ubi sup.*)—was a decision which in my judgment was not a decision on this point. The headnote is this: "A proviso in a lease giving a power of re-entry if the tenant makes default in performance of any of the clauses by the space of thirty days after notice does not apply to the breach of a covenant not to allow alterations in the premises, or to permit new buildings to be made upon them without permission, and an undertenant having erected a portico contrary to the covenant, and notice having been given to him to replace the premises in their former state, which he neglected to do for thirty days: Held, that no forfeiture was incurred." Now, the pith of that case is expressed in one sentence in the judgment of Lord Tenterden: "But it cannot be supposed that the parties anticipated a thirty days' notice being given not to raise the walls or vary from the original plan of the premises, or not to suffer buildings to be erected or windows or openings to be made. It is quite different where the notice required is to do some such act as repairing or paying money; then a stipulation for notice is reasonably introduced, and is evidently for the benefit of the lessee. Taking the whole clause of re-entry together, I think the introduction of these words 'by the space of thirty days next after notice' confines it to those covenants which are to be performed by the lessee, and which not being performed he incurs a forfeiture." It was impossible to introduce the clause as to thirty days after notice so as to make it applicable to the particular circumstances of that case, and it is only a decision with respect to the particular circumstances of that case which contained this impossibility of being applied—namely, thirty days' notice in case of a breach. That, in my judgment, is certainly not a decision upon the point; it does not really

touch the point. I have examined that dictum with such qualifications as I think are inherent in the very terms of the clause itself; and now we have to follow out the string of authorities on the matter, which I do not pause to deal with in very great detail, because they have all been cited and commented upon before the court, and we have had considerable observation upon them. There are one or two to which I must refer. Now, there being no decision, we have to examine the dicta upon the point. There are numerous dicta upon the point, and there are one or two that are certainly strong in favour of the contention of the appellant in this case, and there are some which are in favour of the respondent. But it seems to me that the dicta up to the last and most important one are quite as favourable to the view of the appellant as to that of the respondent. Now, one of the leading cases in this matter is the case of *Croft v. Lumley* (6 H. L. Cas. 672), which went to the House of Lords. There the material words were these: "If Lumley shall make default of or in the performance of all or of any of the other covenants hereinbefore contained which on his part are or ought to be performed, observed, and kept," and the question was whether there had been a breach of the negative covenant not to assign for a certain term. All the judges were of opinion that there had been a breach of that covenant which I have just named, and the dictum as it appears in the case of *Doe v. Marchetti* (*ubi sup.*) was commented on. The default there was specified to be default in the performance, or "if Lumley shall make default of or in the performance," and it was held that the not performing, observing, and keeping any one of them was a default in the performance. Now, Martin, B. in that case held, in the passage where he gave his opinion in the clearest possible terms, that there might be non-performance of a negative covenant, pointing out that it is a duty imposed by the covenant which is not performed, and that a man may break a covenant by doing something that he has undertaken not to do just as much as by not doing something that he has undertaken to do. He says this: "I do not myself consider there is any inaccuracy in language in saying that a man has performed his covenant when he has not done what he covenanted not to do, or that he made default in performing his covenant when he has done it. The abiding by a covenant is a performance of it, the non-abiding a non-performance. It was clearly the intention of the parties that the condition should extend to every breach of covenant, except those specially excepted; and whether it be a condition or a covenant, the intention of the parties, as shown by the words they use, is the true test." Now, as I have said, all the judges were of opinion that there was a breach of the covenant in the form I have named. Then we come to the dictum or opinion of Bramwell, B., which the respondent relies upon as being the strongest in his favour; but it does not appear to me at all to make in favour of the respondent in this case. Bramwell, B. says: "I think that default of or in performance of all covenants to be performed, observed, and kept applies to covenants not to do something as well as to covenants to do something." The learned judge no doubt lays stress on the words "observed

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and kept," but we all know that when one is deciding a point in our courts one does not necessarily decide, and one does not, if one can avoid it, decide anything which it is not necessary to decide, and having the words "performed, observed, and kept," he does deal with "observed and kept," which are much clearer words to make it possible to infer that there was a breach by reason of non-performance; but it is not in the least an authority that it may not have been equally broken had it been limited to the word "perform." But he does emphasise the words "observed and kept," and in that sense so far as that goes it leans in Mr. Hume Williams' direction, but it is very far from an expression of dissent from the view of Martin, B. that the word "perform" would be enough. I need not go through the statements of the judges, because the only two that have given anything that can be said to be a view on one side more than the other are those two—Bramwell, B. and Martin, B. Now, that is the strength of the authorities up to *Croft v. Lumley* (*ubi sup.*), which was a case in the House of Lords. I may just in passing refer to an observation of Lord Cranworth, referred to in the argument, which shows what principle ought to be observed in dealing with these covenants as well as with other covenants. He says this: "This is simply a question whether, either in form or in substance, it is any violation of the covenant to have made a lease which was to endure for one year and one year only commencing at the beginning of the ensuing season." So he treats the matter as one to be decided on the question whether there has been a breach, or whether either in form or in substance there has been a breach. I was dealing with the current of authorities, and I do not think it is necessary to go through them in detail, but we have in the case of *West v. Dobbs* (20 L. T. Rep. 37; L. Rep. 5 Q. B. 460) the dicta of Kelly, C.B. and Channell, B., dicta which go a little beyond the current of authorities, because they treat the word "observed" as being exactly on the same footing as "performed." It is only a dictum, and it is open to the objection that it treats "observed" as "performed," and treats the word "observe" as a limitation that is apt to describe what ought to be done on a negative covenant. Then we come to *Hyde v. Warden* (*ubi sup.*), which is very much relied upon for a dictum of Brett, L.J. It is a dictum in a judgment read by Brett, L.J., but prepared by Amphlett, L.J., that if it had been necessary to decide that point he would have taken the view that "perform" is not a word which would be used in the sense of performing a negative covenant; but that dictum so far as it is a dictum of Brett, L.J. is directly contrary to another dictum of his later on, when he himself was presiding in the Court of Appeal. Then we come to *Evans v. Davis* (*ubi sup.*), which has been very much relied upon by Mr. Hume Williams for a dictum of Fry, L.J.; but all that amounts to is that in a particular case, not involving a decision of this point, he suggests that, if he had been bound to decide the point, he might possibly have felt bound to have decided the point on the dictum of Coke. I gather that it was not the inclination of his own judgment, but that he might, sitting in a court of first instance, have felt constrained to follow the dictum of Coke. I do not think it goes further

than that. I pass over the intermediate authorities, which do not carry us any farther, and I come to what I think is the most important authority in modern times which has been called to our attention. That is the case of *Barrow v. Isaacs* (*ubi sup.*). In that case there are two important dicta; one by Lord Esher, M.R., who said: "It was argued by the defendant's counsel that the covenant not to underlet without the landlord's consent was a negative, not an affirmative, covenant, and that therefore the stipulation for re-entry for breach of the covenant did not apply. But I think that that proposition is disposed of because the word 'observe' as well as 'perform' has been put in the stipulation, though I doubt whether it was necessary to put that word in." Then Kay, L.J. said this: "Another point made was that the proviso for re-entry refers only to the breach of affirmative and not of negative covenants. That is founded on certain *obiter dicta* in *Hyde v. Warden* (*ubi sup.*). Speaking for myself, I should think that an extremely narrow construction of the word 'perform' if the word only had been used. 'Perform' has not necessarily an active meaning. We say that a man performs his duty by not answering revilings, by being silent when he ought not to speak, and by many other abstentions from acting, as well as by active proceedings. But where the words are 'observe' and 'perform' as here, there is no reasonable ground for confining those words to the breach of an affirmative covenant." Now, that is a strong opinion, based upon grounds which he states, by Kay, L.J., who, if anybody was, was an authority on this branch of law, that such words would justify a re-entry for the breach of a negative covenant. Now, I am not for a moment saying that this is an abstract question which can be decided without regard to the special words in particular leases. What we have got to do in these cases, as in every other, is to try to collect from the words used what the parties intended, and I do not say that in certain collocations the courts do not say that "perform" might be an inapt word to describe the breach of a negative covenant. It might be made inapt by context, just as in the case of *Doe v. Marchetti* (*ubi sup.*) the context made it quite impossible to reconcile the word "perform" with the obligation as to thirty days' notice so as to make it applicable to a negative covenant. It could not be done. But, subject to that, it seems to me that the string of authorities leaves us at large now to decide this matter according to our own view and according to common sense. It seems to me that the reasons given by Martin, B. and Kay, L.J. are reasons which do commend themselves to one's common sense, and in my view are much more strictly accurate, if one has to go into subtle analyses of words in this collocation, than the contrary view, because what it dealt with in these provisos for re-entry is the covenant and the obligation to observe the covenant, and when one is dealing with the covenant and not the thing to be done under the covenant, it is perfectly proper to describe the performance of the covenant as being that which is stipulated for, and the performance of the covenant is simply the keeping of the promise, which is another way of saying the same thing, and the promise is equally kept if he abstains from doing that which he has undertaken not to do or does that which he has

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undertaken to do. It is the obligation, not the mode of fulfilling the obligation, and what is treated as the breach is the non-performance of the obligation. If you tell me what he contracted to do, I will tell you whether he performed it or not; but it is put in broad language, failure to perform or default in performing, and the default is the thing. If there is default in performing the covenant, then the covenant has not been performed. If the thing to be done in order to perform the covenant was to abstain from doing something, it seems to me that, as far as the covenant is concerned, "perform" is the right word. The thing to be done might be described in some other phrase. If we are to go into the niceties of the matter, in absolute strictness "perform" is an absolutely legitimate word to express the doing of that which is undertaken to be done, that a man has performed his obligation, or has performed his promise. That being so, it seems to me there is no practical difficulty, and no real difficulty whatever, in applying the word performance as aptly describing the failure to do something, to keep the promise of a negative covenant. That being so, there is no reason why the proviso for re-entry should not apply in this case. There is no doubt that, at the time when this refinement was introduced, there was a very strong and natural leaning on the part of the court to avoid holding that there was a forfeiture. The law was not then as settled or as easy in application, and it was not then so easy to get relief against forfeiture, as it is in modern times, and therefore, speaking broadly, there is no reason why these clauses should not be construed fairly according to their grammatical meaning, taking the whole context together, or why the court should lean, or be said to lean, against a forfeiture. The Legislature has intervened in the matter. It has considered all the cases in which it might be fair that there should be relief; that relief is open for those who bring themselves within the conditions which the Legislature has said ought to be the conditions upon which they get that relief; and it does not affect that argument that in this particular case this particular covenant is one which the Legislature has thought fit should stand outside that particular form of relief. I am dealing with the principle of construction which led to what I think was the exceedingly narrow view taken in the old days of strict pleading, in the time of Coke, and applied to the doctrine of forfeiture. I do not think those general considerations apply to the case now. We are left with the right to decide this question upon our own judgment, and the last and most authoritative pronouncement on the matter is the pronouncement by two judges of the Court of Appeal in *Barrow v. Isaacs* (*ubi sup.*). I think, therefore, that we are entitled to follow their view rather than some of the earlier dicta. That being the state of the authorities, my own opinion, as I have said, is that in this particular case, in the context of this lease, I find nothing which in the slightest degree presses against the view that I have taken *prima facie* of what is meant by performing the covenant. I think that, in this case, it means the performance of the duty undertaken by the covenant; that duty in this case was not to do something, and therefore, it being broken, the person has done that which he undertook not to do. The

inclination of the judgment of Wright, J. was in favour of the view I have taken; but he thought that he was overborne by the authorities. I think the authorities were not an obstacle to his applying his own common sense in the way he would have done if he had not felt overborne by them. I think, also, that the weight of authority in modern times is the other way. That really decides this appeal, but there was a question which arose at the trial and was discussed more or less by Mr. Hume Williams, in whose favour Wright, J. decided the case on the ground which I have discussed. Mr. Hume Williams had another point which, in view of the fact that the learned judge was with him on the first point, does not seem to have been pressed home, and it may be, and I think it is quite probable, that the course the case took and the attitude of the learned judge upon that point, may have probably influenced the learned counsel not to press home another point which would have been, if decided in his favour, conclusive of the case. That point is whether under the circumstances of the case there was a waiver by the plaintiff of this particular breach by subletting without consent. I think the justice of the case will be satisfied by sending the case back for that question to be tried. If it is to be tried again, the less I say upon the facts the better. With respect to this appeal before us, I think this has been an appeal on a very important point of law on which Wright, J. decided in favour of the plaintiff. Our view is that that decision is wrong and that the judgment must be reversed.

ROMER, L.J.—I am of the same opinion. It may, I think, be admitted that the word "perform" may in ordinary cases be said to be more especially appropriate to what may be called positive covenants; but it cannot be said, as a hard and fast rule, that the word is inappropriate to apply, at any rate, to some negative covenants. I agree with the Master of the Rolls that, speaking broadly, one may properly say what Martin, B. said in answering the question put to him in *Croft v. Lumley* (6 H. L. Cas. 672), that there is no necessary inaccuracy of language in saying that a man has performed his covenant when he has not done what he has covenanted not to do, or that he has made default in performing his covenant when he has done what he has covenanted not to do. After what the Master of the Rolls has said, I do not intend to go through the various cases and the observations of learned judges which have been called to our attention. All I need say is that, in the result, it appears to me that we are not bound to hold, and that it would not be right to hold, as a binding rule of construction that in provisos for re-entry the word "perform" must be construed as excluding all covenants by the lessee which may be called negative covenants. It may very well be that, in construing some provisos for re-entry in some leases, there may be sufficient to prevent the application of the word "perform" to some covenants in the lease; but the question whether in a proviso for re-entry in a lease the word "perform" does apply to and include certain negative covenants must depend upon the consideration of and true construction of the lease read and construed as a whole. Now, in the present case, I think that the words "to be performed" in the proviso for re-entry do

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include the preceding covenants in the lease which have been called, and may in a sense properly be called, negative covenants. What are those negative covenants? They are two only. The one is, stating it shortly, a covenant by the lessee not to carry on any business or trade on the demised premises other than that of an outfitter without the consent in writing of the lessor. The other is a covenant against subletting or assigning. Those two covenants have no doubt been put into a negative form as a matter of wording. But I observe that as a matter of substance they are not negative, or at any rate not purely negative. Take the covenant against carrying on a business. That covenant, as a matter of substance, might just as easily have been put, as a matter of wording, in a positive form. In a positive form it would have run as a covenant by the lessee that he would apply for and obtain the consent in writing of the lessor before carrying on any business other than that of an outfitter. Then take the case of underletting. That covenant might just as easily, as a matter of substance, have been worded as a covenant by the lessee that he would apply for and obtain the consent of the lessor before underletting; and the covenant against assigning might have been similarly worded. That being so, and bearing in mind what is the nature of the only two so-called negative covenants in this lease, I think that the words "to be performed" are not inapt to be applied to, and that on the construction of the proviso for re-entry they ought to be applied to and held to include the two so-called negative covenants. Moreover, I should like to add that it is very difficult to suppose that the proviso for re-entry was not intended to apply to such a covenant as that against assigning or underletting without first obtaining the consent in writing of the landlord, that covenant being one the breach of which is so serious, and is regarded as so serious both by the courts and the Legislature that relief cannot be given either under the ordinary doctrines of the court or under the provisions of the Conveyancing Act 1881. I may further observe that, if there were no right to re-enter for breach of that covenant, the covenant being clear in itself, for all practical purposes it would be useless. I will not labour that point, but it is clear to all those who consider what remedies the landlord could possibly have that nothing would be of any real use to him but a proviso for re-entry if, in defiance of his covenant, the lessee underlet or assigned without obtaining the consent of the lessor. The conclusion, then, to which I have come is that on the point of law which arises here the appeal must be allowed. I will add nothing to what the Master of the Rolls has said upon the question of fact which will have to be tried. I agree that the question to be tried is simply one of fact, whether or not, the fact of the breach by underletting being admitted, there has been a waiver of that breach.

MATHEW, L.J.—I am of the same opinion, and have very little to add to the reasons which have been given by the Master of the Rolls and Romer, L.J., with which I entirely concur. We have in this case to construe this lease, and not any other lease. I am satisfied that the true meaning of the proviso for re-entry in this lease is that the word "performed" was intended to apply to positive covenants as well as to negative

covenants. I also agree that it is extremely difficult to define what are negative covenants. No covenant has occurred to my mind which is so purely negative that it cannot be made to have a positive aspect as well as a negative. The covenants in this lease appear to me to have both a positive and an affirmative meaning. The agreement not to assign, &c., is practically an agreement to retain possession, and in that aspect is an affirmative covenant. Now, ought we not to hold that, in this case, upon a breach of a covenant of that description there is a forfeiture? These so-called negative covenants are most important provisions in all leases of house property. If the defendant's contention were right, these covenants would practically be nugatory, and would not afford the protection which the lessor clearly intended to have. The lessor desires to make it sure that his property will be used only in a certain way, and in a way not likely to give offence to occupiers of neighbouring houses belonging to him. It is said that there would be a remedy, and an adequate remedy, by injunction. But the remedy by injunction would not be available if a sublessee or assignee had entered into possession, and the lessor would only have an action for damages. In my opinion, it cannot be supposed that that was intended to be the agreement between the lessor and lessee. I think that there has been in this case a breach of covenant which would entitle the plaintiff to re-enter. The case, however, must go back to be investigated upon the important question of fact which the defendant is entitled to have tried. I agree, therefore, that the appeal must be allowed, and the action sent back to be tried upon that question.

Appeal allowed.

Solicitors: for the appellant, *Leslie, Antill, and Arnold*; for the respondent, *C. E. Soames*.

March 2, 3, 4, and 23.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

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APPEAL FROM THE KING'S BENCH DIVISION.

Revenue—Succession duty—Disentailing deed by tenant for life and tenant in tail—Joint power of appointment—Appointment to purchaser in fee—Alienation—Death of tenant for life—Liability to pay succession duty—Succession Duty Act 1853 (16 & 17 Vict. c. 51), ss. 2, 15.

By a disentailing deed and settlement executed in 1868, the tenant for life and the tenant in tail in remainder of certain land conveyed the land to such uses as they should jointly appoint, and in default thereof to the use of the tenant for life, with remainder to the tenant in tail for life, with remainder to his first and other sons in tail.

In 1870 they sold and appointed the land to a purchaser in fee simple.

In 1874 the purchaser died, having devised the land to his wife; she died in 1888, having devised the land to her daughter, who duly paid succession duty.

In 1899 the tenant for life died.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

Held (affirming the judgment of Ridley, J.), that, upon the death of the tenant for life, succession duty became payable in respect of the succession of the tenant in tail; and that the duty must be calculated on the value of the interest of the alienee considered as an annuity.

Re Cooper and Allon to Harlech (35 L. T. Rep. 890; 4 Ch. Div. 802) overruled on this point.

Solicitor-General v. Law Reversionary Interest Society (28 L. T. Rep. 789; L. Rep. 8 Ez. 233) approved.

APPEAL of the defendants from the judgment of Ridley, J. upon an information by the Attorney-General.

In 1816 certain lands, including the land comprised in the indenture of the 1st Dec. 1870 herein-after referred to, stood limited to the use of the second Duke of Northumberland for life, with remainder to the use of his eldest son, afterwards the third duke, in tail male.

By virtue of common recoveries suffered in 1816 and of indentures of lease and release executed in Jan. 1817, these lands became limited to such uses as the second duke and his eldest son should jointly appoint.

By an indenture of settlement dated the 19th April 1817, the second duke and his eldest son exercised their joint power of appointment and limited the lands to uses, under which, by reason of the events which happened, in 1868 the lands stood limited to the use of the sixth duke for life, with remainder to his eldest son, afterwards and now the seventh duke, in tail male.

By an indenture dated the 19th Dec. 1868, duly enrolled, as a disentailing deed, the sixth duke and his eldest son disentailed the lands and conveyed them to such uses as they should by deed jointly appoint, and in default of appointment to the uses then subsisting under or by reference to the settlement of 1817.

By an indenture of settlement dated the 21st Dec. 1868, the sixth duke and his eldest son, in exercise of the joint power of appointment given to them by the indenture of the 19th Dec. 1868, appointed the lands to such uses as they should by deed jointly appoint, and in default thereof to the use of the sixth duke for life, with remainder to the use of the seventh duke for life, with remainder to the use of the first and other sons of the seventh duke in tail male, with divers remainders over in strict settlement.

By an indenture dated the 1st Dec. 1870, which recited the joint power of appointment given by the settlement of the 21st Dec. 1868, the sixth and seventh dukes, in exercise of that power and in consideration of 250*l.*, irrevocably appointed a part of the lands to the use of Lord James Murray in fee simple.

On the 3rd June 1874 Lord James Murray died, having by his will devised all his real and personal estate to Lady Elizabeth Murray, his wife, who was his sole executrix.

On the 11th Oct. 1888 Lady Elizabeth Murray died possessed of this part of the lands, which she devised to her daughter, the defendant C. F. Murray, whom she appointed her sole executrix.

On the death of Lady Elizabeth Murray succession duty at 1½ per cent. was paid on the value of the interest of the defendant C. F. Murray (considered as an annuity for life) in the real estate so devised to her by Lady Elizabeth Murray,

including the land assured by the indenture of the 1st Dec. 1870.

By an indenture of settlement dated the 1st July 1892, the sixth and seventh dukes appointed the family estates to such uses as they and the present Earl Percy, the eldest son of the seventh duke, should by deed jointly appoint.

By an indenture of settlement dated the 19th Dec. 1894, the sixth and seventh dukes and Earl Percy appointed the estates to such uses as the seventh duke and Earl Percy should by deed jointly appoint, and in default of appointment to the use of the seventh duke for life, with divers remainders over.

The sixth duke died on the 2nd Jan. 1899.

By an indenture dated the 13th May 1902, the defendant C. F. Murray sold and conveyed the particular land in question to the defendant C. W. Bell, who is now its owner. He was made a defendant for the purpose of enforcing the charge for succession duty.

By the information a declaration was asked for declaring that succession duty, under the Succession Duty Act 1853 and the Customs and Inland Revenue Act 1888, became payable on the death of the sixth duke in respect of the land assured by the indenture of the 1st Dec. 1870, at the rate of 5 per cent., under sect. 10 of the Succession Duty Act, the present duke being a descendant of a brother of the father of the third duke, and 1½ per cent. under sect. 21 (1) of the Customs and Inland Revenue Act 1888; and it was asked on behalf of the Crown that the duty should be calculated on the value of the interest considered as an annuity, under sect. 21 of the Succession Duty Act.

The Succession Duty Act 1853 (16 & 17 Vict. c. 51) provides:

Sect. 1. The term "succession" shall denote any property chargeable with duty under this Act.

Sect. 2. Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession," and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.

Sect. 15. Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested, by alienation, or other derivative title, in any person other than the person who shall have been originally entitled thereto under any such disposition or devolution as is mentioned in the second section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created; and where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to

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the income thereof in possession, have become vested by alienation, or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place.

Sect. 20. The duty imposed by this Act shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof; except that, if there shall be any prior charge, estate, or interest, not created by the successor himself, upon or in the succession, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, duty in respect of the increased value accruing upon the determination of such charge, estate, or interest shall, if not previously paid, compounded for, or commuted, be paid at the time of such determination; and, except that in case of an annuity, or property hereby made chargeable as an annuity, the duties shall be paid by such instalments as are hereinafter directed or referred to; provided that no duty shall be payable upon the determination of any lease purporting at the date thereof to be a lease at rack rent, in respect of the increase accruing to the successor upon such determination.

Sect. 42. The duty imposed by this Act shall be a first charge on the interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed; and such duty shall also be a first charge on the interest of the successor in the personal property in respect whereof the same shall be assessed, while the same shall remain in the ownership or control of the successor, or of any trustee for him, or of his guardian or committee, or tutor or curator, or of the husband of any wife who shall be the successor; and the said duty shall be a debt due to the Crown from the successor, having in the case of real property comprised in any succession priority over all charges and interests created by him, but such duty shall not charge or affect any other real property of the successor than the property comprised in such succession.

The information was heard before Ridley, J., who gave judgment in favour of the Crown (88 L. T. Rep. 600).

The defendants appealed.

Haldane, K.C., Danckwerts, K.C., and Austen-Cartmell for the appellants.—The learned judge was wrong in holding that succession duty was payable in this case. The only succession duty which could be payable was that which was paid in 1883 by C. F. Murray. By sect. 1 of the Succession Duty Act 1853, "succession" denotes the property chargeable with succession duty; by sect. 2 any disposition of property by which any person becomes beneficially entitled to any property on the death of any other person, whether in possession or *in futuro*, is deemed to have conferred a succession; but, by sect. 20, the duty is not payable until the successor becomes entitled in possession. Therefore, until some person comes into possession, duty is not payable; and if no person comes into possession by virtue of the disposition creating the succession, no duty becomes payable. Duty can only be payable once in respect of the same succession; but the contention on behalf of the Crown is, in effect, that duty is payable twice in respect of one succession.

There has been but one possession by virtue of the disposition in this case, and therefore only one duty became payable. This case comes within sect. 15, which provides that when a succession, before the successor is entitled in possession, is vested by alienation or any title not conferring a new succession in any other person, duty is payable in the same way as if there was no alienation. That means that, if there has been an alienation conferring a new succession, no duty is payable in respect of the old succession, but only in respect of the new succession:

Re Cooper and Allen to Harlech, 35 L. T. Rep. 890; 4 Ch. Div. 802.

The decision in that case upon this point has never been overruled. In *Wolverton v. Attorney-General* (79 L. T. Rep. 58; (1898) A. C. 535), although Lord Herschell dissented from that decision, it was not necessary to decide the point. The provisions of sect. 15 were intended to extend the liability to pay succession duty to cases where it would not otherwise be payable, and therefore must be construed strictly. Those provisions are limited to cases where the alienation does not confer a new succession. The alienation under which C. F. Murray became entitled in possession did confer a new succession, and duty was paid on that succession. No one has come into possession under the old succession, and therefore no duty is payable in respect thereof. The purchaser died before the tenant for life, the sixth duke, and a new succession from him came into possession during the lifetime of the tenant for life; that removed the liability to pay the duty charged upon the old succession:

Attorney-General v. Cecil, 23 L. T. Rep. 20; L. Rep. 5 Ex. 263;

Wolverton v. Attorney-General (*ubi sup.*);

Charlton v. Attorney-General, 40 L. T. Rep. 760; 4 App. Cas. 427.

The provisions of sect. 12 support the contention of the appellant:

Braybrooke v. Attorney-General, 4 L. T. Rep. 218; 9 H. L. Cas. 150.

The provisions of sects. 10, 15, and 21 show that, if any duty is payable in this case, it must be assessed on the value of the succession considered as an annuity for the life of the seventh duke, and not for the life of the alienee. The decision upon that question in *Solicitor-General v. Law Reversionary Interest Society* (28 L. T. Rep. 769; L. Rep. 8 Ex. 233) was wrong, and has really been overruled by the case of *Wolverton v. Attorney-General* (*ubi sup.*). The disentailing deed of 1868 destroyed the succession to the seventh duke created by the settlement of 1817; by virtue of the Fines and Recoveries Act 1833 a disentailing deed destroys the old estate and creates a new statutory estate; therefore duty is not payable in respect of the old estate tail, which is the succession in respect of which duty is now claimed:

Attorney-General v. Floyer, 7 L. T. Rep. 47; 9 H. L. C. 477;

Attorney-General v. Smythe, 7 L. T. Rep. 47; 9 H. L. C. 497;

Braybrooke v. Attorney-General (*ubi sup.*);

Attorney-General v. Cecil (*ubi sup.*);

Wolverton v. Attorney-General (*ubi sup.*).

In *Lilford v. Attorney-General* (10 L. T. Rep. 652; L. Rep. 2 H. L. 63) the question was quite

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a different one, and that case is not an authority against the appellants.

Sir *B. B. Finlay* (A.-G.), Sir *E. H. Carson* (S.-G.), and *Vaughan Hawkins* for the Crown—The judgment of *Ridley, J.* was correct. The disentailing deed of 1868 did not destroy the old succession. The Fines and Recoveries Act 1833 has not the effect of creating a new title paramount; it only has the effect of making every estate tail an estate which can be converted into a fee simple by means of the Act. In substance the tenant in tail has the same interest after the disentailing deed as he had before:

Lilford v. Attorney-General (*ubi sup.*);

Attorney-General v. Cecil, 23 L. T. Rep. 20; L. Rep. 5 Ex. 263, 271.

It cannot be disputed that, if the tenant for life, the sixth duke, had died during the life of the purchaser, succession duty would have been payable by the purchaser as well as by *C. F. Murray*. In that case there would clearly have been two successions which came into possession, and succession duty would have been payable on each succession. It would be a curious result if duty were only payable once because the purchaser happened to die before the tenant for life. This case comes within both the second and third parts of sect. 15. Under sect. 2 succession duty becomes charged on the property as soon as the succession is created; but by sect. 20 it is not payable until the successor becomes entitled in possession. But for the provisions of sect. 15, duty would become payable immediately whenever there is a merger of the life estate and estate in remainder, and the provisions of that section are intended to prevent the duty becoming payable until the death of the tenant for life. A liability to pay duty once created cannot be destroyed by any subsequent alienation or disposition of the property:

Wolverton v. Attorney-General (*ubi sup.*).

The words in sect. 15, "not creating a new succession," do not qualify the word "alienation":

Attorney-General v. Cecil, 23 L. T. Rep. 20; L. Rep. 5 Ex. 263, 269.

An alienation cannot confer a new succession. The words "any title not conferring a new succession" refer to such a transmission as that which arises on bankruptcy. The decision of *Jessel, M.R.* in *Re Cooper and Allen to Harlech* (*ubi sup.*) must now be taken to have been overruled by the judgments in *Wolverton v. Attorney-General* (*ubi sup.*). The duty is to be assessed on the value of the succession considered as an annuity for the life of the person actually coming into possession; the alienee of a succession is the successor within the meaning of sect. 21 of the Act, which provides how the duty is to be assessed:

Solicitor-General v. Law Reversionary Interest Society, 28 L. T. Rep. 769; L. Rep. 8 Ex. 233.

Haldane, K.C. in reply.

Cur. adv. vult.

March 23.—The following judgments were read:—

COLLINS, M.R.—In this case the Crown claims succession duty on the death of the sixth Duke of Northumberland in respect of a piece of land, a portion of the Northumberland estates, settled in 1817. *Ridley, J.* has decided in

favour of the Crown. The defendants appeal. The material facts are thus stated by *Ridley, J.* "By a settlement dated the 19th April 1817, large estates in Northumberland were limited to certain uses, and in 1867 (in the events which had happened) they stood limited to the sixth Duke of Northumberland for life, with remainder to his eldest son in tail male. In 1868 disentailing deeds were executed giving a joint power of appointment to the sixth duke and his eldest son, *Earl Percy*, now seventh duke; and on the 1st Dec. 1870, under that power of appointment, a parcel of land, which was part of the land so brought into settlement, was conveyed to *Lord James Murray* in fee. In 1874 *Lord James Murray* died, having devised his estates to his wife, and in 1888 the widow died, having devised them to her daughter, *Mias Murray*, one of the defendants. She paid succession duty under 16 & 17 Vict. c. 51, s. 10, and 51 & 52 Vict. c. 8, s. 21, at the rate of 1½ per cent. on the value of the interest derived from her mother (considered as an annuity) in the real estate so devised to her, including this particular parcel of land. On the 2nd Jan. 1899 the sixth Duke of Northumberland died, and it was now contended that succession duty became payable on his death in respect of this piece of land, under the same statutes, at the rate of 6½ per cent. But it was not contended by the Attorney-General, having regard to the date of the sale to *Lord James Murray*, that sect. 18 of the Finance Act 1894 applied, and therefore it was asked that the percentage should be calculated on the value of the interest considered as an annuity, under sect. 21 of the Succession Duty Act 1853." The contention of the Crown, which *Ridley, J.* has accepted, is that the second half of sect. 15 applies to the case, and that duty is payable under that section by *Mias Murray* in respect of the succession of the seventh duke, which passed to her father by alienation under the indenture of the 1st Dec. 1870, and of which she was in possession at the date of the death of the sixth duke, and that the fact that she has paid succession duty in respect of her own succession upon a devise from her mother, who survived *Lord James Murray* and took the succession under a devise from him, is no answer to their claim. The appellants rely on *Re Cooper and Allen to Harlech* (35 L. T. Rep. 890; 4 Ch. Div. 802), decided by *Sir George Jessel*, which, if well decided, governs the present case. They also contend that the effect of the disentailing deed of 1868 and the settlement which followed upon it had the effect of destroying the succession of the seventh duke created under the settlement of 1817. Subject to this point the question on this appeal is whether *Re Cooper and Allen to Harlech* (*ubi sup.*) was well decided. Before going further it is necessary to refer to certain sections of the Succession Duty Act 1853 (16 & 17 Vict. c. 51). Sect. 1 provides that "the term 'succession' shall denote any property chargeable with duty under this Act." [His Lordship then read sects. 2 and 15.] Sect. 20 provides that "the duty imposed by this Act shall be paid at the time when the successor or any person in his right, or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof." Sect. 42 provides that "the duty imposed by this Act shall be a first charge on the

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interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed." Subject to the point as to the effect of the disentailing deed, both sides are agreed that the deed of the 1st Dec. 1870 was an alienation of the seventh duke's succession to Lord James Murray within sect. 15, and that had he survived the sixth duke, not having himself transferred it, he would have been liable to pay the duty on the death of the sixth duke. Had he devised it to his daughter and died, she would have had to pay duty in respect of her succession to her father. Does the fact that her father predeceased the sixth duke make any difference? I think the reasoning of Lord Herschell in *Wolverton v. Attorney-General* (79 L. T. Rep. 58; (1898) A. C. 535) is conclusive that it does not. By sect. 42 of the Act of 1853 the duty is a first charge on the interest of the successor. Therefore the succession came to Miss Murray subject to this charge. How has she got rid of it? "If the person has had a succession conferred upon him, he cannot by parting with it prevent it from being a succession; that is, prevent it from being property liable to the duty. It continues a succession, and will be, when the proper time comes, a succession enjoyed in possession, into whatever hands it has come": (per Cleasby, B., delivering the judgment of the court in *Solicitor-General v. Law Reversionary Interest Society*, 28 L. T. Rep. 739; L. Rep. 8 Ex. 233, 238). "I am unable to find in the Act," says Lord Herschell in *Wolverton v. Attorney-General* (*ubi sup.*), "any warrant for the view that a succession once created can, by the act of the successor, cease to exist and another succession be substituted for it." But it is only by substituting the new succession of Miss Murray for the original succession of the seventh duke that the appellants can succeed. It is not necessary to examine once again the numerous cases decided upon sect. 15 before *Wolverton v. Attorney-General* (*ubi sup.*), nor to repeat at length here the reasons given by Lord Herschell for his opinion, but they are to my mind conclusive, that *Re Cooper and Allen to Harlech* (*ubi sup.*) was wrongly decided. Therefore on this, which was the point principally discussed in the argument, I am of opinion that the decision of Ridley, J. is right. Next, with regard to the effect of the disentailing deed. Here, too, I agree with Ridley, J. I think the point is concluded by authority. *Braybrooke v. Attorney-General* (4 L. T. Rep. 218; 9 H. L. C. 150) and the other cases cited in the same volume, and *Lilford v. Attorney-General* (10 L. T. Rep. 652; L. Rep. 2 H. L. 63), seem to me to establish that the effect of such a deed and the resettlement which followed was not such as to absolve the seventh duke from the obligation of paying succession duty. "I consider it my duty," says Lord Campbell, "to remind your Lordships of the extreme inconvenience which may arise from departing from the broad rule laid down by the Court of Exchequer, that a tenant in tail in remainder cannot vary the succession duty to which he will be liable by barring the entail and resettling the estate": (*Braybrooke v. Attorney-General* (*ubi sup.*)). In that case on disentailment by tenant in tail in remainder after a life estate in his father and a resettlement by father and son to such uses as they should appoint, an appointment was made by them to

the father for life, remainder to the son for life, remainder to his first and other sons in tail, and on the father's death it was held that the son took a succession under a disposition made by himself under sect. 12 of the Act. The disentailing deed did not annul the father's life estate. Therefore what the son had to dispose of was a succession liable to duty. The succession was not destroyed by the enlargement of the estate tail into a fee. Lord Campbell and probably Lord Kingsdown would have reached the same conclusion under sect. 15. In other words, the transaction involved an alienation of a succession. So here, if there had been no sale under the power to Lord James Murray, the seventh duke would have taken a succession under a disposition made by himself. The point, therefore, that the succession was wiped out by the disentailment is no longer open. I have dealt with the case without reference to the clause as to acceleration by the surrender or extinction of prior interests in sect. 15, which certainly does not assist the appellants. With regard to the point that the duty should be calculated by reference to the life of the original successor, the seventh duke, and not that of the ultimate alienee, Miss Murray, we cannot decide in favour of the appellants without overruling *Solicitor-General v. Law Reversionary Interest Society* (*ubi sup.*), decided more than thirty years ago and continually acted upon since. This I am not prepared to do even if I disagreed with it, which I do not. The appeal must be dismissed.

ROMER, L.J.—I agree with the judgment of the Master of the Rolls in this case, and only desire to add some observations on certain points. In the present case a tenant for life and remainderman conveyed land to such purposes as they should appoint, and then appointed the land to a person in fee. For the purposes we have to consider on this appeal, I think it is clear on the authorities that the case should be dealt with as if they had conveyed the land direct to that person in fee. That being so, the question arising on the present appeal may be stated as follows: A., tenant for life, and B., tenant in tail, alienate land to C. in fee by disentailing deed duly enrolled. C. then enters into possession, and dies in the lifetime of A., having devised the land to D., who thereupon enters into possession and pays succession duty as succeeding C.; then A. dies, and the question is whether succession duty is then payable by D. on A.'s death. And, if that question be answered in the affirmative, there is a subsidiary question as to how the duty is to be estimated. The appellants say that no succession duty is payable. They contend in the first place that, even if B. had been tenant in fee, no duty would have been payable. And, as a second point, they contend that, even if duty would have been payable had B. been tenant in fee, it is not payable because B. was tenant in tail. With regard to the first point the appellants rely on the fact that D. had to pay duty on C.'s death as his successor, and they urge that, having so succeeded to the land and paid duty, there was in fact no fresh succession by D. on A.'s death, and that D. could not be liable for more than one succession duty; and the appellants rely on the decision of Sir George Jessel, Master of the Rolls, in the case of *Re Cooper and Allen to Harlech* (*ubi sup.*). But that decision and the

grounds on which it was based have since been considered and, as it appears to me, disapproved of by the House of Lords in the case of *Wolverton v. Attorney-General* (*ubi sup.*), and in particular were shown to be unsound by the reasoning of Lord Herschell in his speech in that case. That reasoning appears to me convincing, but, inasmuch as the appellants challenge it, I desire to add a few remarks, even at the risk of repeating part of what Lord Herschell in the last-mentioned case, and the Master of the Rolls in the present case, have said. In the first place, if I consider the position of C. immediately before he died, it appears to me clear that, in strict accordance with the express provision of the second part of sect. 15 of the Act 16 & 17 Vict. c. 51, the succession of B. had become vested in C. by alienation, and that the duty in respect of that succession thereupon became payable at the same time and rate as the same would have been payable if no alienation had been made. And it is further clear from the section that the alienation of A.'s life estate to C., and the merger consequent thereon, did not operate to prevent the duty being payable. See also sect. 20 of the Act, which provides that the duty imposed by the Act shall be paid at the time when the successor, "or any person in his right," shall become entitled in possession to his succession. The words "in his right" would include purchasers and other derivative owners whose liability to the payment of duty is regulated by sect. 15. It also follows from the provisions of sect. 42 of the Act that, inasmuch as C. claimed "in right" of B., the duty became a first charge on the land. That being so, how has that charge been got rid of? As Lord Herschell pointed out, there is nothing whatever in the Act from which it can be inferred that by any disposition on C.'s part of the land he could free the land from the charge. He may, of course, dispose of the land so as to create further successions in respect of which further duty may become payable, but that will not in any way interfere with the duty already charged on the land, subject only to the provision made by sect. 12 of the Act in favour of C. if he himself became a successor by virtue of his own disposition. The arguments by which the appellants seek to escape from this result in the present case are founded on a misconception of the position of D. He has not been required to pay duty twice for one succession. There are two distinct successions and two distinct duties. One duty became payable by reason of C.'s death in A.'s lifetime, when D. succeeded C. by virtue of C.'s disposition, and in that case duty became payable by D. taking from C. as his predecessor. How the amount of that duty should have been estimated, and whether or not by reference to the suggestion that D. only there succeeded, as it were, during the rest of A.'s lifetime, we are not now concerned, though I am by no means suggesting that the Crown was wrong in estimating that duty in the way it did. The next succession occurred by reason not of C.'s death, but of A.'s, and then the duty already charged on the land in C.'s hands became payable under sect. 15 of the Act, and that duty is assessed without in any way being concerned with C. as a predecessor. In the same way two distinct successions would have occurred and two distinct duties would have been payable if C. had died after A. On A.'s death in that case C. would

have paid duty as successor, and then, if C. had died, D. would have had to pay duty as successor of C. The true position of affairs is somewhat obscured by reason of the merger of A.'s estate and B.'s estate because they were both alienated to C. The true way to regard the case (especially having regard to the provisions as to merger in sect. 15) is to consider how matters would have stood if there had been no merger. C. obtained possession of the land, not because he had acquired B.'s estate, but because he had acquired A.'s estate. On C.'s death in A.'s lifetime, D., claiming through C. as owner of A.'s life estate, took possession and had to pay duty. B.'s estate in remainder expectant on A.'s death had nothing to do with that possession or duty. But, inasmuch as the remainder had been alienated to C., and D. had become owner of that remainder by reason of C.'s devise to him, when he succeeded on A.'s death he had to pay duty. For it is clear that, if the owner of a remainder charged with a duty devises it, the devisee only acquires that remainder subject to the duty. The general question may be further illustrated by considering how matters would have stood if A.'s estate and B.'s estate had been acquired by D. at different times. For example, if C. had only acquired A.'s estate and then had died in A.'s lifetime, having devised that estate to D., succession duty would have been payable by D. In that case B.'s estate in remainder would have clearly remained liable to its duty on A.'s death, and if B. had, after C.'s death and before A.'s death, alienated the remainder to D., duty would have been payable by D. as alienee on A.'s death. But it is unnecessary to multiply cases bearing on the point now before me. All I need say is that I am satisfied, with regard to the first point taken on behalf of the appellants, that if B.'s estate had been a remainder in fee, duty would have been payable on A.'s death. The next point then arises whether the duty ceased to be payable because B.'s estate was one in tail and was barred by the disentailing deed. The appellants contend that the effect of the deed was to destroy B.'s estate in tail, and to create an entirely new estate in C. which was not liable to the duty to which the estate tail was liable. This contention appears to me to be unsound, and is really disposed of by authority. Since the Fines and Recoveries Act, especially having regard to sect. 15 of that Act, which expressly provides that a tenant in tail shall have full power to dispose of the entailed land for an estate in fee simple absolute, it appears to me that it cannot properly be said that a tenant in tail alienating by disentailing deed under the Act thereby destroys for the purposes of succession duty the interest he possessed in the estate. What he did by disentailing, by exercise of the powers vested in him, was to render that estate perpetual, and the effect of such a deed may be quite different from that caused by a fine being levied or a common recovery suffered prior to this Act. It was on this ground that the case of *Lilford v. Attorney-General* (*ubi sup.*) was decided in the House of Lords. In that case Lord Chelmsford said, after referring to sect. 15 of the Fines and Recoveries Act: "The disentailing deed did not operate to destroy the interest of which he was the successor, but enabled him, by the exercise of the power which that interest gave him,

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to render it perpetual." And Lord Cranworth dealt with the point as follows: "The power of barring the entail and so becoming competent to dispose of the property by will was incident to the estate tail which Lord Lilford took. And, therefore, when he executed the disentailing deed, he may be treated as having been competent to dispose by will of a continuing interest in the property. He may be treated for the purpose of succession duty as if he had been a devisee of the fee simple." Lord Colonsay also addressed the House to the same effect; see also the observations in *Braybrooke v. Attorney-General* (*ubi sup.*) of Lord Campbell and of Lord Kingsdown. The effect of the statement by Lord Campbell that "the tenant in tail in remainder when he bars the entail may, if he pleases, alienate, and no succession duty will be payable by him," has, I think, been misunderstood by the appellants' counsel. I think that all Lord Campbell meant was that, as between the tenant in tail and the alienee, the latter would have to pay duty. A tenant in tail may, of course, by disentailing deed, in the same way as he would have done if he had been a tenant in fee, resettle land so as to cause a new succession to arise under that settlement, and so that the persons claiming under that settlement could not be said to be alienees under an alienation, within the meaning of the word "alienation" as used in sect. 15 of the Succession Duty Act. But it appears to me clear that, if a tenant in tail by a disentailing deed simply assures the fee absolutely to a person, that person takes under an alienation within the meaning of the section. The only case which at first appeared to me to occasion difficulty was *Attorney-General v. Cecil* (*ubi sup.*), a case much relied on by the counsel for the appellants. But, having examined that case carefully, I come to the conclusion that it does not really assist the appellants in the present case, nor occasion any difficulty, at any rate on the ground on which it appears to me it was decided. I think that case was decided on the ground that there was a resettlement by Lord Cranborne (the tenant in tail) under which Lord Eustace Cecil took an interest, and such an interest that he could not be said to be entitled to it as an alienee under an alienation by Lord Cranborne, within the meaning of sect. 15 of the Succession Duty Act. This appears to me clear when the judgments of the barons who decided it are considered. Chief Baron Kelly said: "A new succession was conferred on Lord Eustace Cecil. The case is exactly the same as if on the purchase of a property the purchaser had created a term out of the estate so acquired by him. Being thus excluded from the operation of the 15th section, the case is left to the operation of the 2nd section; it is a succession to which Lord Cranborne is the predecessor, and the Crown is entitled to duty on that footing." And Martin, B. observed, referring to sect. 15: "But it appears to me that the clause relied on has no application to the present case; it refers, not to the creation of an interest by way of settlement, but to an alienation in the ordinary sense; as if, for instance, the late Lord Cranborne had sold the whole of his interest to some third person before it came into possession." And, to make his view even more clear, he added: "Whether, inasmuch as Lord Cranborne, if he had survived without making this appointment, must have paid duty on the

whole property, a double duty is not payable, first on the whole interest out of which this term is carved, and then upon the charge itself, is a matter on which I give no opinion." Channell, B. said: "I think the Attorney-General is right in saying that a new succession has been created which prevents the case from falling within the second branch of the 15th section." And, lastly, Cleasby, B. ended his judgment as follows: "I think the Crown is entitled to judgment. First, I am not satisfied that this is a case where the succession of Lord Cranborne has become vested in any other person; and, secondly, if it has, it is by a title which creates a new succession." I think this view of the case was also that taken by the House of Lords in *Wolverton v. Attorney-General* (*ubi sup.*). It appears to me, therefore, that the Crown is right in contending that duty was payable in the present case. The only remaining point is as to the amount of duty, whether the amount is calculated upon the enjoyment of the property which the person actually taking is expected to have. I think it is. The precise point was decided in the case of *Solicitor-General v. Law Reversionary Interest Society* (*ubi sup.*), and that case was, in my opinion, rightly decided for the cogent reasons given by Cleasby, B. in delivering the judgment of the court, and those reasons I need not repeat. It follows that, in my judgment, the appeal must be dismissed with costs.

MATHEW, L.J.—I agree in the comments made by the Master of the Rolls and Romer, L.J. upon the authorities cited in the argument. I propose to state briefly the grounds upon which I am satisfied that this appeal should be dismissed. Under the deed of 1817 and the Act of 1853 succession duty became payable upon the death of the sixth Duke of Northumberland in respect of the estates the subject of the deed. Under sect. 42 the duty was a first charge upon the property in respect of which it was assessed. Under the disentailing deed of 1868 the duty remained payable, and would have been due to the Crown upon the succession of the seventh Duke of Northumberland, if no change had been made meanwhile in the disposition of the property. After the deed of 1868, the sixth and seventh Dukes of Northumberland, as respectively tenant for life and tenant in fee of the estates, conveyed the lands in respect of which the duty has been assessed to Lord James Murray in fee. Under sect. 15 the duty then charged upon the lands became payable at the same time and at the same rate as if no such alienation had taken place—namely, upon the death of the sixth duke. Lord James Murray died in the lifetime of the sixth duke, and before the duty had become payable, and his estate passed to his daughter, who paid succession duty on the value of her interest. Upon the death of the sixth duke the succession duty charged upon the estate was claimed by the Crown. The payment was refused, and then proceedings were taken to make the defendants accountable. The grounds upon which it was contended that the defendants were not liable were submitted in an elaborate and lengthy argument, in which the learned counsel for the defendants struggled, as it appears to me, in vain to escape from the clear language of sect. 15. It was, as I understood, admitted that, if Lord James Murray had survived the sixth duke, the

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duty would have become payable. But it was said that the death in the lifetime of the tenant for life made all the difference. The result, it was contended, was this, that only one succession duty—namely, that paid by the daughter—was claimable. But the answer seemed clear that the duties were due because there had been two successions—(1) the duty payable upon the succession of the seventh duke; and (2) that payable upon the succession of the daughter. It was further contended for the appellants that the estates comprised in the disentailing deed were by that instrument relieved of the succession duty previously charged upon them. The deed, it was said, created a new estate and swept the charge away. No authority was referred to in support of this argument. The previous decisions pointed to a different conclusion. The old fine and recovery was alleged to have created a new estate, and the disentailing deed, it was said, must be taken to have had a similar operation. But the former method of disentailing was only a clumsy mode of expanding the estate tail into an estate in fee. It had in reality no greater effect than the later method of accomplishing the same result. It might as well be argued that the deed would have relieved the estates of any mortgages upon them. It seems to me that nothing has occurred to discharge the duty now claimed, and, therefore, that the Crown is entitled to our judgment. I agree that the amount of the duty must be calculated in the manner pointed out by the Master of the Rolls.

Appeal dismissed.

Solicitors for the appellants, *Bell, Steward, May, and How.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Feb. 12.

(Before BYRNE, J.)

Re ALLEN AND DRISCOLL'S CONTRACT. (a)

Vendor and purchaser—Outgoings—Paving and making up roadway—Charge on frontager's premises—Date from which charge takes effect—"Completion of works"—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 150, 257.

The expenses incurred by a local authority under the Public Health Act 1875 in the execution of works required to be done under sect. 150 become "a charge on the premises in respect of which they were incurred" within the meaning of sect. 257 so soon as the works have been completed.

APPLICATION under the Vendor and Purchaser Act 1874 which raised a question on the construction of sect. 257 of the Public Health Act 1875, the point being the exact date at which expenses incurred by a local authority under the Public Health Act 1875 for paving and other works first became "a charge on the premises in respect of which they were incurred."

By an order made in the action of *Allen v. Driscoll*, dated the 22nd July 1903, the defendants were ordered to pay to the plaintiffs, on or before

the 29th Sept. 1903, the sum of 4440*l.*, in settlement of the purchase money and interest due in respect of eleven leasehold houses in Rusthall-avenue, Acton, Middlesex, the plaintiffs by their counsel undertaking to make a good title to the said leasehold houses, and to assign the same to the defendants, the defendants by their counsel undertaking to accept the leasehold houses so assigned in their present condition; and the plaintiffs were to receive the rents and pay the outgoings in respect thereof up to the 29th Sept. 1903.

On the 10th and 11th Feb. 1903 the Acton Urban District Council duly served upon the vendors notices under the Public Health Act 1875, s. 150, to pave and make up the roadway in front of these eleven houses.

The notices were not complied with, and thereupon the urban district council on the 13th July 1903 entered into an agreement with a contractor for the execution of the works specified in the notices in respect of the said eleven houses and the other houses in Rusthall-avenue for a sum of 2566*l.*

The work was only partly completed by the 29th Sept., and no apportionment of the expenses attributable to the eleven houses had been made at this date or subsequently.

The purchasers required that the costs of these works should be paid by the vendors before completion, and, as this demand was disputed by the vendors, the purchasers took out this summons under the Vendor and Purchaser Act 1874, asking for a declaration that the vendors were liable to pay and indemnify the purchasers against the amount, when apportioned, of the expenses incurred by the local authority under the Public Health Act 1875 for paving and other works in respect of the eleven houses in Rusthall-avenue, and that they might be ordered to pay and indemnify the purchasers against the same accordingly.

By the Public Health Act 1875 (38 & 39 Vict. c. 55):

Sect. 150. Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriage-way, footway, or any other part of such street is not sewered, levelled, paved, metalled, flagged, channelled, and made good . . . such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may be required to be sewered, levelled, paved, metalled, flagged, or channelled . . . require them to sewer, level, pave, metal, flag, channel, or make good . . . within a time to be specified in such notice. . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default according to the frontage of their respective premises and in such proportion as is settled by the surveyor of the urban authority. . . .

Sect. 257. Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered . . . from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. . . .

(a) Reported by E. L. HOPKINS, Esq., Barrister-at-Law.

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Re ALLEN AND DRISCOLL'S CONTRACT.

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W. H. Cozens-Hardy for the purchasers.—By sect. 257 of the Public Health Act 1875, where any local authority have incurred expenses, those expenses shall be a charge on the property. The expenses become a charge the moment the local authority have incurred such expenses:

Tottenham Local Board of Health v. Rowell, 35 L. T. Rep. 887; 15 Ch. Div. 378, 392;

West Ham Corporation v. Grant, 60 L. T. Rep. 17; 40 Ch. Div. 335.

The local authority had clearly become liable to pay expenses before the 29th Sept. 1903. Directly the contract was entered into they had undertaken a liability to the contractor. The date when the charge came into existence is an entirely different date to that when they may be recovered from the owner or occupier. The charge arose at the date of the contract, or immediately any money was paid under that contract. The purchaser is entitled to have the costs of these works paid by the vendors. He also referred to

Re Bettesworth and Richer, 58 L. T. Rep. 796; 37 Ch. Div. 535;

Stock v. Meakin, 82 L. T. Rep. 248; (1900) 1 Ch. 638;

Surtees v. Woodhouse, 88 L. T. Rep. 407; (1903) 1 K. B. 396.

Norton, K.C. and Ashton Cross for the vendors.—The case of *Stock v. Meakin* (*ubi sup.*) is actually in point. The expenses incurred only become a charge on the completion of the works. This also appears from the reasoning of North, J. in *Re Bettesworth and Richer* (*ubi sup.*). The works not having been completed on the 29th Sept., the charge had not attached, and is therefore payable by the purchasers. They also referred to

Re Waterhouse's Contract, 44 Sol. J. 645;

Newcastle-upon-Tyne Corporation v. Houseman, 63 J. P. 85.

W. H. Cozens-Hardy in reply.—The section has to be construed, and none of the recent cases are in point. The inference to be drawn from the cases of *Tottenham Local Board of Health v. Rowell* (*ubi sup.*) and *West Ham Corporation v. Grant* (*ubi sup.*) is that the charge comes into being as soon as the expenses are incurred, though the remedy for recovering the amount from the owner cannot be enforced till the completion of the works. The case of *Surtees v. Woodhouse* (*ubi sup.*) turned upon the meaning of "outgoings" in a lease.

BYRNE, J.—In this case a vendor and purchaser summons has been taken out for the determination of the question whether or not the expenses referred to in sect. 257 of the Public Health Act 1875 were a charge upon the premises prior to the completion of the works in respect of which notice under sect. 150 had been given. I think Mr. Cozens-Hardy has shown that the precise point has not, in the reports, been directly disposed of—that is, to say, no authority has in terms held that the period may not be an earlier date than the completion of the works. [His Lordship stated the facts, and continued:] The crucial date is the date fixed for completion of this purchase, the 29th Sept.; and the question is whether these expenses were incurred within the meaning of the section before that date. In other words, what is the meaning of this sect. 257? The works were not then completed, although I am told that payments had been made on account

under the contract. Now, in *Tottenham Local Board of Health v. Rowell* (*ubi sup.*), Brett, L.J. refers to the clause in these terms: "The condition upon which the charge is made to arise is nothing but this, 'Where the local board have incurred expenses for the repayment whereof the owner is made liable.' Directly, therefore, the local board have incurred such expenses, the section must be read as if immediately after that there came these words, 'such expenses shall be a charge on these premises'; therefore directly from the moment the expenses which are named in that section have been incurred, such expenses are a charge on the premises—that is, the charge is imposed then and there by the statute." Then, passing over a few words, he continues: "Therefore it seems to me that, upon the reading of that section, this is a charge the moment the expenses are incurred, and it is a charge which exists although other remedies exist at the same moment that that commences, or other remedies may by different processes be made to arise either as against the owner, who is, in the first place, the person liable, or as against other persons." That leaves the question still open whether the date of completion is the actual time when the charge first arises, or whether the expenses may be said to have been incurred within the meaning of the section before completion. In the case of *West Ham Corporation v. Grant* (*ubi sup.*), Kay, J. had to deal with another Act, and the question in the case was not the same as the one which arises here, but in dealing with sect. 257 he says: "I need not pause to say what 'expenses incurred' may possibly mean, or whether the term implies actual payment of the expenses or not, because, at the least, it means money which the authority may have paid or become liable to pay. I do not mean to give that as a definition, but it must mean that at the least." It is obvious the learned judge there determined no question whether the period when the expenses were considered to be incurred was the date of completion or some earlier date. Then there is the decision in the case before North, J., *Re Bettesworth and Richer* (*ubi sup.*). He says, after referring to the case of *Reg. v. Swindon New Town Local Board* (42 L. T. Rep. 614; 4 Q. B. Div. 305), and what Cockburn, C.J. said there: "Therefore it comes to this, that the expenses are charged from the time of the completion of the work. That seems to me the construction of the section. And in that view I am fortified by the opinion of the judges who decided the case of *Tottenham Local Board of Health v. Rowell* (*ubi sup.*), when they had that case before them on the construction of a section in an earlier Act, which does not appear in this respect distinguishable from the Public Health Act 1895. It is quite true that the owner cannot be compelled to pay till the total costs have been made out and apportioned between the owners, and notice has been served, and he has had three months to dispute the apportionment, and at the end of three months has had written demand served upon him. The Act says payment may be recovered from the person who is owner at the time when the works were completed, and he is the person charged under the Act." Now, I come to the later cases in which the matter has been dealt with, but, again, the question not arising as it does here. In *Scott v. Meakin* (*ubi sup.*), a case between a vendor and purchaser, it was held that

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the amount of the apportioned expenses of private street works becomes, under the Private Street Works Act 1892, a charge on the premises in respect of which they are apportioned, as from the date of the completion of the works, and not merely as from the date of the final apportionment; and the headnote goes on: "If, therefore, the premises are sold by the owner free from incumbrances after the completion of the works, but before the date of the final apportionment, the vendor must indemnify the purchaser against the sum finally apportioned in respect of the premises." It is true that it was not necessary to decide, as against an earlier date, that the date for the completion of the work was the date from which the charge took effect, but the court expressed the opinion that that was the date. The learned judge in delivering judgment said: "The charge under the Public Health Act 1875, however, is a charge which can only arise on the failure of the owner of the land to comply with the notice of the urban authority and the execution by the urban authority of the works by reason of that default of the landowner, and is, moreover, a charge taking effect from the date of the completion of the works"; and then he says: "It was held in *Re Bettsworth and Richer* (*ubi sup.*) that the expenses became a charge upon the completion of the works." Speaking of the last-mentioned case, he says: "This decision turned entirely on the words of sects. 150 and 257, which plainly gave a charge so soon as the works had been completed and the expenses incurred by the local authority on the failure of the owner of the land to execute the works in compliance with a notice served in pursuance of the powers given by sect. 150." From *Surtees v. Woodhouse* (*ubi sup.*) I take one judgment in the Court of Appeal. I agree here, again, that the question was not the question that I have now to determine. Speaking of *Stock v. Meakin* (*ubi sup.*), Stirling, L.J. says: "The nature of the outgoing in question was considered by the Court of Appeal in the case of *Stock v. Meakin* (*ubi sup.*), and it was held that the amount of the expenses incurred under the Private Street Works Act 1892 becomes a charge on the premises on which they are apportioned as from the date of the completion of the works, and not from the date of the final apportionment. It was not expressly decided in that case whether or not the amount is 'charged on the owner in respect of the premises' as from the same date." In the result, it appears to me that the authorities have laid down that the construction I ought to put upon sect. 257 is, that the expenses incurred by the local authority, within the meaning of this section, become a charge upon the premises so soon as the works have been completed for which such expenses were incurred; or, in other words, that the charge here referred to first arises on completion of the works. I therefore make a declaration that the vendors are not liable to pay for these works.

Solicitors: *T. Blanco White; Taylor, Willcocks, and Lemon.*

Wednesday, April 13.

(Before FARWELL, J.)

Re GRIFFITH; JONES v. OWEN. (a)

Costs — Administration — Priority — Administrator's costs — Res judicata.

Where in an administration action an order made on further consideration has directed the payment of the costs of all parties out of a fund which subsequently proves insufficient to pay the costs in full, the administrators are entitled to have the whole of their costs paid in priority to the other parties.

The order having been silent as to the priorities of the parties inter se must be assumed to have directed payment according to the strict rights of the parties.

Gaunt v. Taylor (1843, 2 Ha. 413) followed.

ADJOURNED SUMMONS.

This was a summons asking that a fund in court in the action should be apportioned rateably between the parties in proportion to the respective amounts of their costs as taxed.

Catherine Harriet Griffith died intestate on the 21st Feb. 1899.

Administration was taken out by Jane Owen, Ann Pugh, and John Richard Griffith, three of the next of kin.

Great delay arose in dealing with the assets, but ultimately a sum of 1200*l.* was distributed by the administrators among eight persons believed to be the persons entitled.

Subsequently further delay took place, and this action was commenced by one of the next of kin seeking administration by the court, and in particular the getting in of a sum of 457*l.* 7*s.* owed to the estate by the solicitor to two of the administrators.

The usual order for administration was obtained, and proceedings were taken to recover the sum of 457*l.* 7*s.*, which resulted in the recovery of 150*l.*

On the 15th July 1903 an order was made on further consideration by which it was directed that "it be referred to the taxing master to tax as between solicitor and client the costs of the plaintiff, of the defendant, and of the . . . parties attending of this action, including this application, and including in the costs of the defendants any charges and expenses properly incurred by them and not already taxed or allowed relating to the administration of the intestate's estate beyond their costs of this action. . . ."

It was further ordered that the defendants were to be at liberty to retain their costs, when taxed, out of the residue of the intestate's estate in their hands; and that certain funds in court were to be dealt with as directed in the payment schedule.

The payment schedule, after directing various payments, proceeded: "Pay costs to be taxed and certified under the order."

It now appeared that the fund in court, after payments had been made thereout as directed, was not sufficient to pay all the certified costs, and this summons was therefore taken out.

Cozens-Hardy, for the plaintiff, stated the facts, and continued:—It has proved impossible to carry out the order on further consideration, because the funds are not sufficient to pay

(a) Reported by H. C. GARRIA, Esq., Barrister-at-Law.

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all the taxed costs. I suggest that the true way to deal with the matter is to divide the funds among the persons who have incurred costs rateably in proportion to the respective amount of their costs as taxed. This was done in an exactly similar case in *Swale v. Milner* (1834, 6 Sim. 572), on the ground that the decree on further directions had, by ordering payment of the costs of the parties, settled their rights—namely, to be paid *pari passu*. So here the order on further consideration has made the whole matter *res judicata*, and it is now too late for the administrators to claim their right of priority. [FARWELL, J. referred to the case of *Gaunt v. Taylor*, 1843, 2 Ha. 413].

Martelli for the defendant.—We are entitled to be paid our costs as administrators in priority to the other parties. Nothing was said as to priorities in the order, because it was then believed that there would be sufficient money to pay all the costs and leave a surplus. How, then, can it be said that the question of priorities is *res judicata*? The case of *Gaunt v. Taylor* (1843, 2 Ha. 413) went on this footing. *Swale v. Milner* (1834, 6 Sim. 572) was there cited, but not followed. He referred also to

Blenkinsop v. Foster, 1838, 3 Y. & Coll. Ex. 205;
Williams on Executors, 9th edit., vol. 1, pp. 850,
851;

Morgan and Wartsburg on Costs, 2nd edit., p. 201.

Cosens-Hardy in reply.—In *Blenkinsop v. Foster* (1838, 3 Y. & Coll. Ex. 205) special liberty to apply to the court, if the funds were insufficient to pay all the costs, was reserved in the original order. Here there is nothing of the sort. Apart from the authorities, I submit that in this case there are special grounds for not allowing the administrators to take their costs in priority to my client. [FARWELL, J.—I am precluded by the order on further consideration from considering that.] I rely, then, on *Swale v. Milner* (1834, 6 Sim. 572).

FARWELL, J.—This is an application relating to the payment of costs out of a fund in court. The order made on further consideration appears to have gone on the presumption that there was sufficient funds to pay all costs, and indeed the payment schedule, after directing the payment of "costs to be taxed and certified under this order," proceeds to order the payment of residue equally among the next of kin. Now, it is well settled that administrators always have priority for their costs over all other persons. The order, however, having been silent as to this, and having merely said that all the costs were to be paid, it is now found that there is not sufficient money in court to pay them all, and consequently this application has been made. The only difficulty is created by the conflicting decisions of two Vice-Chancellors. In my opinion, apart from the cases, the court cannot be taken to have intended, in making an order such as this, to deviate from the ordinary course. The priorities are not mentioned in the order, because it would have been foolish to insert any direction relating to them, if, as was then believed, the fund was adequate to pay all the costs in full. A direction to pay, such as occurs here, must presumably be a direction to pay in accordance with the usual priorities. The cases, however, which are three in number, cause a real difficulty. The first case is *Blenkinsop v.*

Foster (1838, 3 Y. & Coll. Ex. 205). In that case the priority of an executor was recognised in spite of a previous order for payment of costs of all parties, in which no mention was made of priorities. As, however, liberty to apply in case the fund proved insufficient had been reserved by the original order, I feel that the decision may possibly have turned on that, and that it may consequently not be applicable to the present case. This leaves two cases which are at variance with one another. *Swale v. Milner* (1834, 6 Sim. 572) is the first. This was a creditor's suit against the heir and administrator of the debtor. By the decree on further directions it was ordered "that the costs of all parties should be taxed as between solicitor and client and paid" out of a fund in court. The fund proved insufficient, and the defendants presented a petition by which they sought to have their costs in the first instance paid out of the fund. Shadwell, V.C. said in that case, at p. 573: "I cannot grant the prayer of the petition. The order on further direction directed the costs of all parties to be paid, and I cannot vary that order. All that I can do is to direct a reference to the master to divide the fund, amongst all the parties, in proportion to their costs." With all respect to the learned Vice-Chancellor, I venture to comment on this decision, and to point out that the order in that case did not direct payment of all costs *pari passu*, but was entirely silent on the point. It was for some person or the court to say in what priorities the costs should be paid when it was discovered that the fund was not sufficient to pay the costs of all in full. This was the conclusion come to by Wigram, V.C. in *Gaunt v. Taylor* (1843, 2 Ha. 413). In that case the order on further direction, after providing for taxation of the costs of the parties and the placing of a part of the fund in court to a special account, ordered that the residue of such fund was "to be applied in payment of the costs, and costs, charges, and expenses before ordered to be taxed." Wigram, V.C., in passing judgment, said, at p. 420: "I have felt much difficulty in disposing of the question of costs in this case. The order made on further directions, in Dec. 1840, directed the costs, charges, and expenses, ordered to be taxed, to be paid out of the residue of the fund in court, after carrying over part to the special account. In the case of *Swale v. Milner* (1834, 6 Sim. 572) the court considered itself to be bound by a similar order to apply the fund in payment of the costs rateably, when it proved to be insufficient to pay the whole of the costs in full, although the ordinary rule of the court gave to some of the parties a priority over the others in respect of costs. The order of payment which I directed in the case of *Tipping v. Power* (1842, 1 Ha. 412) was merely following the old rule of the court. And, if that is the order in which the parties are entitled to the payment of their costs, and yet the court is to be bound to apply the fund rateably, in consequence of the language of the prior direction, it follows that an effect is given to that direction which I cannot consider the court to have intended, for it involves a disposition of the fund (being deficient to pay all) which is not in accordance with the rights of the parties. Does the order which has been made force upon me the conclusion come to in *Swale v. Milner* (*ubi sup.*)? I cannot say that I think

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the language of the order so stringent as that case supposes. If a fund were ordered to be paid to creditors, and some were creditors by specialty, and others by simple contract, and the fund proved to be insufficient to pay them all, I cannot think the court would be bound to interpret an order, the language of which is plainly flexible, so as to contravene a well-established and undisputed rule of practice. I proceed upon the ground that the order merely amounts to a charge upon the fund in favour of the parties entitled according to their admitted rights." Then he concludes his judgment with the words: "I do not in this respect vary the order on further direction. I only give to it a specific interpretation consistent with the language in which it is expressed." I venture respectfully to agree with the Vice-Chancellor's judgment, and to adopt every word of it. As regards the other point raised by Mr. Cozens-Hardy, that in equity his clients should get their costs, I can only say the order made on further consideration has disposed of that, by directing a distribution according to legal rights. I therefore order that the administrators should be paid their costs in full out of the fund in court.

Solicitors for the plaintiffs, *Robbins, Billing, and Co.*

Solicitors for the defendants, *T. D. Jones, for David Oswald Davies, Dolgelly.*

Tuesday, April 19.

(Before FARWELL, J.)

SAVAGE v. BENTLEY. (a)

Practice—Receiver—Writ of possession—Time—Order XLI., r. 5—Order XLVII., r. 2.

Where an order was made directing delivery of certain premises into the possession of a receiver appointed by the order, but no time within which delivery of possession was to be made was specified in the order, it was held that a writ of possession could not issue because Order XLI., r. 5, had not been complied with.

By writ dated the 18th March 1904 an action was commenced seeking the enforcement by foreclosure or sale of a mortgage of the 2nd Dec. 1903 and of a memorandum of charge dated the 4th Jan. 1904.

On the 29th March 1904 the plaintiff sought by motion to obtain the appointment of a receiver of the premises comprised in the mortgage and memorandum of charge.

By an order of that date Isaac Farlow was appointed a receiver to act at once, and it was further ordered that "the defendants . . . do deliver up possession of the said premises . . . respectively to the said Isaac Farlow as receiver."

Personal service of the order was effected on two of the defendants, Benjamin and Julia Bentley; but they refused to deliver possession of the mortgaged premises to the receiver, and on the 15th April 1904 an application was made to the court on behalf of the receiver asking that a writ of possession should be issued under Order XLVII., r. 2, to place the receiver in possession of the premises in question.

(a) Reported by H. C. GARRIA, Esq., Barrister-at-Law.

An order was duly made to that effect, but the officials at the Central Office refused to issue the writ, because the order of the 29th March 1904 as drawn up and served on the defendants had not specified any time within which possession must be given. Under these circumstances an application was now made to the court *ex parte*.

By Order XLI., r. 5:

Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done. . . .

By Order XLVII., r. 2:

Where by any judgment or order any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment or order shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment or order and that the same has not been obeyed.

F. Whinney.—Order XLVII., r. 2, under which a writ of possession is obtainable, does not provide that a time must have been limited within which possession was to be given up. The requirements of the rule have been duly complied with, and there is no reason why a writ of possession should not issue. In *Kerr on Receivers*, 4th edit., p. 176, where the procedure is discussed, it does not appear that the author regarded this delimitation of time as necessary; nor does *Cozens-Hardy, J.* suggest it in *Re Maudsley, Sons, and Field; Maudsley v. Maudsley, Sons, and Field* (82 L. T. Rep. 378; (1900) 1 Ch. 602, at p. 611), where the question is considered in detail. In *Wyman v. Knight* (59 L. T. Rep. 164; 39 Ch. Div. 165), which was a case of an application for a writ of assistance under the same rule, it does not appear that anything of the sort was required. The difficulty really arises under Order XLI., r. 5, but I submit that it does not apply here, because the court has in effect taken the property in question into its possession by appointing a receiver. If I am wrong as to this, the only course apparently will be to obtain a "four day order" fixing the time.

FARWELL, J.—I cannot assist you in the face of Order XLI., r. 5, which is explicit.

Solicitors: *Martin and Nicholson.*

March 23 and 29.

(Before SWINFEN EADY, J.)

Re SHILSON, COODE, AND CO. (a)

Solicitor—Costs—Taxation—Commission—Collection of rents—Professional work—Professional charges—Items of professional charges in bill of costs.

The solicitors acting for the executors and trustees of the deceased owner of settled real estates charged with legacies and duties which his personally was insufficient to satisfy, having been accustomed to collect and receive the rents for him at an agreed charge until his death on the 7th April 1901, continued to collect and receive the rents for the executors and trustees without making any agreement as to their remuneration for so doing up to the 25th March 1902, when

(a) Reported by J. TRUSTAM, Esq., Barrister-at-Law.

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the succeeding tenant for life assumed the management of the estates, and in their bill of costs delivered to the executors and trustees inserted a charge of a lump sum, being a commission of 5 per cent. on the amount of the rents collected, as their remuneration for the work; but did not set out the items of that work as in the case of charges for strictly professional duties. The succeeding tenant for life obtained an order for taxation of the solicitors' bill of costs, and the taxing master on taxation allowed the charge of a lump sum by way of commission for collecting the rents, and overruled the objections of the tenant for life to that allowance.

On a summons by the tenant for life for a review of the taxation:

Held, that, if the charge was a charge for professional work, the solicitors ought to have delivered a bill of items in respect of it, and that, in the absence of any agreement to that effect, the taxing master was not entitled to allow the solicitors a lump sum by way of commission for it, while, on the other hand, if collecting rents was not professional work, the charge for it ought not to have been inserted in the solicitors' bill of costs; and that the proper order was to direct the master to treat the charge as struck out of the bill of costs.

SUMMONS to review taxation.

John Tremayne, of St. Austell, Cornwall, died on the 7th April 1901 possessed of large estates in the counties of Cornwall and Devon, of part of which he was tenant for life, and the remainder he owned in fee.

Under his will his real estates were vested in executors and trustees, and stood charged, in aid of his personalty, with legacies and duties which his personal estate was insufficient to satisfy.

Upon his death his son John C. L. Tremayne, of Heligan, Cornwall, became tenant for life of the real estates with remainder to his issue; and it was to his interest that the amount of costs payable out of the estate should be reduced on taxation.

During the life of John Tremayne, Messrs. Shilson, Coode, and Co., solicitors and bankers, of St. Austell, Cornwall, collected the rents and tithe of his Cornwall estates, for which they received the sum of 80*l.* a year and a further small payment of about 15*l.*

After his decease Messrs. Shilson, Coode, and Co., acting as solicitors for his executors and trustees, collected the rents and tithe of his Cornwall estates, and received or collected the rents of his other estates, including the rents due and unpaid at his death, and also the proportionate part of the rents from the 7th April 1901 to the 25th March 1902, after issuing printed circulars to the tenants as to the amounts due from them.

No agreement was made with respect to their remuneration for this work, and accordingly they inserted in their bill of costs for professional work, which they delivered to the trustees and executors of John Tremayne, deceased, the following item:

Commission on the rents and tithes collected for the estate involving numerous attendances and holding of rent audits, and the writing of numerous letters, the necessity of bringing pressure to bear on the tenants who

were in arrear, and the fact that many of them paid by instalments involved trouble far beyond what was covered by the old stewardship salary, which was not charged beyond the 7th April 1901. Five per cent. on 4317*l.*, the amount collected, 215*l.* 17*s.*

On the 11th July 1903 John C. L. Tremayne, as a third party interested, took out an originating summons for the taxation under the Solicitors Act 1843 of Messrs. Shilson, Coode, and Co.'s bill of costs, and on the 20th July an order was made that it be referred to the taxing master to tax and settle the bill of fees, charges, and disbursements, amounting to 548*l.* 11*s.* 3*d.*, 98*l.* 9*s.* 3*d.*, and 36*l.* 9*s.* 6*d.* respectively, delivered by the respondents. And it was ordered that if such bill when taxed be less by a sixth part than the said bill as delivered the said master do tax the applicant his costs of this reference and application, and if such bill when taxed shall not be less by a sixth part than the said bill as delivered the said master do tax the respondents' costs of the reference and application. And the said master do certify the amount due from the said executors and trustees and the applicant to the respondents, or from them to the executors and trustees and the applicant as the case may be.

The taxing master, on taxation of the bill, allowed the item set out above.

On the 7th Jan. 1904 John C. L. Tremayne, the applicant, delivered objections to the taxation as follows:

1. It is submitted that the master has no jurisdiction to allow this item or any part of it. As it stands the respondents have specifically refused particulars showing the work included in this charge. Such refusal was made by letter, dated the 1st Jan. 1904, as follows:—"34, Bedford-row, London, W.C., 1st Jan. 1904.—Dear Sirs.—Re Shilson, Coode, and Co.—We have considered your request that our clients shall furnish details of the work covered by the charge of 215*l.* 17*s.* by way of commission or percentage on rents and tithes collected and got in by them, and we decline to comply with it.—Yours truly, COODE, KINGDON, and COTTON.—Messrs. Church, Bendell, and Co." But for this refusal it might have been within the master's discretion (without prejudice to the discretion as to costs of taxation contained in the order) to allow the solicitors to bring in particulars of any work in the usual and proper form of solicitors' charges by items going to make up any professional work included in this charge of 215*l.* 17*s.*

2. It is not even alleged that any form of agreement under the terms of the Solicitors Acts exists justifying any such charge by a lump sum or percentage or otherwise than in accordance with the usual solicitors' charges.

3. Even if such agreement did exist as between the solicitors and the trustees, Mr. J. C. L. Tremayne was certainly no party to such agreement, and it would not be binding upon him for the purpose of this taxation.

4. The solicitors in this case carry on business at St. Austell as bankers as well as solicitors, and the majority of the sums paid to them would be doubtless paid to them in their capacity of bankers rather than as solicitors, and this is an additional reason why in their case such a charge by way of percentage should not be allowed, even were it within the jurisdiction of the master to allow it.

5. Even if the master had any jurisdiction or discretion enabling him to allow this charge calculated upon a percentage otherwise than under a formal agreement under the Solicitors Acts binding upon Mr. J. C. L. Tremayne it is submitted that on the exercise of his discretion the item or any part of it should only be

allowed and dealt with (without prejudice as in clause 1 hereof) and upon full details and information showing by items the actual professional work which it is suggested is covered by this item, and at present not only have no such details been submitted to him on which he can properly form a judgment for the exercise of his discretion (if any) to allow the item as a charge properly representing actual work professionally done, but such details have in fact, as shown above, been specifically refused.

6. There has been no previous course of dealing as between the solicitors and Mr. J. C. L. Tremayne as the party chargeable which can justify any charge being allowed as against him in this form, this being the first charge of this nature made against him since the death of the testator and previous owner, and even if a course of dealing had existed between the solicitors and the previous owner it is submitted that such course of dealing would not even be binding on him without his consent in the absence of any agreement under the Solicitors Acts, and much less upon the new owner of the property.

7. If the master had discretion to apply the practice as to the method of charging between the solicitors and the testator as against Mr. J. C. L. Tremayne (which it is submitted he has not) he could not properly exercise that discretion to allow the increased sum, the testator having been in the habit of paying a sum of 80*l.* per annum only, and the item being calculated at the increased sum of 143*l.* 6*s.* 8*d.* per annum.

8. On all the above grounds it is submitted that it is impossible for the master to allow this item, and the most it would have been within his discretion to do towards his allowing it (and this only without prejudice to the direction in the order as to costs of taxation) was to allow the solicitors (if they so desired) to bring in full detailed particulars by items in the usual form of a solicitor's bill for any professional work which may be covered by this item, but as they do not desire but in fact refuse to do so, the whole item must be disallowed.

To these objections the taxing master answered on the 19th Jan. 1904 to the effect that he saw no reason whatever for not allowing the commission; that the bills were fair, reasonable, and proper to be allowed, and that he therefore in the exercise of his discretion allowed the commission; and that particulars and details of the work done were, in his opinion, unnecessary, as the commission allowed by him was for the collection of such rents and not for legal work, and there was no solicitor's professional work covered or included in the item of commission.

Further objections to the taxation and answers thereto passed between John C. L. Tremayne and the taxing master dealing with details not material for the purpose of this report.

This was a summons taken out by John C. L. Tremayne on the 4th March 1904 for a review of the taxation.

The question for decision was whether on an application under the Solicitors Act 1843, for taxation of a solicitor's bill of costs by a party chargeable who stands in the position of a client, a solicitor can insist, as against his client, on charging by percentage for collection of rents as part of his professional bill.

Eve, K.C. and *Ashworth James* for the applicant.—Under the Apportionment Act the applicant is the person entitled to collect the rents from the 25th March 1901, not the respondents as solicitors to the executors of the preceding owner of the estates. The taxing master has not power to allow solicitors a lump sum by way of commission for collecting rents in the absence of

any agreement to that effect. There is no prevailing practice of paying solicitors by commission as in the case of surveyors:

Attorney-General v. Drapers' Company, L. Rep. 9 Eq. 69.

This allowance of commission for collecting rents is assessment rather than taxation, and here it was the duty of the taxing master to tax, not to assess:

Re Johnston; Mills v. Johnston, 89 L. T. Rep. 497; (1904) 1 Ch. 132.

The solicitors are entitled to professional charges, but not to commission for collecting rents.

Vernon Smith, K.C. and *J. G. Wood* for the respondent solicitors.—The taxing master when taxing a bill of costs has a discretion to allow a commission for collecting rents. The case of the *Attorney-General v. Drapers' Company* (*ubi sup.*) is something like the present case. In the case of *Re Weall; Andrews v. Weall* (61 L. T. Rep. 238; 42 Ch. Div. 674) the tenant for life declined to pay the charges of the trustees' solicitors for collecting rents on the ground that some were chargeable against corpus and not income, and others had been unnecessarily incurred. Here the trustees could not possibly be expected to collect the rents of the numerous small tenants of this large estate. [SWINFEN EADY, J.—The taxing master cannot tax items which the solicitors are not entitled to insert in their bill of costs.] It is a question of amount over which the taxing master has complete discretion. [SWINFEN EADY, J.—Is it a taxable charge?] It is a charge for work sanctioned by the general practice of the Profession if not strictly professional work:

Re Remnant, 11 Beav. 603;

Ex parte Strawbridge; Re Hickman, 48 L. T. Rep. 913, and on appeal 49 *Ib.* 638; 25 Ch. Div. 266.

As to the question whether it was professional work, the decision of the taxing master covers that point.

Eve, K.C. in reply.—Issuing printed circulars to the tenants showing the amount of rent due and then collecting the rent is not professional work, and a charge for such work ought not to be included in a bill of costs. Assuming it to be professional work, there is no authority for allowing a lump sum by way of commission for it.

SWINFEN EADY, J.—This is an application to vary the taxing master's certificate made under an order of the 20th July 1903. By the terms of that order it is referred to the taxing master to tax and settle three bills that are named in the order. One is a bill for 548*l.* 11*s.* 3*d.*, 98*l.* 9*s.* 3*d.*, and 30*l.* 9*s.* 6*d.* It was an order made upon a special application by originating summons. The bill of costs included one item of 215*l.* 17*s.* for collecting rents, and it was arrived at by calculating 5 per cent. on 4317*l.*, being the amount collected. No agreement to pay the solicitors by a commission is proved or indeed set up or alleged. During the lifetime of their former client, John Tremayne, the solicitors were paid for collecting the rents by a salary of 80*l.* a year, together with a commission on certain other sums that came to about 15*l.* a year. They allege that after Mr. John Tremayne's death on the 7th April 1901 that arrangement was no longer applicable, and in respect of this amount—4317*l.*—they claim to be allowed a lump

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WARRBURG AND CO. v. MCKERROW AND CO.

[K.B. Div.]

sum of 215*l.* 17*s.* Part of that was for collecting rents that accrued during the life of the testator, John Tremayne, including 182*l.* the apportioned part of the rents from the 25th March 1901 to the 7th April 1901 which they collected after his death on behalf of the executors and trustees of his will. Other part was for collecting the rents of the settled estate between the 7th April 1901, the day of John Tremayne's death, and the 25th March 1902. The master has proceeded upon the footing that the 182*l.* was properly collected by the solicitors on behalf of the executors and trustees, as they had a right so to receive them. That ground was not persisted in before me, having regard to the terms of the Apportionment Act, but it was said that the real truth was that they collected them by arrangement with the succeeding owner of the estate, and certain letters have been referred to this morning, which are not yet in evidence, which seem to show that that was the arrangement. But I do not attach too much importance to that, because the other side, the applicant on the summons, has not had a sufficient opportunity of explaining those letters. The master has further proceeded upon this footing, that in the exercise of his discretion and in the absence of any agreement he is entitled to allow the solicitors a lump sum by way of commission to remunerate them for their trouble in collecting the rents. This application is by the succeeding tenant for life, who, not being satisfied with the taxing master's decision on that point, seeks to review the taxation. I am of opinion that the solicitors in this case are in a dilemma. If this sum of 215*l.* 17*s.* is a charge for professional work done by them as solicitors, they ought to deliver a bill of items in respect of it, and the master has no discretion to allow them a lump sum for work of that character in the absence of any agreement between the solicitor and client. I think that the reasoning of Farwell, J. in the case of *Re Johnston; Mills v. Johnston (ubi sup.)* supports this view. On the other hand, if the work was not professional work, then the commission ought not to have been included in the bill of costs. Now, I am of opinion that the proper order to make upon this application is to vary the certificate by directing the master to treat that sum as struck out of the bill of costs as having been improperly included in it. The effect of that will be to leave the matter at large between the parties. The solicitors will still be entitled to their proper remuneration for work done; they will not be barred in respect of that claim, but, on the other hand, they will not be entitled necessarily to receive this particular sum by way of remuneration for their work. It may be that some application may hereafter be made for them to deliver a bill of items in respect of it, or it may be that if the work is treated as non-professional work—that is to say, not taxable work, but work done by solicitors not in their professional capacity, but nevertheless for which they are entitled to receive a fair remuneration—it may be agreed between the executors and the solicitors what is a fair charge for it, and, if the tenant for life or other *cestui que trust* is dissatisfied with the conclusion at which the solicitors and the executors arrive, it may be it will be open to him to impeach the arrangement so come to, although of course it will be at his own risk if he takes any proceedings with that

view; but on the present application the item must, I think, be struck out of the solicitors' bill. That will affect the balance found due to the solicitors, and it may affect the result of the taxation as to whether a sixth is taken off or not. My view is that for the purpose of arriving at that sixth the item should be treated as if it were struck out of the bill—that is, as if the bill had originally been brought in at a reduced amount—and the one-sixth must be calculated on that footing. I am of opinion that I am judicially bound to come to the conclusion that this certificate should be varied; but I am by no means satisfied that the sum claimed by the solicitors is not a fair and proper remuneration for work done. I have not sufficient materials before me nor is it incumbent upon me to determine that; but, having regard to the materials that were before the master, I strongly incline to the view that the amount that he allowed them was only a fair remuneration for the work done. The master, however, was not entitled to arrive at it in the way he did; nor am I entitled, on the materials before me, to come to any such conclusion; but I am not satisfied that the applicants will ultimately derive any benefit from this application to vary. The order will be that the matter be referred back to the taxing master to vary his certificate accordingly, and I think the applicants must have the costs of the application. They have succeeded in varying the certificate, and I think they are entitled to the costs of the application.

Solicitors: Church, Rendell, and Co., for T. J. Pitts-Tucker and Sons, Barnstaple; Coode, Kingston, and Cotton.

KING'S BENCH DIVISION.

Friday, April 15.

(Before WALTON, J.)

WARRBURG AND CO. v. MCKERROW AND CO. (a)
Arbitration—Costs—Discretion of arbitrator—Award fees—Costs of reference—Arbitration Act 1889 (52 & 53 Vict. c. 49), ss. 4, 14, 15 (2).

Costs left to the discretion of the arbitrator, but not dealt with by him, only follow the event when the matter is referred by the court under sect. 14 of the Arbitration Act, and not when the action is stayed and arbitration is directed by the court under the submission of the parties, for to such a reference sect. 15 (2) does not apply.

SUMMONS in the Commercial List taken out by the plaintiffs to stay the action and for directions that the costs of the action and of two references thereunder be paid by defendants.

The plaintiffs' claim was for damages for breach of contract, dated the 18th April 1903, for the sale by the defendants to the plaintiffs of 10,000 Singapore green snail shells.

By the terms of the contract the shells were

To be of fair merchantable quality, or if inferior a fair allowance to be made. The same to be settled by the selling brokers, such arbitration to be demanded within twenty-eight days, and held within six weeks after the arrival of the vessel.

The contract provided that

Any dispute arising out of this contract except with regard to quality to be settled by arbitration in London

(a) Reported by W. TREVOR TUSTON, Esq., Barrister-at-Law.

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in the usual manner, according to the rules of the General Produce Brokers' Association of London.

The General Produce Brokers' Association of London Rules for Arrival Contract, the 1st Jan. 1897, were printed on the back of the contract, No. 7 being as follows :

In the event of any dispute whatever arising out of this contract between the parties hereto, or their personal representatives, or in any way whatever relating to it or to its construction or fulfilment, every such dispute shall be referred to arbitration in accordance with rule 7 set out below. This submission to arbitration shall be irrevocable, and it and the award to be made in pursuance thereof shall be enforceable under the provisions of the Arbitration Act 1889.

Rule 7 (e). The fees or (sic) arbitration or appeal and award shall be paid by the losing party unless otherwise awarded.

The plaintiffs sold at a profit direct to buyers at Hamburg.

The buyers considered the goods were inferior, and first asked for an allowance, but then claimed to reject on the ground that the goods were not Singapore shells.

The defendants immediately obtained from the selling broker an award directing an allowance of 32l. 7s. to the plaintiffs for inferior quality.

The plaintiffs, wishing to set that award aside and reject the goods, brought the action claiming damages.

The defendants, without abandoning the award, applied for a stay under sect. 4 of the Arbitration Act, and obtained the following order :

It is ordered that all further proceedings in this action be stayed pending the decision, by the tribunal agreed upon in the contract, of the sole question whether the shells delivered were in fact Singapore snail shells as described in the contract. Costs of this action to be reserved. Costs of the reference and award to be in the discretion of the arbitrators. Liberty to apply. Fit for counsel.—Nov. 13, 1903.

The umpire at the arbitration gave the following award :

I award that buyers are entitled to reject the shells, as they do not correspond with the description named in the contract—viz., Singapore green snail shells. I further award that the fees for the award—viz., 6l. 6s.—be paid by the sellers. Dec. 30, 1903.

The plaintiffs coming before the court on the question whether they were entitled to damages in reference to the resale, the following order was made :

It is ordered that, the parties admitting that there is no question in dispute other than the question whether the plaintiffs are entitled to recover damages, and, if any damages are recoverable, what is the amount of such damages, it be referred to the tribunal agreed in the contract to determine that question, and that in the meantime all further proceedings in this action are stayed; and that the costs of this application be reserved. Fit for counsel.—Jan. 18, 1904.

The umpire gave the following award :

Sellers to pay the cost of invoice plus interest at rate of 5 per cent. per annum, freight (if paid by buyers) and 5s. per cwt., damages to the buyers, who are to hand over documents to the sellers, to enable them to take possession of the shells. I further award that the fees for the award—viz., 10l. 10s. for arbitrators and umpire—be paid by the sellers. March 12, 1904.

A. H. Chaytor for the plaintiffs.—The umpire has decided as to fees—that is, as to the costs

of the award—but has made no order as to the costs of the reference. The Arbitration Act 1889, s. 15, sub-s. 2, applies and makes the award of the arbitration equivalent to a verdict of the jury; the costs therefore follow the event. The words in sect. 15 are general :

Carr Brothers v. Dougherty, 67 L. J. 371, Q. B.

As regards the costs of the action, the plaintiffs are entitled to them, since it was necessary for them to bring the action. The plaintiffs have obtained in the arbitration all that they wanted, and now seek to dispose of the action by a stay.

Atkin for the defendants.—It was not necessary for the plaintiffs to bring the action and those costs have been thrown away, and the plaintiffs are not entitled to them. As to the costs of the reference, they were left to the arbitrator's discretion.

WALTON, J.—The matter must be referred back to the umpire to deal with the costs of the reference, the plaintiffs to have the costs of the action; no order as to the costs of the application of the 18th Jan. 1904. Costs left to the discretion of the arbitrator, but not dealt with by him, only follow the event when the matter is referred by the court under sect. 14 of the Arbitration Act, and not when the action is stayed and arbitration is directed by the court under the submission of the parties, for to such a reference sect. 15 (2) does not apply.

Solicitors for the plaintiffs, *Hollams, Sons, Coward, and Hawksley*.

Solicitors for the defendants, *Morley, Shirreff, and Co.*

Feb. 4 and 5.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

CENTRAL LONDON RAILWAY COMPANY v.
HAMMERSMITH BOROUGH COUNCIL. (a)

Metropolis—Smoke nuisance—Notice to abate—Notice to prevent recurrence—Prohibition order—Specifying works—Evidence—Public Health (London) Act 1891 (54 & 55 Vict. c. 76), ss. 4, 5, 130, sched. 3.

Before a notice is served under sect. 4 (2) of the Public Health (London) Act 1891 requiring the person served to do what is necessary for preventing a recurrence of the nuisance, it is not necessary that a notice requiring such person to abate the nuisance under sect. 4 (1) shall have been served previously or included in such notice. Therefore, a notice having been given under sect. 4 (2), a court of summary jurisdiction can make an order under sect. 5 prohibiting a recurrence of the nuisance and specifying works to be executed, where the only notice served has been under sect. 4 (2), if such court is satisfied that the nuisance, although abated, is likely to recur.

On the hearing of informations and complaints under sect. 5 (1) (b), the respondents proved the nuisances alleged, but offered no evidence as to how the black smoke which caused the nuisances had been caused or as to what works were necessary to abate or prevent such nuisances.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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The appellants' witnesses stated that the black smoke might have been caused by two furnace doors being open at the same time.

The magistrate determined that the respondents were entitled to a prohibition order, and thereupon the appellants required that the order should specify the works they were to execute under sect. 5 (5), but insisted that, the case being closed, the magistrate was precluded from hearing further evidence as to the works necessary. The magistrate therefore added to his prohibition order a direction to the appellants to fit up apparatus to prevent the furnace doors being opened simultaneously.

Held, that the order was valid.

CASE stated on six informations and complaints preferred by the respondents against the appellants.

Upon the hearing of the informations and complaints, the following facts were either proved in evidence or admitted.

The appellants are the occupiers of an electricity generating station, which provides power for the running of the trains of the appellants, at Wood-lane, Shepherd's Bush, in the borough of Hammersmith.

The respondents are the council and sanitary authority of that borough.

By the Public Health (London) Act 1891 (54 & 55 Vict. c. 76):

Sect. 4, (1). On receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises requiring him to abate the same within the time specified in the notice, and to execute such works and do such things as may be necessary for that purpose, and, if the sanitary authority think it desirable (but not otherwise), specifying any works to be executed. (2) The sanitary authority may also by the same or another notice served on such occupier, owner, or person require him to do what is necessary for preventing the recurrence of the nuisance, and, if they think it desirable, specify any works to be executed for that purpose and may serve that notice, notwithstanding that the nuisance may for a time have been abated, if the sanitary authority consider that it is likely to recur on the same premises.

Sect. 5 (1). If . . . (b) The nuisance, although abated since the service of the notice, is in the opinion of the sanitary authority likely to recur on the same premises, the sanitary authority shall make a complaint and the petty sessional court hearing the complaint may make on such person a summary order (in this Act referred to as a nuisance order). (2) A nuisance order may be an abatement order, a prohibition order, or a closing order, or a combination of such orders. . . . (5) An abatement order or a prohibition order shall, if the person on whom the order is made so requires or the court considers it desirable, specify the works to be executed by such person for the purpose of abating or preventing the recurrence of the nuisance.

By sect. 130 the forms in the 3rd schedule to this Act or forms to the like effect varied as circumstances may require may, unless other forms are prescribed under the Summary Jurisdiction Act 1879, be used and shall be sufficient for all purposes. In the 3rd schedule are form A, notice requiring abatement of nuisance; form B, summons; Form C, nuisance order.

On the 5th Feb. 1903 S. H. Brown, the sanitary inspector of the respondents, in pursuance of instructions from the respondents, served upon the appellants at their office, No. 125, High Holborn, W.C., notice in a printed form such as is prescribed in the 3rd schedule—namely, form A—but filled up and varied in manuscript with partial alterations as follows:

Public Health (London) Act 1891 (54 & 55 Vict. c. 76). —Borough of Hammersmith (Public Health Department), Town Hall, Broadway, Hammersmith, W.—To the Central London Railway Company Limited, of 125, High Holborn, London, W.C., by Mr. Richard Oliver Graham, their secretary. — Take notice that under the provisions of the Public Health (London) Act 1891 the council for the metropolitan borough of Hammersmith, the sanitary authority for the said borough, being satisfied that at the generating station, Wood-lane, Shepherd's Bush, in the said borough, of which you are the occupiers, there existed recently, to wit, on or about the 22nd day of January 1903, the following nuisance—namely, a chimney (not being the chimney of a private dwelling-house), known as No. 1 shaft, sending forth black smoke in such quantities as to be a nuisance—and that, although the said nuisance has since the last-mentioned day been abated, the same is likely to recur at the said premises, do hereby require you to do such things as may be necessary for preventing the recurrence of the said nuisance. If you make default in complying with the requisitions of this notice a summons will be issued requiring your attendance before a petty sessional court to answer a complaint which shall be made for the purpose of preventing the recurrence of the nuisance, and for recovering the costs and penalties that may be incurred thereby.—Dated this 5th Feb. 1903.—S. HUGGINS BROWN, Sanitary Inspector.

On the 8th April 1903 S. H. Brown laid six several informations at the West London Police-court, and obtained six summonses against the appellants in the following form:

West London Police-court. — In the Metropolitan Police District.—To the Central London Railway Company, of No. 125, High Holborn, London, W.C.—Information has been laid this day by Samuel Huggins Brown, sanitary inspector on behalf of the metropolitan borough of Hammersmith, for that on the . . . day of 1903, at the generating station, Wood-lane, Shepherd's Bush, in the borough of Hammersmith, within the district aforesaid, of which you are the occupier, there existed recently the following nuisance—namely, a chimney (not being of a private dwelling-house), known as No. 1 shaft, sending forth black smoke in such quantities as to be a nuisance—and, although the said nuisance has since the last-mentioned day been abated or discontinued, that the same or a like nuisance is likely to recur at the said premises. You are therefore hereby summoned to appear before the court of summary jurisdiction sitting at the West London Police-court, on Wednesday, 22nd April 1903, at the hour of two in the afternoon, to answer to the said information.—Given under my hand and seal this 8th April 1903.—(Signed) R. O. B. LANE, one of the magistrates of the police-courts of the metropolis.

The dates on which the nuisances were alleged to have existed in the summonses were the 27th Jan., the 20th Feb., the 24th Feb., the 4th March, the 11th March, and the 25th March 1903.

The informations were by consent heard together at the West London Police-court on the 22nd April 1903.

For the appellants it was argued that the notice of the 5th Feb. was defective and invalid as not being in compliance with the provisions of the

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Public Health (London) Act 1891 (54 & 55 Vict. c. 76) in that under sect. 4 (1) and sect. 5 (1) (b) the respondents should have served upon the appellants a notice requiring them to abate the nuisance within a time specified therein, and that the notice of the 5th Feb. did not require the appellants to abate the nuisance within a specified time or at all, and that under sect. 4 (2) the notice of the 5th Feb. should have been either incorporated with or supplemental to a notice to abate the nuisance, and that under sect. 5 (1) (b) no complaint or summary order could be made against the appellants unless and until the nuisance had been abated by them after and in consequence of a notice to abate the nuisance.

For the respondents it was argued that the notice of the 5th Feb. followed the second part of form A in the 3rd schedule to the Public Health (London) Act 1891; that such second part of form A was intended to apply to intermittent nuisances, such as the issuing of black smoke; that the notice of the 5th Feb. was a notice to abate under sect. 4 (1) and sect. 5 (1) (b), and that the word "abated" in sect. 5 (1) (b) had reference to a discontinuance of the nuisance however caused, and whether a notice to abate the same had been served or not.

It was further contended by the respondents that the first part of form A was quite inapplicable to the present case as it contemplated an existing nuisance requiring to be abated at the time of serving notice in the form of the first part of form A, and, further, that by reason of sect. 130 of the Act the second part of form A was properly used as a notice under sect. 4 (1) and sect. 5 (1) (b) in reference to such matters as intermittent black smoke nuisances under sect. 24 of the statute.

The only witnesses called on behalf of the respondents were S. H. Brown, the sanitary inspector, who stated that he had observed black smoke in such quantities as to be a nuisance issuing from No. 1 shaft on the dates in question, and Edward Harrison, a coal officer of the London County Council, who said he had watched with S. H. Brown for black smoke on the 22nd Jan. 1903, and no evidence was given or tendered on behalf of the respondents as to how the black smoke had been caused, nor specifying any works to be executed by the appellants for the purpose of abating or preventing the issue of black smoke.

Evidence was called on behalf of the appellants, by their engineers, that for the purpose of generating electricity to work their railway many hundreds of tons of coal per week were burnt, and that, in consequence of the complaints of the respondents with regard to smoke, they had at great expense equipped and fitted the generating station with furnaces fired by hand and had replaced automatic mechanical stokers by hand firing and had converted their boilers in that behalf, and that the appellants burned nothing but the best quality of Welsh smokeless coal. There was no suggestion that the appellants' installation machinery and equipment were not in all respects the best possible. The appellants' witnesses, who denied the sending forth of black smoke in such quantity as to be a nuisance, admitted that nothing had been done by them in reference to the machinery or appliances con-

nected with or used for the generation of electricity to remedy the nuisance or prevent its recurrence since the service of the notice of the 5th Feb. 1903, and the emission of black smoke might have been caused by two furnace doors being open at a time.

After hearing the arguments, and the witnesses called on behalf of the respondents and the appellants, the magistrate overruled the objections of the appellants to the notice of the 5th Feb. He found that on the several dates in the summonses the chimney sent forth black smoke in such quantities as to be a nuisance, and he held and determined that the respondents were entitled to a prohibition order under sect. 5 (1) and (2) of the Public Health (London) Act 1891. Thereupon counsel for the appellants required under sect. 5 (5) of the Act that the prohibition order should specify the works to be executed by the appellants. No suggestion was made by either party as to the works necessary, and the counsel for the appellants insisted that, the case being closed, the magistrate was precluded in law from hearing further evidence as to the works necessary, but the magistrate adjourned the case to consider them, and on the 30th April 1903 made the following order:

To the Central London Railway Company, whose registered offices are at 125, High Holborn, in the administrative county of London, the owners and occupiers of certain premises, to wit, the electrical generating station situate at Wood-lane, in the metropolitan borough of Hammersmith, in the said county of London and within the metropolitan police district.—Metropolitan Police District and Administrative County of London, to wit.—Whereas the Central London Railway Company, being the owners and occupiers of the said electrical generating station within the meaning of the Public Health (London) Act 1891, have this day appeared before me, John Rose, Esq., one of the magistrates of the police-courts of the metropolis, sitting at the West London Police-court within the metropolitan police district, to answer the matter of a complaint made by Samuel Huggins Brown, sanitary inspector for and on behalf of the council of the metropolitan borough of Hammersmith aforesaid, that on the 25th March 1903 at the said generating station there existed the following nuisance—namely, a chimney (not being the chimney of a private dwelling-house), known as No. 1 shaft, sending forth black smoke in such quantities as to be a nuisance—and that, although such nuisance had since the last-mentioned day been abated or discontinued, the same or the like nuisance was likely to recur at the same premises, now on proof here had before me that recently before the time of making the said complaint, to wit, on the said 25th March 1903, the nuisance so complained of did exist on the said premises, but that the same has since been abated, and that the same was caused by the act, default, or sufferance of the said Central London Railway Company, yet, notwithstanding such abatement, I, being satisfied that it is likely that the same or a like nuisance will recur at the said premises, do therefore prohibit the said Central London Railway Company from allowing a recurrence of the said or a like nuisance, and for that purpose I direct the said Central London Railway Company to fit up at the doors of the furnaces communicating with the said chimney apparatus to prevent the doors being opened or kept open simultaneously, for example, a horizontal bar on a centre pivot between the doors and movable vertically in front of them so that the door of one furnace must be barred and the door of another released by the act of depressing either end of the bar, or other apparatus having a like effect, and to adopt all other means which shall be neces-

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easy to prevent the emission of black smoke from the said shaft in such quantities as to be a nuisance, and I do further order the said Central London Railway Company to pay to the said council the sum of 10*l.* 10*s.* for costs in this behalf.—Given under my hand and seal at the police-court aforesaid this 30th April 1903.—(Signed) JOHN ROSE, one of the magistrates of the police-courts of the metropolis at the West London Police-court.

The questions submitted for the opinion of the court are: (1) whether the notice dated the 5th Feb. 1903 was and is defective and invalid for the reasons above stated or any of them; and (2) whether, even if the notice was valid in law, the order made by the magistrate was and is bad because he specified therein the works to be executed by the appellants without having heard evidence with respect to such works.

Roskill, K.C. and Theobald Mathew for the appellants.

Macmoran, K.C., Bodkin, and Bruce Williamson for the respondents.

LORD ALVERSTONE, C.J.—I think it is better that I should confine myself to dealing with the points that have been raised and nothing more. In this case, the appellants being summoned, they first took the technical point that, because the black smoke had been abated before the first summons for abatement or for a prohibition order, therefore there had been no abatement in pursuance of duress, or threat, or notice in the natural course of events, and that therefore the magistrate had no jurisdiction. Mr. Roskill put his point most plainly, and, with every desire to appreciate the point, I venture to say that my mind is so constituted that I am absolutely unable to appreciate it. There were five other summonses—that is to say, there was proof of black smoke coming out on five days, two of them in the month of February and three in the following month of March. Therefore, even assuming, although I do not wish at all to be thought to say so, that there had been anything in the argument with regard to the first occasion on the 27th Jan., that could have no application with regard to the others. The only point that can be suggested is that because the notice was a prohibition notice instead of an abatement notice that made a difference to the magistrate's jurisdiction. I hope it is not necessary to give effect to such an argument unless there is some substantial justice behind it, because, as I say, I am not able to appreciate it, and I think such a technicality ought not to be given effect to unless there is a substantial wrong being done. Then came the second point, and I agree that the magistrate has rather complicated the matter by putting in those directions which I have called the directions of a mechanical engineer—for instance, a horizontal bar on a centre pivot put between the doors; and the order, in my opinion, would have been better if it had been in one of two forms, either "I tell you not to be negligent in the matter of stoking the furnaces, and not to do it again," or "I direct you to put up apparatus which will prevent your being able to stoke two furnaces at the same time." But, when we look at what happened, I think it would be wrong and it would be contrary to the first principles of justice to allow such an objection to prevail. In the first place the appellants denied black smoke coming out at all, and, when their witnesses were in the

box, what they said was that the emission of black smoke might have been caused by two furnace doors being open at a time. We have had this kind of case in the courts before, and we know perfectly well that one reason why the Legislature has been so stringent about black smoke is this: It has been established over and over again that it is careless stoking that brings about black smoke. Therefore one is not surprised to find that, this incident having occurred in this case, the appellants' witnesses said that it must have been owing to two doors being open at one time. But it had occurred on a series of days, and on no less than six days, spread over a period of three months. The local authority, the Borough Council of Hammersmith, being satisfied with their case proving black smoke, they were not then and there prepared with evidence how it would best be remedied; and the prohibition order being about to be made, counsel for the railway company was within his right in saying: "Will you be good enough to tell us the works which we are to do." The magistrate, being in a difficulty, appears to have asked the appellants whether they had any evidence there, but no suggestion was made, and then, when the question arose of an adjournment for evidence, the railway company's ingenious counsel says: "You must not hear evidence at all now; the appellants have closed their case"—which they had closed long before the request had come—"and therefore you are not entitled to hear any evidence." All I can say is this (I do not wish to say anything which goes beyond this case), that this is not the way in which a point should be raised, if objection is afterwards going to be taken to the magistrate having said in his order something which he ought not to have said. I think the law has not made the change which Mr. Roskill suggests. I think that the case of *Millard v. Wastall* (77 L. T. Rep. 692; 18 Cox C. C. 695; (1898) 1 K. B. 342) was rightly decided under the Public Health Act 1875, which case applies to the Public Health (London) Act 1891 and says that in a smoke nuisance case it is not necessary to specify the works, but merely to say: "Do not be careless again." Now, it is said because the statute of 1891 has said an abatement order or a prohibition order shall, if the person on whom the order is made so requires, specify the work required to be done, that the law is altered as compared with sects. 94 and 96 of the Public Health Act 1875, which requires the notices to specify the work to be done. In my opinion, as far as this case is concerned, the law is not altered substantially. I quite agree that the compulsory obligation to specify is taken away, and now the abatement order shall, if the person on whom the order is made requires or the court orders it to be done, specify the works. That, in my opinion, does not make an abatement order or a prohibition order bad because it is said no works are required, but merely says: "Do not stoke carelessly again." But that does not quite cover the whole ground, because it may be said this order is bad because it does specify works, and it specifies works without sufficient evidence. I think, if that were really what the order means, it might be open to some objection. I think the fair reading of this order is: "I direct the railway company to fit the doors of the furnaces with apparatus to prevent the doors being

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open or kept open simultaneously." The point of that was this: The respondents, the railway company, had themselves said that the only cause they could suggest was that two doors were open at the same time, and that stoking was going on at two furnaces at the same time. It is true the other part goes on "for example," but I do not think that means that that is the only way in which it can be done; and, looking at the words of the statute specifying the works to be executed and bearing in mind that magistrates are not experts, I see no reason for holding that it would not be properly complied with by saying: "You are to put works which will prevent two furnace doors being open at the same time," and, as the order goes on: "And to adopt all other means to prevent the emission of black smoke." I cannot help thinking this has been largely brought about by the respondents, the railway company, the then persons summoned, taking an objection which, in the ordinary conduct of litigation, I think they ought not to have taken. If they were going to raise the point that the magistrate could not make a proper order at their request without evidence, they ought not, in the same breath, to have objected, they having taken the objection that he was not entitled to hear evidence. I think the tactics were ingenious, and I think they were obviously for the purpose of preventing any order being made. I therefore think this appeal fails, both on the technical point and on the merits.

WILLS, J.—I am of the same opinion. I entirely agree that the first point taken is captious. With regard to the second point, I think myself that a magistrate in a case of this kind, if he had to specify works, certainly ought, under all ordinary circumstances, to hear evidence, because it is absurd to suppose that he is an expert in matters of this kind, or that he is competent to specify works without knowing something about it from evidence. But in this case he is not, I think, so entirely without evidence as to prevent his exercising jurisdiction. The defendants, who were summoned, were asked to explain how this took place, and they said that it was owing to two furnace doors being open at the same time, which is really the substance of this order. The words "for example" might have been entirely omitted, and I certainly think that this objection ought not to be listened to in the mouth of a person who has prevented the evidence being given. I cannot conceive, to my mind, anything more unsatisfactory or more captious and unreasonable than this, when the question first arises as to whether there should be evidence about works or not, at the first moment when it can arise and when it is proposed that the evidence shall be gone into, instead of saying it is necessary to have an adjournment, or anything of that kind, objecting when the respondent's case was closed that it is too late to hear evidence, and then coming to try and upset the order because that evidence had not been given. I do not think such tactics ought to succeed. I should like to say, with regard to the case of *Millard v. Wastall* (77 L. T. Rep. 692; 18 Cox C. C. 695; (1898) 1 Q. B. 342), that I think it rightly decided. Under sect. 94 of the Public Health Act, the tribunal, the magistrate, the court of summary jurisdiction is empowered to do two things; one is to make an order to abate a nuisance, and another

is an order to execute works. If he has power to do two things, he certainly has power to do one. If the second part were wholly unnecessary under the circumstances, I think he would be quite justified in leaving that part out of the order which he otherwise would have power to make if necessary.

KENNEDY, J.—I entirely agree with the judgment of my Lord and my brother Wills, and I have nothing to add.

Appeal dismissed.

Solicitors: *Bircham and Co.; Watson, Sons, and Room.*

Tuesday, March 1.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

THOMPSON (app.) v. MASON (resp.). (a)

Gaming—Shop—Automatic machine—Game of chance or skill—Gaming House Act 1854 (17 & 18 Vict. c. 38).

T., being the occupier of a tobaccoist's shop, kept there an automatic machine by which a person, having put a penny in the slot, pulls a knob, and on releasing such knob the penny flies up into one of five compartments. If the penny goes into either of two compartments it is returned to the person using the machine; if it goes into either of the two others it is retained in the machine; but if it goes into the fifth he receives a ticket by which he can have a 3d. cigar or its value at his option.

It was established by evidence that dexterity could be acquired to some extent by the operator by practice, but the magistrates came to the conclusion that it was not proved that the chances were alike favourable to the appellant and the operator.

Held, that T. was properly convicted of permitting the shop to be used for the purpose of unlawful gaming, contrary to the Gaming House Act 1854.

CASE stated on an information preferred by the respondent against the appellant, for that he, being the occupier of a shop, unlawfully, knowingly, and wilfully permitted it to be opened, kept, and used by other persons for the purpose of unlawful gaming being carried on there, contrary to the Gaming House Act 1854 (17 & 18 Vict. c. 38).

At the date of the alleged offence, and for some time prior thereto, the appellant carried on the business of a tobaccoist in the shop in question, and kept therein for the use of persons who frequented the shop an automatic machine worked on the penny in the slot system, and supplied by the Northern Automatic Company Limited.

The working of the machine was thus described:

Having placed a penny in the slot, the operator pulls down a spring by means of a knob and then suddenly releases the knob, whereupon the spring flies up, and the penny is projected into one of five compartments. If in the course of its flight the penny finds its way into either of two compartments it is returned to the operator; if it goes into either of two other compartments it is retained in the machine and is lost to the

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law

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THOMPSON (app.) v. MASON (resp.).

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operator. If the penny falls into the fifth (the centre) compartment, the operator receives a ticket entitling him to receive from the appellant a 3d. cigar or its value at his option.

It was contended on behalf of the appellant that the user of the machine constituted a game of skill as distinguished from a game of chance, or, at all events, was a game partly of skill, inasmuch as dexterity in the play could be acquired by practice. In support of that contention it was established by evidence before the magistrate that such dexterity could in fact be acquired to some extent by continuous practice with the machine or with machines of similar construction.

The magistrate, however, on this contention was of opinion that the judgment in *Fielding v. Turner* (89 L. T. Rep. 273; (1903) 1 K. B. 867) was conclusive against the contention, seeing that the construction of the machine described in that case and its operation (so far as the mode of play was concerned) were in all respects similar to the construction and operation of the machine in use on the appellant's premises.

It was further contended for the appellant that even if the game played were one of chance and not of skill, yet the gaming was not unlawful gaming, inasmuch as it was not proved that the chances were not alike favourable to the operator and to the appellant, and that the decision in *Fielding v. Turner* (sup.) was adverse to the appellant in that case, because the chances of the game played were obviously not alike favourable to him and to the operator, there being four compartments (out of seven) in which the coin was lost to the operator.

No evidence was offered by the appellant to prove that the construction and physical condition of the machine in his shop and the force and adjustment of the spring were such that it was an absolutely even chance that the penny would fall into any one of the five compartments, and the magistrate was of opinion that (except on such an assumption of fact) it could not be established that the chances were alike favourable to the appellant and to the operator.

If that assumption were made, the magistrate was of opinion, as a matter of arithmetic (though no evidence was tendered on the point), that the expectation of the value emerging from the machine on the insertion of a penny into the slot would on the average be

$$\frac{3d. + (4d. \times 2) + (1d. \times 2)}{6} = 1d.$$

That is to say, the result in the long run, after a vast series of experiments by the same customer, would be that neither party would win or lose.

There was, however, no proof that this assumption was in fact well founded.

It was urged on behalf of the respondent that, if indeed it were well founded (seeing that practice with the same machine would admittedly give an operator a greater chance of success than he would enjoy on the first occasion), it would follow that the user of the machine by different customers, many of whom frequently operated and so acquired dexterity, must in the long run result in loss to the appellant, and it was contended that if this were so the machine could be retained by him only for the purpose of inducing custom by encouraging a spirit of gambling.

It was further contended for the respondent that playing at any game of mere chance may amount to unlawful gaming, and reference was made to the observation of Hawkins, J. in *Jenks v. Turpin* (50 L. T. Rep. 808; 13 Q. B. Div., p. 513), that regard must be had to the illegality of the gaming, not merely to the illegality of the game, and it was also contended that the observations of the court in *Fielding v. Turner* (sup.) had reference to the facts of that particular case, and were not intended to lay down as a principle of law that there could be no unlawful gaming where the chances of the game as played were alike favourable to all the players, and that if it were otherwise a shopkeeper might habitually play pitch and toss with his customers.

It was contended on behalf of the appellant that using the machine in the manner described did not amount to unlawful gaming.

The magistrate came to the conclusion that it was not proved that the chances were alike favourable to the appellant and to the operator, and that in any event the user of the machine in the circumstances mentioned constituted the offence alleged in the information, and he accordingly convicted the appellant.

Danckwerts, K.C. and Llewelyn Davies for the appellant.—The conviction here was wrong, for this is not a game of mere chance within *Jenks v. Turpin* (50 L. T. Rep. 808; 13 Q. B. Div. 505). The present case is very different to *Fielding v. Turner* (89 L. T. Rep. 273; (1903) 1 K. B. 867), for there the chances were four to three against the player, but here they are three to two in his favour.

M. Lush, K.C. and E. O. Simpson for the respondent.—The findings of the magistrate show that this was a game of pure chance. Mere dexterity acquired after practice cannot make a game of chance a game of skill. *Fielding v. Turner* really disposes of this case.

Lord ALVERSTONE, C.J.—If the magistrate here had not found the facts in this case, but had merely held that the facts in *Fielding v. Turner* were binding on him, I think we should have had to send the case back to him; but he has not done that. In this case the elements of chance were of the same kind as in *Fielding v. Turner*; but it was contended that there was more evidence in this case that it was a game of skill and not of chance, and that it was not proved that the chances were not alike favourable to the operator and the appellant. I think here that the magistrate meant to find that this was a game of chance, and that the element of skill involved in it was of the same kind as in *Fielding v. Turner*. I do not think that there is anything in this case to turn the game of chance into a game of skill, and it cannot be said that if a person goes on long enough and so becomes more successful after a time that that prevents the game being a game of chance.

WILLS and KENNEDY, JJ. concurred.

Appeal dismissed.

Solicitors: Keith and Humphries, for Peckover and Scriven, Leeds; King, Wigg, and Co., for T. Thornton, Leeds.

K.B. Div.]

BEARDSLEY (app.) v. GIDDINGS (resp.).

[K.B. Div.]

Thursday, March 3.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

BEARDSLEY (app.) v. GIDDINGS (resp.). (a)

Food and drugs—Institution of prosecution—Laying of information—Service of summons—Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), s. 19 (1).

A prosecution is instituted within sect. 19 (1) of the Sale of Food and Drugs Act 1899 at the date on which the information is laid and the summons is issued, and not on the date when such summons is served.

CASE stated on an information preferred by the appellant against the respondent for that on the 23rd June 1903 he unlawfully sold milk not of the nature, substance, and quality as that demanded by the purchaser, but deficient in milk fat to the extent of 15 per cent.

The information was laid by the appellant on the 18th July 1903, and the summons was issued and signed by a justice of the peace and left by the appellant with the police for service on the same day.

The summons, however, was not served upon the respondent until the 22nd July 1903.

The summons was returnable at the petty sessions held on the 18th Aug. 1903.

Sect. 19, sub-sect. 1, of the Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51) is as follows:

(1) When any article of food or drug has been purchased from any person for test purposes any prosecution under the Sale of Food and Drugs Acts in respect thereof, notwithstanding anything contained in sect. 20 of the Sale of Food and Drugs Act 1875, shall not be instituted after the expiration of twenty-eight days from the time of the purchase.

At the hearing of the summons the solicitor for the respondent took the preliminary objection that the proceedings had not been instituted within the time specified under the above section, the alleged offence having been committed on the 23rd June 1903 and the summons not served until the 22nd July following, the summons therefore being served after the expiration of twenty-eight days from the date of the alleged offence. The respondent's solicitor contended that the laying of the information and issue of a summons was not the institution of the prosecution and that the prosecution was not instituted until the service of the summons, and that as the summons had not been served until after the expiration of twenty-eight days it must be dismissed.

The appellant contended that the date when he laid the information was the date from which the commencement of the prosecution was to be calculated, and as the information was laid and summons issued within the twenty-eight days the prosecution was instituted within the time limit.

The justices were of opinion that the time from which the institution of the prosecution was to be calculated was the date of the service of the summons, and not the date of the laying of the information, and they therefore held that the proceedings had not been instituted within the twenty-eight days from the date of the alleged offence.

They therefore held the objection made by the respondent's solicitor to be good and dismissed the summons.

J. R. Randolph for the appellant.—The institution of the prosecution under sect. 19 (1) of the Sale of Food and Drugs Act 1899 means the institution of the prosecution by the prosecutor, and that is done when he lays the information. When he has done that, he can do no more, as the summons is issued by the justices, and when so issued is served by the police. In *Thorpe v. Priestnall* (1897) 1 Q. B. 159 it was held that the prosecution was instituted when the information was laid. The justices appear to have considered *Cowling v. Taylor's Drug Company* (66 J. P. 11), where it was decided that a prosecution under the Sale of Food and Drugs Acts is not instituted until the summons has been served. That case certainly does not bind this court, and I submit that it was wrongly decided.

J. A. Simon for the respondent.—*Thorpe v. Priestnall* (sup.) was decided under the Sunday Observance Act 1676, but, in order to find out whether the institution of proceedings refers to the laying of the information or the service of the summons, it is necessary to look at the whole scheme of the Sale of Food and Drugs Acts. The reason for giving a limited time under these statutes, which deal with articles of a more or less perishable nature, is to let the person who sold the food or drug know within a reasonable time that proceedings are going to be taken against him. Under sect. 10 of the Sale of Food and Drugs Act 1879 it was provided that the service of the summons, if the thing was perishable, was to be within twenty-eight days. That section is now repealed, and, if the contention of the appellant here is right, the seller, for whose protection these sections were inserted, is really in a worse position, and this could not have been intended. In *Ditcher v. Denison* (11 Moo. P. C. 324) the service of a citation was held to be the institution of the proceedings. He also referred to

Yates v. The Queen 52 L. T. Rep. 305; 14 Q. B. Div. 648.

Lord ALVERSTONE, C.J.—Mr. Simon has brought before us a very able argument for limiting the construction of this sect. 19 of the Sale of Food and Drugs Act 1899, but I do not think that we can accept it. He said that sect. 10 of the Sale of Food and Drugs Act 1879, which said that the summons must be served within a reasonable time, and, in the case of a perishable article, within twenty-eight days, being now repealed and replaced by sect. 19, showed what was the intention of the Legislature in passing the later section, and that as the earlier one referred to the service of the summons, the later one must also mean the service of the summons when referring to the institution of the prosecution. That is a dangerous argument, for by repealing the earlier section and enacting a different section the Legislature may have intended otherwise, and meant to alter the time from which the period ran. Now, sect. 19 says that a prosecution shall not be instituted after the expiration of twenty-eight days from the time of the purchase. Laying of an information and issuing a summons are well known as the com-

(a) Reported by W. DE B. HENBERT, Esq., Barrister-at-Law.

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BEARDSLEY (app.) v. PIKE AND SONS (resps.).

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mencement of a prosecution, and it would require strong indications of intention or strong necessity to make us hold that a commencement of a prosecution does not mean laying the information and issuing the summons. It would be unsafe to hold that, because proceedings under these Acts ought to be taken promptly, the institution of the prosecution is the service of the summons. If the service of the summons was the test, we should have found other words, in fact express words, to that effect.

WILLS, J.—I am of the same opinion. It seems to me impossible to see from sect. 19 of the Sale of Food and Drugs Act 1899 whether it was meant to continue the old policy or whether that old policy should be got rid of. We must therefore look at the actual words of the statute and put a natural construction on them. The commencement of a prosecution means the beginning of the proceedings by which a person is brought before the court, and there is nothing in the words of sect. 19 to show a contrary intention. In *Ditcher v. Denison* (*sup.*) the Acts imported nothing of themselves, and had to be followed up by a citation. It may be said to be the nearest case to support the respondent's contention, but it lays down nothing of any general application, but depended upon the proceedings in that particular court, which was an ecclesiastical one.

KENNEDY, J.—I agree. I see nothing to make one feel justified in saying that the words "any prosecution . . . shall not be instituted" does not refer to the laying of the information. Laying the information is the institution of a prosecution and not the service of a summons. The words in the Criminal Law Amendment Act 1885 are very nearly the same, and under the words of that Act, which are in no sense essentially different, but substantially the same, the laying of the information within the specified time has been held to be sufficient.

Appeal allowed.

Solicitors: *R. B. Wheatley, Son, and Daniel, for Cruttwell, Daniel, and Cruttwells, Frome; J. T. Rossiter, for E. B. Titley, Bath.*

Friday, March 4.

(Before Lord ALVERSTONE, C.J., KENNEDY and CHANNELL, JJ.)

BEARDSLEY (app.) v. PIKE AND SONS (resps.). (a) *Weights and measures—Sale of coal—"Cause the weight of the vehicle . . . to be previously ascertained"—Weights and Measures Act 1889 (52 & 53 Vict. c. 21), s. 22.*

By sect. 22 (1) of the Weights and Measures Act 1889: "Where any quantity of coal exceeding two hundredweight is conveyed for delivery on sale in a vehicle in bulk, the seller of the coal shall . . . cause the weight of the vehicle to be previously ascertained."

Held, that the true test was whether the vehicle had been weighed so recently and under such circumstances that its correct weight had been ascertained.

Semhle, that weighing at reasonable intervals was

not the proper test, but that the waggon need not be weighed before every delivery.

CASE stated on an information preferred by the appellant against the respondents for failing to insert or cause to be inserted on a ticket a statement of the correct weight of the vehicle, contrary to sect. 22 of the Weights and Measures Act 1889.

At the hearing of the summons there was evidence on behalf of the appellant of the delivery of a load of coal to one Kate Hurdle on the 23rd Oct. 1903, and that on the ticket delivered with the coal in accordance with the provisions of the Weights and Measures Act 1889 the tare weight of the waggon was entered at 10½cwt.

The appellant and his assistant also gave evidence to the effect that after the delivery of the coal on the 23rd Oct. 1903 the waggon was weighed by the appellant, and the actual weight was then 11cwt. Neither of the respondents was present at the weighing, and there was some contradictory evidence between the appellant and the keeper of the weighbridge, who was present at the weighing, as to the exact weight of the vehicle, but, having regard to the decision in *Knowles and Sons Limited v. Sinclair* (77 L. T. Rep. 624; (1898) 1 Q. B. 170) that the correct weight to be inserted in the ticket was the weight as ascertained previous to the delivery, the justices did not consider it necessary to find as a fact what the correct weight of the vehicle was after the coal had been delivered.

The respondents contended through their solicitor that, the waggon having been weighed as recently as the 20th Oct. 1903 and found then to scale only 10½cwt., there was no obligation on the part of the respondents to have the same weighed previous to the delivery of the coal on the following 23rd Oct.

Evidence was given on behalf of the respondents of the weighing of the waggon on the 20th Oct. 1903 and that the weight was then only 10½cwt., and that the same vehicle had been weighed on many previous occasions and never weighed more than 10½cwt.

The appellant, however, contended that the provisions of the Weights and Measures Act 1889 had not been complied with, that the weight of the waggon was liable to vary from day to day, and that it was obligatory upon the seller of the coal to cause the weight of the vehicle, as well as of the coal it contained, to be ascertained by a weighing machine previous to each delivery of coal.

The justices found as facts: (1) that the vehicle was not weighed on the 23rd Oct. 1903 previous to the delivery of coal on that day; (2) that the vehicle was last weighed on the 20th Oct. 1903, on the occasion of a previous delivery of coal by the respondents, and then weighed only 10½cwt.

They held, however, that the respondents were not obliged to take the weight of the waggon previous to each delivery of coal, but only at reasonable intervals, and that they had complied with the requirements of the Act, and they therefore dismissed the summons.

By the Weights and Measures Act 1889 (52 & 53 Vict. c. 21), s. 22:

(1) Where any quantity of coal exceeding two hundredweight is conveyed for delivery on sale in a

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

H. OF L.] CATERHAM URBAN DIST. COUNCIL v. GODSTONE RURAL DIST. COUNCIL. [H. OF L.]

vehicle in bulk, the seller of the coal shall, unless the vehicle is provided by the purchaser, cause the weight of the vehicle, as well as of the coal contained therein, to be previously ascertained by a weighing instrument stamped by the inspector of weights and measures and being on or near to the place from which the coal is brought, and shall from time to time cause the tare weight of the vehicle to be marked therein in such manner as the local authority approve. (2) In any such case the seller of the coal shall insert or cause to be inserted in the ticket required by this Act to be given by him a statement of the correct weight of the vehicle, or of the vehicle and of the animal drawing it where both are weighed together with the load, as well as of the correct weight of the coal contained in the vehicle. (3) If any person fails to comply with the requirements of this section he shall be liable to a fine not exceeding 5l.

J. R. Randolph for the appellant.

The respondent did not appear.

LORD ALVERSTONE, C.J.—I think this case must go back to the justices. The waggon was not weighed between the 20th and 23rd Oct., and there was some evidence that the weight of the waggon varied at certain times. It may have been thought that if the waggon was weighed at reasonable intervals that would suffice, but I do not think that that is the proper test. I do not think that a waggon should be weighed before every delivery, but the question is whether the justices had evidence before them that it had been weighed so recently and under such circumstances that the correct weight had been ascertained.

KENNEDY and CHANNELL, JJ. concurred.

Case remitted to justices.

Solicitors: *R. B. Wheatley, Son, and Daniel, for Cruttwell, Daniel, and Cruttwells, Frome.*

House of Lords.

April 22, 26, and May 2.

(Before the LORD CHANCELLOR (Halsbury).
Lords DAVEY, JAMES OF HEREFORD, and
ROBERTSON.)

CATERHAM URBAN DISTRICT COUNCIL v.
GODSTONE RURAL DISTRICT COUNCIL. (a)
ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

*Local government—Alteration of boundaries—
Creation of new urban district—Adjustment
of property and liabilities—Local Government
Act 1888 (51 & 52 Vict. c. 41), s. 62.*

*The loss of a portion of a ratepaying area does not
support a claim for an adjustment of "property,
income, debts, liabilities, or expenses," within
the meaning of sect. 62 of the Local Government
Act 1888. Therefore where a parish forming
part of a rural district was made into a sepa-
rate urban district by an order of the county
council under the Act, and before the alteration
the contribution out of the rates of that parish
towards the expense of maintaining the high-
ways in the rural district had largely exceeded
the cost of maintaining the highways in that
parish:*

*Held (reversing the judgment of the court below),
that the rural district council had no ground*

*for contending that, as their income and expenses
were affected by the alteration, it was a matter
requiring adjustment under sect. 62 of the Local
Government Act 1888.*

*Rochdale Union v. Haslingden Union (80 L. T.
Rep. 146; (1899) 1 Q. B. 540) and Buckingham-
shire County Council v. Hertfordshire County
Council (80 L. T. Rep. 85; (1899) 1 Q. B. 515)
overruled.*

APPEAL from an order of the Court of Appeal
(Vaughan Williams, Stirling, and Mathew, L.J.J.),
reported 88 L. T. Rep. 414; (1903) 1 K. B. 554,
who had affirmed a judgment of Wright, J. upon
a special case stated by an arbitrator.

The question was whether, when a new urban
district is created under the Local Government
Acts of 1888 and 1894 out of part of a previously
existing rural district, the latter is entitled, under
sect. 62 of the Local Government Act 1888, to an
adjustment of property, income, debts, liabilities,
or expenses in respect of the loss of a ratepaying
area caused by the severance. The courts below
held that the respondents were so entitled on
the authority of the cases of *Rochdale Union
v. Haslingden Union* (80 L. T. Rep. 146; (1899)
1 Q. B. 540) and *Buckinghamshire County
Council v. Hertfordshire County Council* (80 L. T.
Rep. 85; (1899) 1 Q. B. 515).

The special case and the sections of the Acts of
Parliament are set out in full in the reports in
the court below.

R. Bray, K.C. and *M. Shearman, K.C.* appeared
for the appellants.

C. A. Russell, K.C. and *G. Humphreys* for the
respondents.

Bray, K.C. was not called on to reply.

At the conclusion of the arguments their
Lordships took time to consider their judgment.

May 2.—Their Lordships gave judgment as
follows:—

THE LORD CHANCELLOR (Halsbury).—My
Lords: I am of opinion in this case that the judg-
ment of the Appeal Court and of Wright, J.
should be reversed; but in truth, though the
question is raised in this case and the consequence
must follow, it is really the decision in the case of
Rochdale Union v. Haslingden Union (*ubi sup.*),
which is here under appeal. There seems to have
been some misapprehension about the decision in
that case. Lord Russell, C.J. commences his
judgment by saying that he agrees with the
judgment of Channell, J. "substantially," and
entirely in the principle involved in it; but,
upon the point now in debate, the judgment of
Channell, J. and Ridley, J., who entirely agreed
with him, was the other way. The language of
the section now under construction does not
seem to me to be appropriate to the compensation
of one district for being placed "in a less advanta-
geous financial position" (those are the words used
by the Legislature itself) than before the altera-
tion in its boundaries. This is language which
the Legislature has used elsewhere when what is
now contended for was contemplated by the
Legislature, but I do not think that the 62nd
section ever contemplated "adjustment" as being
applicable to such a state of things as has been
brought about by a diminution of rateable area.
Where two areas are being divided, and each
becomes responsible for its own administration,

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.
Vol. XC., 2332.

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and where previously they possessed property, it is obvious enough that they must have some mode of adjusting the division of the property which each possessed prior to such separation—the buildings, for example, the workhouses for the administration of the poor law—and, to quote the language of the section, “property, income, debts, liabilities, and expenses.” The only word within which the present claim can be embraced is the word “income.” Now, it may be conceded that in a loose mode of speech the capacity for being rated for future liabilities might be so described, but it would not be accurate. And it is not with the word itself alone that one has to deal, but with the word associated, as it is here, with the words, “property, debts, liabilities, and expenses.” I cannot think that the Legislature intended so grave a departure from the general and very obvious meaning of the words that it has actually used. Where it did intend to allow compensation to be given—compensation, be it observed, not adjustment—it has shown that it can use appropriate and express words for the purpose, and the words, “property, and income from property” can well be satisfied by a division of property and income resulting from property without importing the element of compensation for loss of income. Even if the word “income” itself were appropriately used, I think that the word “adjustment,” as distinguished from “compensation,” means a division of existing assets, while “compensation” would be quite rightly interpreted to mean the loss of some right to obtain income by rating, or of some area which would furnish the right to get income. But it seems to me to be quite contrary to principle, in the case of the alteration of boundaries applicable to a municipal body, which is to be for the future self-sufficing, to make the adjustment of its “property and income, debts and liabilities,” a subject of compensating arrangements. Of course, if the Legislature has done it it must be acquiesced in; but I entirely dissent from the idea of presuming that this has been done without express words. For these reasons it seems to me that the judgment appealed from ought to be reversed, and I so move your Lordships.

LORD DAVEY.—My Lords: The question to be determined in this appeal was thus stated by Vaughan Williams, L.J.: “It is said,” he observes, “that by reason of the separation of the parish of Caterham from the Godstone rural district, the council of that district will lose the profit which they formerly derived from the contribution of the parish of Caterham”; and the question, he added, was whether that apprehended loss was matter for adjustment pursuant to the provisions of sect. 62 of the Local Government Act 1888. Mr. Russell disclaimed stating the question in that way. But I think that the Lord Justice accurately described the claim which is put forward by the respondents. What they are seeking is not an adjustment, in the ordinary sense of that word, of common property or liabilities, or of any reciprocal liabilities of Caterham and Godstone towards each other, but for compensation for a loss which they apprehend that they will suffer by the severance of Caterham from the Godstone rural district. I do not assume that the arbitrator, if he should be required to proceed with the matter, would award

to the respondents the full amount of the extravagant claim put forward by them; and I refer to that claim only as showing the true nature of their demand. The first observation that occurs to me is that sect. 62 says nothing about compensation for apprehended loss of profit or injury. Your Lordships are familiar with Acts of Parliament which give a right to such compensation, and one would have expected if that was the meaning of the Act that it would have been expressed in plain terms. Local authorities are by the section in question authorised to make agreements for the purpose of adjusting “any property, income, debts, liabilities, and expenses.” The *prima facie* meaning of these words is to give powers or facilities for adjusting any matters which by reason of the Act or a scheme made under it require adjustment. In the following words the expression is altered. The section goes on to say (reading it short) that any agreement authorised by the Act to be made “for the purpose of the adjustment of any property, debts, liabilities, or financial relations,” may provide for the transfer or retention of any property, debts, or liabilities, or for the joint use of any property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint user, or in respect of the salary, remuneration, or compensation payable to any officer or person. I have troubled your Lordships by reading the section at length because the latter words, in my opinion, confirm the *prima facie* meaning which I attach to the earlier words. It must be admitted, I think, that the property, debts, or liabilities to be retained or transferred must mean existing property or debts, or a liability actually incurred, and the expression financial relations, I think, also refers to any reciprocal financial obligations which the undivided district and the reserved portion may have already incurred towards each other. I construe the words “income and expenses” in the same manner. I think that “income” means income presently enjoyed, or to which there is a present title, and does not include income which may hereafter be derived from property which is held in trust for the district, or some income such as a rentcharge or other annual payment applicable under some charitable trust or otherwise for the benefit of the district or relief of the ratepayers in it. I think that the words would also include the proceeds of any rate already made on the whole district. It is true that income in this sense would strictly be included under the general word “property,” and that is, perhaps, the reason why the word is dropped out in the subsequent enumeration of matters of adjustment. I am, therefore, of opinion that the words of the section do not necessarily, or according to their proper construction, confer any such right as is claimed in this litigation. But I think that the case may be put on a broader principle. The very object of the scheme which has been made under sect. 57 of the Act is to enable the present appellants to rate their own district and expend the rates so raised for the exclusive benefit of their own district. In fact, when one speaks of the severance of an administrative unit it is only a compendious way of expressing this result. That the rates derived from the severed district will be

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lost to the district from which it is severed is the inevitable consequence and intention of putting the Act in force, and if this were understood by the Legislature to be a matter of compensation some words would be found in the Act which would confer the right to such compensation. Adjustment seems to me a different idea from compensation. When a severance takes place of an administrative unit some adjustment is necessary. There are, or may be, common property or income, debts, liabilities, or expenses owing or incurred by or on behalf of the undivided area. These matters require adjustment, and sect. 62 appears to me to be nothing more than a procedure section for enabling such matters to be adjusted. But the respondents have no vested interests in the profit to be derived from the Caterham highway rates after severance, and there is no abstract right of either of the parties to be compensated by the other for any future financial detriment arising from acts directed or authorised by the Legislature; and in my opinion there is nothing in the Act which creates such a right. I am therefore of opinion that the appeal should be allowed. It follows from what I have said that I think the cases of *Rochdale Union v. Haslingden Union* and *Buckinghamshire County Council v. Hertfordshire County Council* were wrongly decided, and should be overruled.

LORD JAMES OF HEREFORD.—My Lords: In this case I agree with the opinions already expressed that the judgment of the Court of Appeal should be reversed; for I concur in the view that the loss of a portion of a ratepaying area does not support a claim for an adjustment of "property, income, debts, liabilities, or expenses" within the meaning of sect. 62 of the Local Government Act of 1888. It seems to me that the separation of a portion of an area within which a rate has been levied cannot occasion a loss of "income" within the meaning of the section to the remaining portion of the area; nor can such change in the existence of the rateable area occasion any claim for adjustment under the word "liability." Both of these words, "income" and "liabilities," must be read as referring to ascertained and existing income and liabilities, and cannot be held to include the mere liability to be rated if the order of division had not been made. It may be that the application of this view may in some cases confer on one portion of a divided area substantial advantage at the expense of another portion. But if such gain or loss would amount to injustice, it may be that the remedy is to be found by objecting to the order being made by the county council under sect. 57 of the Act, or to its confirmation by the Local Government Board.

LORD ROBERTSON.—My Lords: I am very clearly of the same opinion. I do not think that the claim of the respondents comes within sect. 62; and when I say so I mean not merely that the word "adjust" and the other phrases used are not appropriate to cover it, but that the claim is, in its nature and substance, altogether heterogeneous to the things contemplated, and is outside the scheme of setting up new authorities, as stated in the Act. It must be remembered that when, under sect. 62, Caterham and Godstone proceed to "adjust," whatever that means, they meet as separate and self-contained rating authorities,

Caterham having been, by deliberate statutory proceeding, vested with the full and exclusive power of rating for its own use within the boundaries assigned to it, and Godstone, while retaining its old name, having a jurisdiction differing from and smaller than that which formerly existed. The direct and necessary result of setting up Caterham as an urban district is to establish not merely one, but two new rating units—namely, Caterham and the lesser Godstone. The rating in each is necessarily on the new basis of the new area, and it would be merely an accident if the rates in the two areas were the same after as before the separation. Now, the assumption, and what I must venture to call the fallacy, of the judgments under review is that the Legislature intended that the two new bodies should set about what Bruce, J. calls "restoring the true balance"—that is to say, the former balance—of rates. I see no warrant for any such assumption. On the contrary, I should suppose that in some cases at least one of the reasons why a new urban district is set up is because the rating is unfair, and would be made more equitable by dividing the rating area into two. The inhabitants of some proposed new district (I am not for the moment speaking of Caterham) may very well say that they, having grown into a self-contained community, are made to pay for things in which they have no interest, and, because of their large valuation, are paying more than the people who are interested in them. All these considerations and the like, *pro and con*, are for the county council and the Local Government Board. But the cases of *Rochdale Union v. Haslingden Union* and *Buckinghamshire County Council v. Hertfordshire County Council* depend upon the view that in the matter of rates the *status quo* before the order is to be treated as the standard of right after the order, and that any detriment on the one side and advantage on the other, caused by the independence of the new district, are to be redressed by adjustment. I see no trace of an intention thus to stereotype by compensation the results of a system of rating which, *ex hypothesi*, has ceased. Of course, it is quite conceivable that the Legislature might have made it a condition of the setting up of a new rating body that it should purchase its independence, and might have taken the financial position in the year of independence as fixing the price. But this is an idea unexpressed in the statute, and remote from the simple one expressed in sect. 62, which primarily at least deals with extant things, and extant liabilities which belong to the undivided community, must perforce be divided, now that the community is broken up and the partners are taking with them what belongs to them. And the difficulty of applying the words of sect. 62 to a claim of compensation becomes, as I think, an impossibility, when the nature of the claim is clearly realised. I have read with care all the judgments in the previous cases. In *Rochdale Union v. Haslingden Union* and in *Buckinghamshire County Council v. Hertfordshire County Council* the principle laid down is that to which I have already referred, that the "true balance," meaning thereby the existing balance at the date of the separation, must be "restored." That is most clearly shown in the judgment of Bruce, J. in the *Bucks* case and in the judgment of Smith, L.J. in the *Roch-*

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dale case. It is significant that all subsequent judicial opinions have been based on the authority of these cases, and that in none has the principle been independently asserted.

Order appealed from reversed. Respondents to pay to the appellants the costs here and below.

Solicitor for the appellants, F. B. Winter.

Solicitors for the respondents, Cooper, Turner, and Evans, for Evelyn A. Head, East Grinstead.

Supreme Court of Judicature.

COURT OF APPEAL.

April 28 and 29.

(Before COLLINS, M.R., ROMER and
MATHEW, L.JJ.)

OGDENS LIMITED v. NELSON; OGDENS
LIMITED v. TELFORD. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract—Implied condition—Contract to pay bonus to customers for four years—Sale of business—Implied contract to continue to carry on business—Breach of contract.

In consideration of a promise by the defendant, a retail tobacconist, not to sign any agreement with any company or firm which would prevent him from buying or selling the goods of the plaintiffs, and to continue to buy and sell the plaintiffs' goods, the plaintiffs agreed that the defendant should for four years share in a distribution by them of an annual bonus among such of their customers as should purchase direct from them, the distribution to be made according to the purchases for the year.

In pursuance of the agreement, the defendant bought goods from the plaintiffs; but the plaintiffs, before the expiration of one year, sold their business and went into liquidation.

Held (affirming the judgment of the Lord Chief Justice), that it was an implied term of the contract that the plaintiffs would not discontinue to carry on business during the term of four years, so as to prevent the defendant from earning his share of the bonus, and that the defendant was entitled to damages for breach of the contract.

APPEAL of the plaintiffs from the judgment of Lord Alverstone, C.J. at the trial of the action without a jury.

The plaintiffs sued the defendant to recover the price of goods sold; the defendant counter-claimed damages for breach of contract.

The plaintiffs were wholesale tobacconists, and the defendant was a retail tobacconist.

In the early part of 1902 there was a keen competition between the plaintiffs and the Imperial Tobacco Company to obtain the custom of the retail tobacconists in the United Kingdom.

The Imperial Tobacco Company issued a circular to the retail tobacconists, asking them to sign an agreement not to deal with the plaintiffs, or any other company, firm, or person

objected to by the Imperial Tobacco Company, and offered to distribute among those who signed the agreement a bonus of 50,000*l.* and a share of one-fifth of the whole of the net profits of their home trade.

The plaintiffs then sent out a circular, in March 1902, to retail tobacconists, as follows:

Bonus Distribution.—Our entire net profits and 200,000*l.* per year for the next four years. Commencing the 2nd April 1902, we will for the next four years distribute to such of our customers in the United Kingdom as purchase direct from us our entire net profits on the goods sold by us in the United Kingdom. In addition to the above, we will, commencing the 2nd April 1902, for the next four years distribute to such of our customers as purchase direct from us the sum of 200,000*l.* per year. Distribution of net profits will be made as soon after the 2nd April 1903, and annually thereafter, as the accounts can be audited, and will be in proportion to the purchases made during the year. Distribution as to the 200,000*l.* will be made every three months. The first distribution to take place as soon after the 2nd July 1902 as accounts can be audited, and will be in proportion to the purchases during the three months' period. To participate in this offer we do not ask you to boycott the goods of any other manufacturer.

Accompanying this circular there was a form of contract, as follows:

Messrs. Ogdens Limited, Liverpool.—Dear Sirs,—I beg to inform you that I have not signed the agreement with the Imperial Tobacco Company Limited, dated March 1902, and in consideration of participating in your bonus distribution of the entire net profits on goods sold by you in the United Kingdom, and 200,000*l.* per year, for the next four years, as set out in your particulars, I hereby agree not to sign it or any similar agreement with the Imperial Tobacco Company Limited, or any other company or firm, containing any conditions which would prevent me from buying, displaying, selling, or distributing your goods or the goods of any other manufacturer, and I also undertake to continue to buy, display, and sell your goods.

The defendant signed this contract and sent it to the plaintiffs.

Pursuant to the agreement the defendant dealt with the plaintiffs, and in July 1902 received a share of 50,000*l.*, being one-quarter of the 200,000*l.*, for the three months ending the 2nd July 1902; and he also received credit in account for his share of that bonus for the three months ending the 2nd Oct. 1902; but he did not receive any share of the entire net profits on the goods sold by the plaintiffs in the United Kingdom.

In Sept. 1902 the plaintiffs sold their business in the United Kingdom to the Imperial Tobacco Company, and they informed the defendant and their other customers of that fact; they ceased to carry on any business in the United Kingdom, and went into voluntary liquidation.

The defendant admitted the claim for the price of goods sold. By his counter-claim the defendant alleged that the plaintiffs had broken the contract by ceasing to carry on business, and he claimed damages for that breach. It was agreed that the plaintiffs had not made any net profits during the period from the 2nd April to the 2nd Oct. 1902.

The Lord Chief Justice gave judgment in favour of the defendant on his counter-claim, and assessed the damages at 70*l.*

In the action of *Ogdens Limited v. Telford* the facts were the same, and the Lord Chief Justice

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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gave judgment for the defendant on his counter-claim for 200*l.* damages (89 L. T. Rep. 296).

The plaintiffs appealed.

Asquith, K.C., Duke, K.C., and F. E. Smith for the appellants.—The learned Lord Chief Justice was wrong in holding that the defendant was entitled to damages for breach of contract. The defendant seeks to import into this contract an implied stipulation that the plaintiffs will continue to carry on business during the period of four years. Upon the true construction of this contract such a stipulation cannot be implied. The bonus is to be paid only so long as the relation of seller and customer continues to exist, and it is clear that, if for any reason that relation ceases, the bonus is not to be payable. That shows that there cannot be implied any stipulation that the business is to be carried on. There is not in this contract any express provision that the plaintiffs will continue to supply the defendant with goods, and therefore there cannot be an implied agreement that they will continue to carry on business:

Rhodes v. Forwood, 34 L. T. Rep. 890; 1 App. Cas. 256;

Hamlyn v. Wood, 65 L. T. Rep. 286; (1891) 2 Q. B. 488;

The Moorcock, 60 L. T. Rep. 654; 14 P. Div. 64.

Banks, K.C., Montague Lush, K.C., and J. R. Randolph for the respondent.—The judgment of the Lord Chief Justice was correct, and in accordance with the authorities. The defendant is not seeking to read any implied stipulation into this contract. The plaintiffs have expressly agreed to pay the bonus for four years, and the plaintiffs cannot import into that contract an implied term that the bonus is to be paid only if they continue to carry on business. The defendant gave consideration at once for the agreement to pay the bonus because he bound himself not to sign the agreement of the rival company or any other agreement which would prevent him dealing with the plaintiffs. The defendant having given the consideration on his part, the plaintiffs cannot do anything which will prevent him from being a customer during the four years and so obtaining his share of the promised bonus. Upon the true construction of this contract, the consideration being executed on one side, the other party cannot free himself from the obligation to permit the earning of the agreed remuneration:

McIntyre v. Belcher, 8 L. T. Rep. 461; 14 C. B. N. S. 654;

Telegraph Dispatch and Intelligence Company v. McLean, L. Rep. 8 Cb. 659;

Inchbald v. Western Neilgherry Coffee Company, 11 L. T. Rep. 345; 17 C. B. N. S. 733;

Turner v. Goldsmith, 64 L. T. Rep. 301; (1891) 1 Q. B. 544;

Brace v. Calder, 72 L. T. Rep. 829; (1895) 2 Q. B. 253;

Northey v. Trevillion, 7 Com. Cas. 201.

In *Rhodes v. Forwood* (*ubi sup.*) the decision turned entirely upon the peculiar nature of the contract, there being no express agreement by the defendants to sell any goods at all through the plaintiff, whom they had appointed their agent at a specified place. The decision in *Hamlyn v. Wood* (*ubi sup.*) also turned upon the special nature of the contract, which was construed

to mean that the defendants would sell to the plaintiff merely such grains as they might make.

Duke, K.C. in reply.

COLLINS, M.R.—This appeal raises the question whether, upon the true construction of the agreement between the parties, the respondents are emancipated from the obligation of paying the share of profits and the bonus, which would be payable if they were still carrying on business, by reason of the fact that they have sold their business. The case arose in this way: Ogdens Limited, who are the defendants to the counter-claim, had formed a scheme for capturing the tobacco trade in this country. They were confronted by a powerful opposition from the Imperial Company, which came forward with a similar scheme. In this competition each competitor went on offering better and better terms to customers. In view of the competition of the Imperial Company, Ogdens thought that it would help them in the competition if they made an arrangement with customers which I will presently read. They accordingly sent out a circular in which they invited the attention of intending customers to the terms which the Imperial Company were offering, and pointed out how much better their terms were than those of the other company. The circular was in these terms: [His Lordship read it as set out above.] Then followed the contract which customers were asked to sign, a draft form accompanying the circular. This contract was in fact signed by Nelson. It was as follows: [His Lordship read it as above set out.] When the customer signs that document, Ogdens by that signature obtain from the customer an undertaking which severs him completely from the scheme of the Imperial Company and obliges him to abstain from signing any agreement which would prevent him from dealing with Ogdens. Ogdens thereby at once secure that undertaking which is most essential from their point of view in their competition with the Imperial Company. What did Ogdens undertake to give the customer in return? Are they entitled to receive that benefit from the customer and then to get rid of their promise to give something in return? They promise in their circular to give for the next four years a bonus distribution of their net profits and of 200,000*l.* a year in addition, in absolute and express terms. It is contended that, notwithstanding the fact that the consideration on the part of the customer was so far executed, and the distinct terms of the promise by Ogdens to give this bonus, yet Ogdens may dispose of their business at any time and then say to the customer that they are making no profits and that therefore there is no bonus to distribute; that they have ceased to carry on business, and have not undertaken by their contract to continue to carry on business, and that therefore there are no customers to whom the bonus is to be distributed, and that a person who is not a customer is not entitled to anything. It is contended on behalf of Ogdens that Nelson is obliged to rely upon some implied undertaking on the part of Ogdens to carry on business, and that such an undertaking cannot be implied in this contract. That contention goes too far, for it would follow that, even while Ogdens were still carrying on business, if Nelson were to ask Ogdens to sell him tobacco, Ogdens might say that they did not want to sell him any,

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and properly refuse to do so. That would have prevented Nelson being a customer, and there would have been no obligation to pay him any bonus, because he was not a customer, and Ogdens would be therefore absolved from any obligation to pay him any bonus. The argument on behalf of Ogdens would necessarily go as far as that. It seems to me that, *a fortiori*, if the customer is entitled to read into the contract an implied promise by Ogdens while they are carrying on business to sell tobacco to the person who signs the contract, so that they are not entitled by any act of theirs to keep him out of the category of customers, they are equally responsible if by any act of theirs they prevent him from continuing to be a customer. There is a long line of authorities upon questions of this kind; and there is a distinct line of demarcation running through those authorities, some falling on one side of the line and some on the other side of the line; most of them fall on this side of the line. The broad general principle to be deduced from those cases is, that a person cannot receive the consideration for a contract, when that consideration implies that he will continue to do something, without being subject to an implied obligation to continue to keep in existence the conditions which make it possible. There are many authorities for that proposition. For instance, in cases where a business is sold and is to be paid for out of the profits of that business, there is a clear obligation on the purchaser to continue to carry on the business so that profits can be made out of which the purchase money may be paid. That is the broad general principle, and it is applicable to the present case. In this case the consideration was executed in a great part, Nelson having signed the undertaking not to join the opposition. Having got that executed consideration, Ogdens were in the same position as a person who has bought a business and has contracted to pay for it out of the profits; that is, there is the same obligation upon them not to make it impossible to pay out of profits. It is contended on behalf of Ogdens that there is the authority of a case in the House of Lords to the contrary, *Rhodes v. Forwood* (34 L. T. Rep. 890; 1 App. Cas. 256). When that case is carefully considered, it appears to have been a peculiar case depending upon the special circumstances. The substance of that case was that the defendants had appointed the plaintiff as their sole agent at a particular place for the sale of their coals for seven years, and there was no agreement obliging the defendants to sell any coals at all through that agent at that place; they were free to sell all their coals elsewhere. The defendants afterwards sold their business, and it was held that the plaintiff was not entitled to say that the defendants were bound to carry on their business for the seven years because there was no special agreement to furnish him as their agent with any coals at all. It was held that on the true construction of the contract in that case there was no obligation to sell any coals at all through that agent. That case was decided upon the special terms of the contract. When that case has been criticised and distinguished in later cases, it has been said that it was decided upon the ground that there was no absolute contract to employ the plaintiff as agent at all. It was so distinguished, in *Turner v. Goldsmith* (64

L. T. Rep. 301; (1891) 1 Q. B. 544), by Lindley, L.J., from whose judgment I will read a short passage. He said: "It was contended that the point was settled by authority. I will refer to three cases on the subject. In *Rhodes v. Forwood* (*ubi sup.*) it was held that an action very similar to the present was not maintainable. But that case went on the ground that, there not being any express contract to employ the agent, such a contract could not be implied. In the present case we find an express contract to employ him." For the reasons which I have given, I think that the present case falls outside the narrow line laid down in *Rhodes v. Forwood* (*ubi sup.*). The consideration was executed, and there was a contract absolute in its terms to pay the bonus for a period of four years. It seems to me that, therefore, the circumstances necessarily imply that the party giving the undertaking to pay cannot free himself from the obligation before the end of the term by getting rid of the business. I think, therefore, that the judgment of the Lord Chief Justice was right, and that this appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. After what the Master of the Rolls has said about the authorities, in which I entirely concur, I do not think that it is necessary for me to discuss the authorities. Those authorities, so far as they lay down any principle upon which the courts should act, show that in a case like this the question is, What is the true construction of the contract when its terms are fairly considered? As to this contract, it is first to be noticed that, for the benefit of Ogdens, Nelson at once gave valuable consideration, for he contracted with Ogdens in the first place not to sign the agreement of the Imperial Company, and also further contracted not to sign any similar agreement with the Imperial Company, or with any other firm or company containing any conditions which would prevent him from buying, displaying, selling, or distributing Ogdens' goods. For present purposes I need not pause to consider the extent of the obligation upon Nelson under the last condition of the contract. What do we find in the contract entered into by Ogdens? It appears to me that Ogdens made certain absolute contracts with Nelson. In the first place, they absolutely contracted for the period of four years to distribute to their customers their entire net profits on the goods sold by them in the United Kingdom; they further contracted, and this is even more important for this purpose, for the period of four years to distribute to their customers the sum of 200,000*l.* a year; and then followed the conditions as to distribution. That agreement by Ogdens is absolute in form, and I think that it is absolute in substance. The obligations undertaken by Ogdens were intended to bind them for the term of four years. It appears to me that, in this contract, when fairly construed, there cannot be implied in favour of Ogdens that after it was made they should be at liberty, as against Nelson, at their own free will to stop selling their goods in the United Kingdom during the four years, or to do any voluntary act which would make it impossible to distribute the sums which they had so contracted to distribute. That really determines this case, for in consequence there has been a breach of contract by Ogdens. Their assignment of their business was clearly a volun-

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tary act which prevented Nelson from obtaining any part of the sums contracted to be paid by Ogdens. Therefore there was clearly a breach of contract for which Nelson was entitled to recover substantial damages. This appeal, therefore, fails, and must be dismissed.

MATHEW, L.J.—I am of the same opinion. We must ascertain what was the common intent of the parties. It is said on behalf of Ogdens that the true implication is that the contract was optional, and was only binding so long as Ogdens chose to carry on business. On behalf of Nelson it is contended that there was an absolute contract to carry on business for four years, and that that was the intention of the parties. Upon considering the terms of the contract, it seems to me to be clear that the latter contention is the right one. The true meaning of the contract is that, if Nelson will deal with Ogdens and sign the proposed agreement, Ogdens will for four years distribute this money among their customers, and that they bind themselves to do so. I think that that is the contract between the parties, and that Ogdens cannot get out of it by parting with their business. By parting with their business they have committed a breach of contract, and Nelson is entitled to damages. Counsel for Ogdens have tried to bring this case within the authority of *Rhodes v. Forwood* (*ubi sup.*) and *Hamlyn v. Wood* (65 L. T. Rep. 286; (1891) 2 Q. B. 488). In those cases it was held upon the terms of the particular contract in question that they were purely optional. Those two cases stand alone, and are quite different from the present case. The alleged inconsistency in the authorities is, in my opinion, more apparent than real. I think that the judgment of the Lord Chief Justice was right, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *George Thatcher, for Grace, Hood, Smith, and Hood, Liverpool.*

Solicitors for the respondents, *Bell, Brodrick, and Gray, for Cousins, Botsford, and Phoenix, Cardiff.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

July 23, 29, 30, Nov. 5, 1903, and Feb. 12, 1904.

(Before BYRNE, J.)

SMITH v. LAW GUARANTEE AND TRUST SOCIETY LIMITED. (a)

Company—Debenture trust deed—Payment of interest and principal—Default—Realisation of securities—Appropriation by payees to principal and interest—Income tax.

The trustees of a debenture deed were directed, in case of default by the J. C. M. Trust Company, to pay the principal moneys and interest for which it should become liable under its debentures, to realise the securities, and apply the proceeds to payment, first, of all arrears of interest on the debentures, and, secondly, in or towards payment of principal.

The J. C. M. Trust Company having made default, an order was made in a debenture-holder's

action for the trusts of the debenture deed to be carried into execution. Under numerous orders made in the action sums were paid to the debenture-holders on account both of interest, less income tax, and of principal and interest generally. The realisation had now been practically completed, and it was proposed to pay a final dividend to the debenture-holders. It was admitted that if the whole of the past payments which had been made on account generally and any further sums available were attributed solely to principal, they would be insufficient to discharge the whole amount thereof. The Inland Revenue authorities claimed income tax on all payments made generally on account of principal and interest.

Held, that all payments hitherto made by the trustees on account generally might be attributed, at the option of the payees as between themselves and the trustees at their election, as payments on account of principal or interest, without prejudice to any question whether or not such payments should be treated in the hands of the payees as principal or interest; and that income tax would be payable upon so much, if anything, as should be paid to debenture-holders as for interest.

By a trust deed dated 29th June 1892, and made between the Jarvis Conklin Mortgage Trust Company of the one part and the Law Guarantee and Trust Society Limited of the other part, a security was created in favour of the defendant society upon property of the company to secure the principal moneys and interest for which the company should become liable under its debentures.

By this deed provision was made by clause 9 for realisation in case of default, and by clause 11 it was provided that the Law Guarantee and Trust Society Limited, the trustees, should hold the money to arise from the realisation of securities appropriated for each series of debentures upon trust after payment of costs, expenses, and remuneration, to apply the residue, first, in or towards payment of all arrears of interest remaining unpaid on the debentures of such series; secondly, in or towards payment of the debenture-holders of such series *pari passu*, in proportion to the debentures of such series held by them respectively, and without any preference or priority on account of priority of issue or otherwise howsoever of all principal moneys due on such debentures, and that whether the same principal moneys should or should not then be payable according to the tenor of the same debentures; and, thirdly, to pay the surplus of such moneys to the company, or its assigns.

Clause 13 was as follows:

Upon any payment under clause 11 hereof to the registered holder of a debenture on account of the principal moneys or interest thereby secured, the trustees shall be entitled to require the production of any debentures in respect of which they are making payment to the holder of any principal money or interest thereby secured, and the trustees shall, in the event of production, cause a memorandum of the amount and date of payment to be indorsed thereon, but the receipt of the registered holder of each of the debentures, or in the case of joint holders of any one of the registered joint holders, as regards the principal money expressed to be thereby secured, and the delivery to the trustees of each of the interest coupons as regards the interest

(a) Reported by H. M. CHARTERS MACPHERSON, Esq.,
Barrister-at-Law.

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therein mentioned, shall be a good discharge to the trustees, who shall be entitled in their reasonable discretion to dispense with the production of the debenture upon a proper indemnity being given, but shall not be entitled to dispense with the production of the coupons.

By clause 14 the company were to pay the principal moneys and interest secured by the debentures in accordance with the tenor thereof respectively.

By the judgment in the action, dated the 8th Dec. 1893, the defendant society undertaking, until further order, not to part with, or dispose of, without the leave of the court, any of the securities still in their hands in England, or which should thereafter come to their hands in England, comprised in the said trust deed, it was declared that the mortgage debentures of the series "C" constituted a first charge upon all property and effects comprised in the deed, and that the trusts of such deed ought to be performed and carried into execution, and the usual accounts and inquiries in a debenture-holder's action were directed, the first being on account of what was due for principal and interest to the holders of the "C" series of debentures.

By an order of the 6th Aug. 1894 it was ordered that the defendant society should be at liberty to pay 2 per cent. on the amount of the debentures of the "C" series on account of interest in arrear.

By an order of the 2nd April 1895 it was ordered that the defendant society should, out of the funds in their hands to the credit of income, pay on account of arrears of interest due on debentures a further dividend of 2 per cent. on the capital amount of the debentures, and that the trustees should be at liberty to pay the income tax thereon, and on the last payment under the order of the 6th Aug. 1894.

These orders were duly acted upon and payments made accordingly.

The certificate was filed on the 24th April 1895, whereby it was found that there was due to the holders of the "C" debentures the sum of 123,000*l.* for principal and a sum of 8702*l.* 6*s.* 5*d.* for interest, calculated up to the 1st Oct. 1894.

This date was the last half-yearly date prior to the making of the certificate for payment of interest under the debentures. The schedule to the certificate showed the names of the then holders of the debentures and the amounts respectively due to them for principal and interest to the same date.

In pursuance of an order of the 14th June 1895 a further sum was paid on account of interest, income tax being duly deducted and paid by the defendant society.

On the 15th June 1896, upon a summons taken out by the plaintiff, which came before the judge in chambers personally, an order was made whereby it was ordered that the defendant society should be at liberty out of cash in their hands to pay the balance of interest found due to the 1st Oct. 1894 by the chief clerk's certificate, and then out of any surplus to pay a dividend of 1 per cent. on account of what was due on the debentures. In fact under this order the actual amount paid in respect of interest appeared to have exceeded (with the amounts previously paid) the amount found due. Income tax was duly paid on this.

By an order of the 21st July 1897 it was ordered that the defendant society should be at liberty out of cash in hand to pay a dividend of 10 per cent, calculated on the face value of the debentures, on account generally of what was due on the said debentures for principal and interest, and having regard to the fact that the registers of the company had been removed to New York and were not open to inspection, and having regard to the chief clerk's certificate and to the notices received by the defendant society of devolution of interest in debentures since the certificate, the defendants, the trustees, were to be at liberty to continue to make such payments to the debenture-holders mentioned in certain lists therein referred to.

Further orders were from time to time subsequently made on similar terms to that last mentioned; and in all there had been paid to the debenture-holders a sum of 104,550*l.* on account generally of principal and interest. These moneys arose from realisation from time to time of securities included in the trust deed by the defendant society.

In April 1897 there was a dividend paid direct from the general assets of the company under an American decree without any express direction as to its application for principal or for interest. The realisation had now been completed, except to an amount which was not likely to exceed 4000*l.*, and the society as trustees had in hand a sum of about 1900*l.*

It was estimated that the final dividend available for the debenture-holders would probably not exceed 5 per cent., calculated on the face value of the securities, and it was also admitted that if the whole of the past payments which had been made generally on account, and any further sums available, were attributed and applied solely in payment of principal, they would be insufficient to discharge the whole amount thereof.

The Inland Revenue authorities now claimed income tax on all the amounts paid generally on account of principal and interest.

This was a summons taken out by the defendant company asking for the direction of the court whether the payments already made by them on account under the order of the court, and any further payments to be made not exceeding in all the principal moneys secured by the debentures, were to be treated as payments in respect of capital, or whether any and, if any, what parts thereof ought to be treated as payments in respect of interest, and whether any and, if any, what provision ought to be made for income tax thereon.

E. Beaumont for the applicants, the Law Guarantee and Trust Society.

Levett, K.C. and *A. à-B. Terrell* for the plaintiffs.—The debenture-holders are entitled to treat these payments on account generally as they think fit, and to appropriate them to capital; and, even if this is not so, these past payments must be treated as having been made rateably on account of capital and interest, and cannot now be disturbed. All further payments, the security being deficient, can be attributed to capital, on which no income tax is payable.

Ward Coldridge for a debenture-holder.—The debenture-holders can appropriate the pay-

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ments made on account generally to capital or interest:

Cory and Co. v. Owners of Steamship Mecca, 76 L. T. Rep. 579; (1897) A. C. 286.

The orders of the court have carefully abstained from appropriating the amounts. The Inland Revenue authorities cannot claim income tax on the authority of *Bower v. Morris* (Cr. & Ph. 351), which was the case of a solvent estate. The Customs and Inland Revenue Act 1888, s. 24, does not impose upon a trustee the duty of appropriating to interest rather than principal. He referred also to

Chitty v. Naish, 2 Dowl. 511;

Foley v. Fletcher, 28 L. J. 100, Ex.

[BYRNE, J. referred to *Scoble v. Secretary of State for India* (88 L. T. Rep. 144; (1903) 1 K. B. 494; affirmed 89 L. T. Rep. 1; (1903) A. C. 299).]

H. Whitten, a debenture-holder, in person, supported the other debenture-holders.

Vaughan Hawkins for the Crown.—Upon the true construction of sect. 24 of the Customs and Inland Revenue Act 1888, the trustees ought to have deducted income tax from the amounts paid:

London County Council v. Attorney-General, 83 L. T. Rep. 605; (1901) A. C. 26.

Under clause 11 of the trust deed it is impossible for the debenture-holders now to elect to treat the payments as on account of capital. Here there has been an irrevocable appropriation by the debtor in the trust deed. It is the general rule that interest must be paid before capital:

Fisher on Mortgages, 5th edit., p. 723, sect. 1514.

Nor can the money be applied, as was argued, in payment of principal and interest *pro rata*; this would be departing from the provisions of the trust deed, which have not been altered by any of the orders made. The Statute of Limitations does not apply to this case. See

Taxes Management Act 1880, s. 63, sub-s. 2.

He referred also to

The Nizam's Guaranteed State Railway Company v. Wyatt, 62 L. T. Rep. 765; 24 Q. B. Div. 548.

Levett, K.C. in reply.—The real point to be decided here is what is capital and what is interest. He referred also to

Dowell's Income Tax Laws, 5th edit., p. 420.

Cur. adv. vult.

Feb. 12.—BYRNE, J. stated the facts, and continued:—It is contended on behalf of certain of the debenture-holders that, there having been no attribution of these past payments to capital or to interest or otherwise than as payments on account generally of the amount due, they are entitled to elect how to treat all such payments, and also any future payments, as being payments on account of principal, in which case there is no income tax payable. On behalf of the plaintiffs, as representing the general body of debenture-holders, it is argued that the past payments ought, in the most hostile aspect, to be treated as having been made rateably on account of principal and interest from time to time due, that these have been finally made, and that, if by error or from oversight, income tax which has not been ought first to have been deducted from so much of the payments as represents the rateable

proportion attributable to interest, things must stand as they are; and that it is now competent for the *cestuis que trust* under the deed to say, "We now elect to receive further payments as and for capital." This injures no one; the mortgagors cannot be injured, and if by some chance further assets should be discovered and come in, this method of dealing with the fund cannot be worse, and may be better, for the mortgagors. For the Inland Revenue, the argument, shortly, is that the payments were on account generally, and that means on account of principal and interest subject to adjustment at a future date; when adjusted, if it appears that payments have been made on account of interest, income tax ought to be answered out of any balance of trust funds, because the court will, so long as trust property remains to be distributed, take care that any adjustment shall be so made as to make good any payments which ought properly to have been made had circumstances allowed them to have been made from time to time as and when they ought to have been; and, further, that the deed having provided for payment first of interest, and a judgment having been given for execution of the trusts, every payment must be treated, in the absence of other directions, as having been made in accordance with the terms of the trust. The trustees, the society, are only concerned in seeing that they are indemnified against any possible claims against them personally on behalf of the Inland Revenue authorities. Having considered the various orders made, I have satisfied myself that, in ordering payment on account of what was due generally, there was no intention to alter or affect the rights of any of the parties, and that, in effect, the matter stands before me in the same position in regard to the rights as between mortgagors and mortgagees as though I had now to deal with the whole fund for distribution, subject only to this—that I have no jurisdiction in this action to direct repayment of anything which has already been paid. To further clear the ground, I will next express my opinion that I cannot accept the argument that I must treat the payments already made as having been made rateably on account of principal and interest. The court has not directed that they should be so made, either directly or by implication, but simply that they should be made on account generally of what was due. Exactly why the orders were so made I am unable to say with certainty; but there is no difficulty in understanding that there were sufficient reasons, and it is enough to point out that there was no certificate of what was due for principal and interest brought up to date; it was quite possible, so far as appears, that there would ultimately be realised enough to pay principal and interest, in which case no question would ever arise, and it might have been thought reasonable to give time to ascertain whether or not the mortgaged property would prove sufficient or insufficient, so that, if there were any option to take as for principal or interest, time might be given to raise the question of right to elect. I am unable to accept the argument grounded in general terms on the doctrine approved in *Cory Brothers v. Owners of Steamship Mecca* (*ubi sup.*) as to the right of appropriation of any payment on the part of the creditor to the last moment, where the

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debtor has not in making the payment himself appropriated its destination. This is a doctrine applicable as between debtor and creditor in the absence of express contract, but in the present case there was an express contract that moneys realised should be applied in a particular way—viz., in payment, first, of interest and then of principal. Nor can I say that the trust ceased to be effective *ipso facto* because the estate has turned out insufficient. I agree with Mr. Vaughan Hawkins' argument on this point. But I accept this view, which was presented to me on behalf of the plaintiffs—viz., that the provision in the deed for payment of interest first is one inserted obviously for the benefit of the creditors, and one, therefore, which they could waive if they so desired in the absence of opposition by the debtors, who in the present case do not oppose, nor is it conceivable that they could have any reason for opposing. It has been argued that it is impossible to permit any choice or right of election to appropriate to the creditors, because many of the debenture-holders may be trustees and would have to distribute amongst their own *cestuis que trust*, having regard to the quality of payments made to themselves whether as for principal or for interest. I will not pretend that the case is otherwise than complicated and difficult, but, having fully considered it, the matter presents itself to me in this way. As between the defendant society and the company it is matter of absolute indifference to the mortgagors how the proceeds of realisation are disposed of, as they have nothing coming to them in any event. If they had any conceivable interest in the matter, it would, of course, be in favour of the application of the moneys in payment of capital first, contrary to the terms of the deed. As between the society holding the proceeds of realisation and their *cestuis que trust*, the debenture-holders, the provision may, as I conceive, be waived by the *cestuis que trust*. How the moneys ought to be dealt with when received by the debenture-holders is a question if they are trustees between them and their *cestuis que trust*. Moreover, the court is not executing any trusts as between the last-named parties. But this being an action for the common benefit of a number of creditors standing as between themselves *pari passu* as to their rights, no one or more of them could elect to receive moneys contrary to the terms of the deed to the detriment of any other of them. It cannot, however, be to the detriment of any of them that any other or others of them should receive payment as for principal instead of as for interest, because, on working out the account, any such payment must work in favour of those who desire to be paid strictly in accordance with the deed. The society have nothing to do with the question whether or not their *cestuis que trust* are trustees or not for others; they pay to the persons entitled under the deed, in accordance with the trusts of it, or otherwise, at the option of their payees, unless this could work injustice to others. I think the true solution of the matter, and one which will preserve all rights, is this. Let all payments heretofore made by the defendant society on account generally be attributed, at the option of the payees as between themselves and the defendant society at their election, as payments on account of principal or of interest, all such sums to be deemed to be so attributed without prejudice to any question

whether or not such payments, or any part or parts thereof, are in the hands of the payees to be treated as capital or interest. In case any of the debenture-holders payees shall elect to have the payments to them made, in accordance with the deed, in discharge of interest first and then of principal, an account will have to be taken having regard to the election of such of the debenture-holders as shall have elected in favour of past receipts being treated as capital, so to take of what remains due to the debenture-holders, and let any balance now or hereafter to become distributable, subject to costs, charges, and proper deductions, be distributed accordingly. If, as I should apprehend would be the case, all the debenture-holders elect to take their past and future payments as for capital, there will probably be no occasion to take any account. The Inland Revenue will then, of course, look for payment from the debenture-holders of any income tax properly payable by them in respect of moneys, however paid to them, which in their hands are distributable as income. I imagine that, having regard to the considerable amounts already paid on account generally, if there be trustee debenture-holders, they must already have made payments for income from which they have deducted income tax. Of course, provision will have to be made for payment of income tax upon so much, if anything, as is paid to debenture-holders as for interest. I have not referred in detail to the authorities cited because I do not think that any of them really touch the actual point I have to decide. If anything that has been paid was in fact interest, income tax ought to have been or to be provided for; but, in the view I take, none of it was definitely paid as interest. The order will require settling carefully, but I think I have sufficiently stated the principle on which it must be framed.

The minutes of the order as finally settled were as follows: "The court declares that all payments heretofore made by the applicants to the holders of the debentures of the 'C' series in the defendant company 'on account generally' of what was due thereon ought to be attributed, at the option of the holders of the said debentures as between themselves and the applicants, as payments on account of principal or of interest, and no income tax is payable in respect of so much thereof as is attributed to capital; but this declaration is without prejudice to the question whether or not such payment or any part or parts thereof ought, in the hands of the persons to whom payments have been made, to be treated as capital or interest, and in case any of the holders of the said debentures shall elect to treat the said payments heretofore made 'on account generally' of what was due on the said debentures as having been made in discharge first of interest then due and as to the balance in discharge of capital, let an account be taken to ascertain how much out of the amounts paid 'on account generally' as aforesaid ought, in accordance with such election, to be treated as having been paid in respect of interest, and how much in respect of capital; and out of any moneys now or hereafter to become distributable in respect of the said debentures whose holders should have so elected, let the applicants first pay the income tax payable in respect of the amounts found to have been

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paid in respect of interest as aforesaid. And it is ordered that subject as aforesaid any moneys now or hereafter to become distributable amongst the holders of the said debentures of the 'C' series in the defendant company may be paid, at the option of the holders of the debentures as between themselves and the applicants, on account of principal and of interest, but so that (inclusive of payments already made on account of principal) no more than 20s. in the pound be paid on account of principal secured by any of the said debentures; and income tax is to be paid on such part thereof (if any) as shall be payable on account of interest."

Solicitors: Gribble, Oddie, Sinclair, and Johnson; W. H. Smith and Son; Bennett and Chance; Solicitor of Inland Revenue.

Feb. 26 and March 3.

(Before BYRNE, J.)

VEZEY v. RASHLEIGH. (a)

Statute of Frauds (29 Car. 2, c. 3), s. 4—*Written contract*—*Parol variation of terms of*—*New agreement*—*Rescission*—*Specific performance*.

Where a written agreement for a lease had been executed and one of the parties declined to execute the lease because a parol agreement had been subsequently come to between the parties: Held, that such parol evidence, though admissible on a claim for rescission, could not be admitted in variation of the original agreement, the terms of which must be carried out.

MOTION.

An order was made on the 5th Nov. 1903 in an action staying all further proceedings except such as might be necessary for the purpose of carrying out the compromise set forth in the schedule thereto; and the schedule provided that a certain mining lease should be granted by the defendant to the plaintiff upon terms therein stated.

Subsequently on the 11th Dec. 1903 the plaintiff and the defendant had an interview at which the terms of the proposed lease were discussed, and certain alterations were agreed to and embodied in a memorandum of which each of the parties signed a copy and copies were exchanged.

The defendant's solicitor objected to several of the proposed alterations, but the plaintiff insisted on them as forming part of a new contract made at this interview.

This was a motion by the defendant that the plaintiff might be ordered to execute the lease in compliance with the terms of the agreement contained in the schedule to the order.

Norton, K.C. and G. B. Rashleigh for the motion.

Rowden, K.C. and A. J. David for the respondent.—We can give parol evidence of what occurred at the interview on the 11th Dec., as this amounted to a rescission of the earlier contract, and the court will not order specific performance of it. They referred to

Fry on Specific Performance, 4th edit., p. 443.

Norton, K.C. in reply.—No parol evidence of alterations in a contract required by the law to be in writing can be admitted. The only excep-

tion is in the case of a contract to rescind, of which parol evidence is admissible:

Price v. Dyer, 17 Ves. 356; 11 R. R. 102;

Robinson v. Page, 3 Russ. 114; 27 R. R. 26.

BYRNE, J. (after stating the material facts and deciding that the memorandum of the 11th Dec. did not amount to an agreement between the parties at all) said:—The question, therefore, is how far I can receive parol evidence to prove what took place at the discussion between the parties. The decisions in *Price v. Dyer* (*ubi sup.*) and *Robinson v. Page* (*ubi sup.*) appear to me to show that, though parol evidence of a subsequent agreement for rescission of a contract can be admitted, parol evidence of an agreement to vary cannot. Here, though there is a contradiction between the parties, there is none on the point that all that was intended at the interview was a variation in the terms of the first agreement. I think, therefore, the defendant is entitled to have the terms of the agreement as they appear in the schedule to the order carried out.

Solicitors: W. H. Martin and Co; Rashleigh, Son, and Hall.

Wednesday, April 13.

(Before FARWELL, J.)

Re REPINGTON; WODEHOUSE v. SCOBELL. (a)

Revenue—*Legacy duty*—*Part of reversion assigned*—*Assignees' liability*—*Covenant for further assurance*—*Right to indemnity*.

A settlor assigned a sum of 10,000l., part of a mortgage debt of 15,000l. to which he was entitled in reversion expectant upon the death of his father.

Held, that the assignees were liable rateably for the legacy duty payable in respect of the whole upon the death of the tenant for life; nor could the assignees claim to be indemnified under a covenant for further assurance made by the settlor.

ADJOURNED SUMMONS.

By his will, dated the 10th Sept. 1836, the testator, Charles Edward Repington, devised certain real estates upon certain trusts not material to this report, and then, in the events which happened, devised it in remainder to the use of Charles Henry Wyndham à Court Repington during his life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of Charles Henry Wyndham à Court Repington successively according to seniority in tail male.

The testator also bequeathed his residuary personal estate upon the like ultimate trusts as far as possible, so that in 1882 Charles Henry Wyndham à Court Repington had become tenant for life of the residuary personal estate, and his son, the defendant Charles à Court Repington, who had then attained twenty-one years of age, was entitled to the residuary personalty in reversion absolutely.

The residuary personalty then consisted of a mortgage debt of 15,000l., secured by an indenture of the 14th Jan. 1840 on property in Warwickshire, and a sum of 783l. 1s. 1d. Consols.

By his marriage settlement, dated the 10th Feb. 1882, Charles Repington, the son, assigned the

(a) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

(a) Reported by H. C. GARRIA, Esq., Barrister-at-Law.

sum of 10,000*l.*, "part of the mortgage debt or sum of 15,000*l.*" to which he was entitled "in reversion expectant upon the death of his father," to his trustees upon the trusts therein contained. He also covenanted for further assurance in the following terms:

That he . . . and every person claiming through or under him will at any time or times hereafter, upon the request of the trustees or trustee for the time being of these presents or any other person for the time being interested in the premises and at the cost of the trust estate, execute and do every such assurance and thing for the further or more perfectly assuring the said premises hereinbefore expressed to be hereby assigned or any part thereof unto the trustees or trustee for the time being of these presents and for enabling them or him to obtain payment of the same as by the person or persons making such request shall be reasonably required.

The sum of 783*l.* 1*s.* 1*d.* Consols was transferred by the trustees to Charles Repington the father and Charles Repington the son in 1885, so that from and after that time the mortgage debt of 15,000*l.* constituted the entire residuary personalty of the testator remaining in the hands of the trustees of the will.

Five thousand pounds out of the mortgage debt was paid off in 1894 and invested by the trustees in 5012*l.* 9*s.* 7*d.* Consols, which they still retained.

The defendant Charles Repington, the son, created divers charges upon his interest in the residuary personal estate of the testator, but all of them were made subsequent to the date of his marriage settlement, the first instrument of charge being dated the 23rd Dec. 1886. All these charges were vested in the defendant C. R. Nicholl.

The tenant for life, Charles Repington the father, died on the 29th Oct. 1903, and thereupon the defendant Charles Repington the son or his assigns became absolutely entitled to the residuary personal estate of the testator, subject only to the payment of legacy duty at the rate of 5 per cent., and of the costs of and incidental to the winding-up of the trusts of the will. All probate duty had already been paid.

The question thereupon arose whether the trustees of the marriage settlement were entitled, by virtue of the assignment therein contained, to the payment of the clear sum of 10,000*l.* free from all deductions, or whether that sum was liable rateably with the balance of the residuary personalty to the legacy duty and costs.

On the 9th March 1904 an originating summons was taken out seeking the decision of the court on this question, and it now came on for hearing.

Bryan Farrer for the trustees of the will.

MacSwinney for the trustees of the settlement. —If this had been the case of an assignment of a part of a reversion, and the reversion had been subject to a mortgage, the assignor would have been bound under his covenant for further assurance to discharge the mortgage out of the part of the reversion which he had retained:

Re Jones; Farrington v. Forrester, 69 L. T. Rep. 45; (1893) 2 Ch. 461.

Legacy duty is a payment for which the whole fund is liable, and ought to be dealt with as though it were a charge. Under these circumstances the retention by the settlor of part of the reversion makes him liable under his covenant

for further assurance. It was clearly intended by the settlement to settle a clear sum of 10,000*l.* charged upon the mortgage; there can be no question that if the security had decreased in value the loss would have had to be borne by the unsettled part.

Romer for Charles Repington the son and his mortgagee. —The fact that if the whole fund had been settled the liability for legacy duty would have fallen on the reversion so settled (and this has not been denied) disposes of the argument that in this case the part assigned is not liable rateably for the legacy duty. Legacy duty is not an incumbrance:

Bliss v. Putnam, 1843, 7 Beav. 40.

On the sale of a reversion the purchaser is liable for duty. Again, when successive appointments are made out of a fund, each appointee has to bear the legacy duty on the share appointed to him. If the argument on the other side were correct, the unappointed part of the fund, or, if all were appointed, the last appointed share, would have to bear the entire duty. *Re Shaw; Tuckett v. Shaw* (71 L. T. Rep. 873; (1895) 1 Ch. 343) proves that this is not the case. Further, by the settlement a part of the mortgage debt is settled, not a sum charged on the mortgage debt. The covenant for further assurance cannot help the other side, seeing that it is expressly provided that everything to be done under that covenant is to be done at the expense of the settled estate.

FARWELL, J.—In my opinion the 10,000*l.* must bear its own share of the duty. On the construction of this settlement the settlor has assigned, in my opinion, a specific portion of the mortgage debt. He has not settled the 10,000*l.* as a sum in cash, charged upon or to be raised out of the larger sum of 15,000*l.*; but has in effect assigned 10,000*l.* as part of the 15,000*l.* He has, in other words, assigned two-thirds of the mortgage debt to which he was entitled. That seems to me to be, upon the construction, the true view. That being so, it is assigned in terms as a reversion expectant on the death of his father. Had it been an assignment by the settlor of the whole sum to the reversion of which he was entitled, it is obvious that the duty would be borne by the assignee. It has been argued that the covenant for further assurance throws the burden of the legal duty on the settlor. In my opinion that is not so. I do not myself see that that particular covenant has any bearing at all on the present case. I do not think that legacy duty can be regarded as an incumbrance, properly so called; but, however that may be, the case is clearly distinguishable from *Re Jones; Farrington v. Forrester* (69 L. T. Rep. 45; (1893) 2 Ch. 461). That was the case of a mortgage on the property assigned, and the court held, on the construction of the particular covenant, that when a man had assigned the moiety of a property for value, without mentioning the existence of a mortgage upon the property, he was bound, under this covenant, to discharge the mortgage out of the unsold moiety. If, however, the assignment had been made subject to the mortgage, it is clear that no such question would have arisen, and when a vendor or settlor assigns a reversionary interest, which is on the face of it a reversion, both parties know that duty will become payable. So much so that I think it has been held, if I remember rightly,

that a purchaser is bound to covenant to indemnify his vendor against succession duty. At any rate, there is no sort of deception in the matter. When the assignment is an assignment of a reversion as a reversion, all parties know that it carries a liability for duty with it, and the duty that is payable is legacy duty in proportion to the amount of the legacy. The whole legacy is 15,000*l.*, and it appears to me it would be a distortion of the rights of the parties to cast the whole burden in respect of the 15,000*l.* on the part of it retained by the settlor, and I can find no ground for doing so. The result is that the 10,000*l.* must bear its own share of the legacy duty payable. The costs will follow the same rule, including the costs of these proceedings.

Solicitors for the trustees of the settlement,
Ellis and Ellis.

Solicitors for the settlor and his mortgagee,
Nicholl, Manisty, and Co.

Tuesday, April 19.

(Before FARWELL, J.)

STEVENS v. KING. (a)

Will—Legacy—Intended satisfaction of an obligation—Legatee predeceasing testatrix—Lapse.

Where a testatrix, in exercise of a power of appointment, appointed a sum to her brother in satisfaction of certain over-payments received by her out of trust funds of which he was the sole trustee, it was held that, as the appointment was made with the intention of performing a moral obligation and not of conferring a bounty, the gift did not lapse through the testatrix being predeceased by her brother.

Williamson v. Naylor (1838, 3 Y. & C. Ez. 208) followed.

PETITION.

Under the will of Thomas John King, dated the 19th Feb. 1845, Charlotte Wilson, formerly Charlotte King, became entitled, in the events which happened, to an equal third share of the proceeds of sale of the testator's residuary real and personal estate.

The testator died on the 26th March 1859, and the defendant William King, who has since died, was the sole trustee and executor of his will.

By the terms of a deed of arrangement of the 23rd April 1860, which was made between the persons beneficially entitled under the testator's will and William King as sole trustee and executor, it was agreed that William King should hold certain of the freehold and copyhold estate of the testator upon trust to sell the same and to stand possessed of the proceeds thereof as to two-thirds for his two sisters, one of whom was Charlotte Wilson, and as to the remaining third part for himself.

By an indenture of settlement dated the 26th April 1860, which was made upon the marriage of Charlotte Wilson with Charles Stuart, Charlotte Wilson assigned her third share under the deed of arrangement of the 23rd April 1860 to William King and John Stuart upon the usual trusts as to investment and then upon trust to pay the income arising therefrom to herself

during her life for her sole and separate use. The settlement then provided that the trustees

Immediately after the decease of the said Charlotte Wilson shall out of the said trust moneys, stocks, funds, and securities raise and pay the sum of 2000*l.* sterling to Julia Charlotte Wilson (the daughter of the said Charlotte Wilson by her first husband William Wilson) for her sole and separate use independently of any husband with whom she may intermarry, and shall transfer and pay the residue of the said stocks, funds, and securities, and the interests, dividends, and the annual produce thereof, unto such person or persons in such shares or proportions and in such manner as the said Charlotte Wilson shall notwithstanding her now intended or any future coverture by her last will direct or appoint, and in default of such appointment shall pay the income of the trust moneys unto the said Charles Stuart if he be then living and his assigns during his life for his and their own use and benefit.

And from and after the death of Charles Stuart the trustees William King and John Stuart were directed to stand possessed of the trust funds upon the usual trusts for the children of the marriage, and then, subject to these trusts, in trust for Julia Charlotte Wilson for her sole and separate use.

Charles Stuart died on the 12th May 1861, and there was no issue from the marriage.

On the 20th Aug. 1866, upon the occasion of her marriage with Herbert Lidington, Julia Charlotte Wilson, the daughter of Charlotte Wilson, settled the 2000*l.* which passed to her under the above settlement of the 26th April 1860.

On the 21st June 1873 Charlotte Stuart and Julia Charlotte Lidington mortgaged the trust premises settled by the deed of the 26th April 1860 to John Madocks to secure 500*l.*, and it was declared that the 500*l.* "should be deemed to be the proper debt of the said Charlotte Stuart, her heirs, executors, and administrators."

On the 6th Oct. 1874 Charlotte Stuart married John Blinks.

The present suit was commenced in the year 1872 for the execution of the trusts of the deed of arrangement of the 23rd April 1860. An order was made at the original hearing for a sale of the property subject to the trusts of that deed, and on further consideration an order was made, dated the 8th Aug. 1877, by which it was ordered that Charlotte Blinks' share in the funds should be carried to a separate account entitled "Share of Charlotte Blinks settled by indenture dated the 26th April 1860."

It appeared that Charlotte Blinks had from time to time received over-payments in respect of her interest in the trust funds, and the court declared by the same order that Charlotte Blinks by her counsel had admitted that the sum of 168*l.* 18*s.* 7*d.* appearing by the chief clerk's certificate to have been paid to her by the defendant William King in excess of her share of the income of the said trust estate and the sum of 115*l.* 9*s.* 6*d.* mentioned in the same certificate constituted an aggregate debt of 284*l.* 8*s.* 1*d.* then due and owing from her to the defendant William King, for the payment whereof her separate estate was liable.

The order then declared that Charlotte Blinks had undertaken by her counsel to execute in favour of the defendant a valid appointment by will

(a) Reported by H. C. GARRIA, Esq., Barrister-at-Law

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(subject only to the indenture of the 21st June 1873 above mentioned for securing 500*l.* and interest thereon to John Madocks) of a sum of 284*l.* 8*s.* 1*d.* out of the property subject to the power of appointment given to her under the marriage settlement of the 26th April 1860; and that she had also undertaken that she would not thereafter exercise her power of appointment so as in any way to prejudice or affect the appointment in the defendant's favour. Liberty to apply with reference to the enforcement of this undertaking was reserved by the order to the defendant William King. Directions as to payment of interest on the sum of 284*l.* 8*s.* 1*d.* out of the interest arising from the fund in court were also given, but no such payments were ever in fact received by William King in his lifetime.

William King died on the 10th Jan. 1889, having appointed his daughter Alice Jane King his sole legatee and executrix. No new trustees of the settlement of the 26th April 1860 were ever appointed.

On the 14th Sept. 1877 Charlotte Blinks duly made her will in the following terms, so far as material:

I Charlotte Blinks . . . do hereby in exercise of the power given to me by the settlement executed by me on my marriage with the late Charles Stuart bearing date on or about the 26th day of April 1860 and in compliance with the order on further consideration of the High Court of Justice, Chancery Division, in the suit of *Stevens v. King* bearing date the 6th day of August 1877 appoint and bequeath to my brother William King the several sums of 168*l.* 18*s.* 7*d.* and 115*l.* 9*s.* 6*d.*, making together the sum of 284*l.* 8*s.* 1*d.* And I also appoint and bequeath to John Madocks, formerly of Chertsey in the county of Surrey, but now of Dartmouth in the county of Devon, the sum of 500*l.* sterling and also such a sum as shall be equivalent to the interest owing on a certain mortgage security bearing the date 21st day of June 1873 for securing the sum of 500*l.* borrowed by me of him. And I appoint my daughter Julia Charlotte Lidington sole executrix of this my will.

Charlotte Blinks died on the 4th Dec. 1903, and probate of her will was duly taken out by the petitioner Julia Charlotte Lidington.

By an indenture dated the 17th Feb. 1904 Robert Otteswell Chambers was appointed a trustee of the settlement of the 20th Aug. 1866 in place of William King, deceased.

The question now arose whether the bequest of 284*l.* 8*s.* 1*d.* to William King contained in the will of Charlotte Blinks lapsed upon his pre-deceasing her.

Vaughan Hawkins for the petition.—I submit that the legacy clearly lapses. The cases have never gone as far as would be necessary to save the legacy from lapsing in such a case as this. Nor can it be said that the testatrix's will sufficed to make the fund dealt with part of her assets:

Re Boyd; Kelly v. Boyd, 77 L. T. Rep. 76; (1897) 2 Ch. 232, 235.

The cases show that the testatrix must have so dealt with the funds as to blend them with her own property:

Re Marten; Shaw v. Marten, 85 L. T. Rep. 704; (1902) 1 Ch. 314.

Hart for Miss Alice Jane King.—There is no need to consider whether the funds have been made assets, if, as I submit, there has been no lapse. The gift is in compliance with the order

on further consideration that is in fulfilment of, any rate, a moral obligation. I cannot find a case of an appointment by a testator where this question of lapse has been considered, but I submit that it makes no difference in principle whether the gift is by exercise of a power of appointment or out of the testator's own property. The cases go on the principle that where there is a moral obligation and a bequest to a person is clearly attributable to a desire to satisfy it, there is no gift of a personal nature depending on the particular person outliving the testator, but a mere intention to meet a liability. That intention is equally fulfilled whether the money is received by the person named in the will or by his estate:

Williamson v. Naylor, 1838, 3 Y. & C. Ex. 208;

Philips v. Philips, 1844, 3 Ha. 281, 300;

Re Sowerby's Trusts, 1856, 2 K. & J. 630.

The last case was affirmed on appeal under the name of *Turner v. Martin* (1857, 7 De G. M. & G. 429).

Vaughan Hawkins in reply.

FARWELL, J. stated the facts, and, after reading the order made upon further consideration, continued:—Charlotte Blinks having given this undertaking, duly made her will. [His Lordship then read the bequest to William King.] She then appointed a sum of 500*l.* to John Madocks, which was also a debt of her separate estate, and appointed her daughter Julia Charlotte Wilson her executrix. William King predeceased the testatrix, and it is therefore said that the bequest to him lapsed. Now, the reason that a legacy lapses upon the death of the legatee before the testator is that the whole object of the testator in making the bequest is presumed to have failed through the death of the person whom he intended to benefit. Whether the object of the legacy has failed must depend, therefore, upon the testator's intention in making the gift; and in each case the question of lapse becomes a question of fact, or rather a question partly of fact and partly of construction. It is settled by *Williamson v. Naylor* (1838, 3 Y. & C. Ex. 208), *Philips v. Philips* (1844, 3 Ha. 281), and *Re Sowerby's Trusts* (1856, 2 K. & J. 630) that where the court finds that by a bequest a testator has intended to satisfy a moral duty, whether it be legally binding or not, and not to perform an act of bounty, the bequest does not lapse through the death of the legatee before the testator, provided that the moral duty continues. Here there has been no desire to confer a benefit, but an intention to discharge an obligation; and, notwithstanding the arguments of the plaintiffs' counsel, I am satisfied that, if William King had been paid the whole of the sum of 284*l.* 8*s.* 1*d.* during the testatrix's life, he could not have retained the amount appointed to him by her will if he had survived her. The appointment was not in fact due to a desire on the part of the testatrix to perform an act of bounty, but to her intention to discharge a liability, and consequently there is no lapse. The fact that the testatrix was a married woman, that she dealt with no property of her own, but only with property over which she had a power of appointment, and that in spite of this she appointed an executrix; the fact, too, that the only other exercise of her power of appointment was for the purpose of paying off a mortgage debt for which she was personally liable, all afford, in my opinion, additional evidence that her inten-

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tion was solely to perform a duty. And that is an intention which is equally fulfilled by payment to William King or his estate. Except to discharge this obligation and to discover the persons to whom that obligation should then be due, there could have been no possible reason for the appointment of an executrix. The result is that there is no lapse in the present case, and that the amount appointed must be paid to the personal representatives of William King. The costs will be paid out of the fund subject to the testatrix's power of appointment.

Solicitors for the petitioners, *W. J. Fraser and Son*.

Solicitor for William King's personal representative, *W. W. Boz*.

April 26 and 29.

(Before SWINFEN EADY, J.)

LEA v. THURSBY. (a)

Lease—Merger—Bankruptcy Act 1883 (46 & 47 Viet. c. 52), s. 55—Res judicata.

By an indenture of lease dated the 20th Aug. 1880 *W.* demised certain property to *M.* for a term of ninety-five years at the rent of 222*l.* 5*s.* 6*d.* By a mortgage dated the 24th June 1881 *M.* demised the term, less three days, at a peppercorn rent to *H.* to secure 2000*l.* and further advances. Eight thousand pounds was now due on the security. *M.* procured a conveyance of the fee on the 27th March 1882, and in 1885 sold to *F.*, the conveyance being expressed to be subject to the lease of the 20th Aug. 1880. In July 1902 *M.* became bankrupt, his trustee disclaimed the lease, and on the 5th May 1903 an order was made by the registrar of the Warwick County Court that *H.*'s representatives should be excluded from all interest in the lease, and that the same should be vested in a purchaser from *F.*, unless *H.*'s representatives declared their option to accept a vesting order of the lease. *H.*'s representatives did not appeal from the order in bankruptcy, but now asked (1) a declaration that the term created by the lease of the 20th Aug. 1880, subject to the subterm created by the mortgage of the 24th June 1881, became merged and extinguished on the conveyance of the fee to *M.*; and (2) a declaration that *H.*'s representatives were entitled to the premises for the residue of the term created by the mortgage, subject only to a peppercorn rent and the equity of redemption.

Held, that the County Court judge had full jurisdiction to determine the question of merger, and that, as *H.*'s representatives had not appealed from the registrar's decision, they were estopped by the proceedings in the Bankruptcy Court, and could not have the question tried over again.

Held, also, that, even if there were no estoppel, there was no merger, as it was for the benefit of *M.* and his intention to keep the term subsisting.

ACTION.

By an indenture dated the 20th Aug. 1880, and made between *T. Worthington* of the one part and *R. H. Milward* of the other part, Highfield House was demised to *Milward* for the term of ninety-five years from the 25th March 1880, at a yearly rent of 222*l.* 5*s.* 6*d.*

On the 24th June 1881 *Milward* mortgaged the same premises by way of sub-demise to *James Horsfall* for the whole term of the lease, less the last three days thereof, at a peppercorn rent to secure 2000*l.* and further advances. From time to time further advances were made, bringing the total amount advanced up to 8000*l.*

James Horsfall died on the 17th Oct. 1887, and the plaintiffs were the present trustees of his will.

On the 27th March 1882 the reversion in fee of the premises comprised in three leases, including the lease in question, was conveyed to *Milward* in consideration of 8272*l.* The conveyance was expressed to be subject to and with the benefit of the leases.

In 1885 *Milward* sold the premises comprised in the three leases to *W. E. J. B. Farnham*, subject to and with the benefit of the leases and also subject to an agreement that *Farnham* should grant to him a lease of the same premises for a term of 500 years at a yearly rent of 300*l.* On the same day a lease on these terms was granted by *Farnham* to *Milward*.

Subsequent dealings took place with the property, and ultimately it was purchased by *A. H. Thursby* for 6000*l.*

In July 1902 *Milward* was adjudicated a bankrupt, and *Philip Bates* was appointed trustee of his estate.

On the 18th Oct. 1902 *Bates* served on *Thursby* and the plaintiffs a notice of his intention to disclaim the lease of the 20th Aug. 1880. No notice of this was taken by either *Thursby* or the plaintiffs.

On the 21st Nov. 1902 *Bates* disclaimed the lease. It was not disputed that if the lease of the 20th Aug. 1880 was then a subsisting lease the trustee was entitled to disclaim it. The plaintiffs, however, alleged that the lease had then become merged in the freehold, and that the disclaimer was therefore inoperative.

On the 23rd Dec. 1902 *Thursby* served a notice of motion in bankruptcy on the plaintiffs for an order that unless the plaintiffs elected to have the property comprised in the lease of the 20th Aug. 1880 vested in them, subject to the rent, covenants, and conditions contained in that lease and to the same liabilities and obligations as the bankrupt was subject to under the lease at the date of the filing of the petition in bankruptcy, they should be excluded from all interest in the property, and that it should be delivered to and vested in the applicant.

On the 5th May 1903 an order was made in bankruptcy by the registrar of the County Court of Warwickshire that the plaintiffs should be excluded from all interest in the lease and that the same should be *Thursby* unless the plaintiffs should declare their option to accept a vesting order of the same, which they did not do. The plaintiffs did not appeal from the order in bankruptcy.

The plaintiffs, who were the trustees of the will of *James Horsfall*, deceased, asked: (1) a declaration that the full term created by the lease dated the 20th Aug. 1880, subject to the sub-term created by the mortgage of the 24th June 1881, became merged and extinguished on the conveyance of the fee simple in the demised premises to *Milward*, the lessee; and (2) a declaration that the plaintiffs were legally entitled to the premises

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

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comprised in the lease for the residue of the term created by the mortgage, subject only to the nominal rent reserved by the mortgage and to the equity of redemption subsisting thereunder.

A motion to dismiss the action as frivolous and vexatious and an abuse of the process of the court had been dismissed, both by Swinfen Eady, J. (89 L. T. Rep. 744) and the Court of Appeal (90 L. T. Rep. 265).

Micklem, K.C. and Druce for the plaintiffs.—The order in the Birmingham County Court had no effect if the lease had merged, and the plaintiffs are not prejudiced by the order if the lease is not subsisting. When Milward took a conveyance of the fee in 1882 the lease merged. The County Court judge had no jurisdiction to determine the question.

Haldane, K.O. and Wootten for the defendant.—The County Court judge had full jurisdiction to decide the question of merger, and it was fully argued before him. The case stood over until the case *Capital and Counties Bank v. Rhodes* (88 L. T. Rep. 255; (1903) 1 Ch. 631) had been reported. After this had been done, the registrar decided that there was no merger. The registrar was exercising a judicial discretion:

Re Britton, 61 L. T. Rep. 52;

Re Smith; Ex parte Hepburn, 63 L. T. Rep. 621; 25 Q. B. Div. 536.

As the plaintiffs did not appeal, they are estopped from again raising the question.

Micklem, K.C. replied.

April 29.—SWINFEN EADY, J.—It is clear that if the lease of the 20th Aug. 1880 was a subsisting lease and had not been merged or extinguished at the date of the bankruptcy, the defendant Thursby was entitled to apply to the Bankruptcy Court for such an order. This right is conferred by sect. 55 of the Bankruptcy Act 1883. It has been decided that, under this section, the landlord may apply that the mortgages shall take a vesting order or be excluded from all interest in the disclaimed property: (*Re Finley; Ex parte Clothworkers' Company*, 60 L. T. Rep. 134; 21 Q. B. Div. 475; see also *Re Baker; Ex parte Lupton*, 85 L. T. Rep. 33; (1901) 2 K. B. 628). The court to which this application was made was the only court having jurisdiction in the matter—namely, the Birmingham County Court, in which the bankruptcy proceedings against Milward were then pending. Upon the hearing of this application the question arose whether the lease of the 20th Aug. 1880 was subsisting or had been merged. Upon the evidence before me it appears that the court deemed it expedient or necessary to decide that question for the purpose of doing complete justice. The right of the applicant Thursby to apply for and obtain a vesting order (assuming always that the lease was subsisting at the date of the bankruptcy) was a right or claim arising out of the bankruptcy of Milward and the subsequent disclaimer by the trustee, and could only have been enforced by him in the Bankruptcy Court, and certainly could not, before the passing of the Bankruptcy Act 1883, have been enforced by action in the High Court within the proviso in sect. 102, sub-sect. 1, of the Bankruptcy Act 1883, and the consent of all parties to the County Court exercising jurisdiction was not necessary. In my opinion, the County Court in bankruptcy had full jurisdiction under sect. 102 of the Bank-

ruptcy Act 1883 to decide upon the claim of Thursby and all questions of law or fact arising thereon, including the question whether the lease of the 20th Aug. 1880 was subsisting or had been merged by the conveyance in fee of the 27th March 1882. What took place before the registrar was this. There was first a preliminary discussion, upon the effect of which the parties are not agreed. The plaintiffs contend that the question was raised as to the jurisdiction of the registrar to decide the question of merger; the recollection of the defendant Thursby's counsel, Mr. Wootten—who was present before the registrar—is that the only question raised was whether the registrar had jurisdiction to dispose of Thursby's application or whether it should be adjourned to the judge. I believe that Mr. Wootten's recollection is the more accurate, and this is quite consistent with the evidence given by the plaintiffs' solicitor, Mr. Tom Hadley, of what he heard stated by his counsel to the registrar. The point, however, is not of importance, as the defendant Thursby does not rely on any consent as giving jurisdiction to the County Court. The registrar stated that he certainly had jurisdiction, and proceeded to deal with the matter. It is common ground between the parties that the question whether there had been a merger of the lease or whether it was subsisting at the date of the petition was fully and elaborately argued before the registrar. The first hearing was on the 30th Jan. 1903; and upon its being represented to the registrar that the case then pending and since decided and reported—namely, *Capital and Counties Bank v. Rhodes* (*ubi sup.*)—would probably affect the matter under consideration, he adjourned the further hearing until that case had been decided. After that case had been decided and reported, the adjourned hearing of the defendant Thursby's application took place—namely, on the 5th May 1903; and the registrar then made the order of that date. According to Mr. Wootten's recollection, the registrar said: "I do not think there was a merger—I shall make the order in the terms of the notice of motion." The defendant Thursby then applied for and obtained an order for the payment of the costs of the application by the present plaintiffs, who had throughout resisted the motion. Having regard to sect. 13 of the Bankruptcy Act 1890, and to the cases of *Re Britton* (*ubi sup.*) and *Re Smith; Ex parte Hepburn* (*ubi sup.*), it seems clear that the Court of Bankruptcy is exercising a judicial discretion, and not merely acting ministerially in dealing with applications for vesting orders. The Bankruptcy Court has so dealt with the defendant Thursby's application on its merits and has made an order, and has, in fact, decided that the lease has not merged. The plaintiffs deliberately determined not to appeal from this decision; and in my judgment they are estopped by the proceedings in the Bankruptcy Court, and cannot have the merits tried over again in this court. I may add that even if the plaintiffs were entitled to have the matter decided again on the merits, my judgment would be that the lease was subsisting at the date of the bankruptcy petition and had not merged in the inheritance. The law as to merger is summed up by Cozens-Hardy, L.J. in *Capital and Counties Bank v. Rhodes* (1903) 1 Ch. 631, at pp. 652-653). He says: "The courts of equity . . . had regard to the intention of the parties, and, in the

absence of any direct evidence of intention, they presumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party, that merger should not take place. . . . A court of equity had regard to the intention of the parties, to the duty of the parties, and to the contract of the parties, in determining whether a term was to be treated as merged in the freehold." Since the Judicature Act, if there would have been no merger in equity, there is now no merger at law. In my opinion it was for the benefit of Milward that the term should not merge upon the conveyance of the freehold reversion. Such a merger would have fettered his own dealing with the property he had just bought. If there was no merger he could sell it, mortgage it, or otherwise deal with it as he pleased without paying off the mortgagee of the term and without his concurrence. Seeing that the timber and mines were reserved to the reversioners when the lease of the 20th Aug. 1880 was granted, he could have dealt with those items without the concurrence of the mortgagee of the term. Again, on the very date on which he obtained a conveyance of the reversion—the 27th March 1882—he signed a further charge indorsed on the mortgage of the term for 2000*l.*, bringing up the whole loan on the term to 8000*l.* There is no reference to the freehold reversion, or to the term being merged in the inheritance, but by further charging the term he indicated an intention of keeping it subsisting. The subsequent dealings by Milward with the property clearly show that he then treated the term as still subsisting, and the parties dealt with him on the footing that it was subsisting. The conveyance by Milward to Farnham of the 1st Aug. 1885 is a conveyance of the reversion expressly subject to and with the benefit of the term created by the deed of the 20th Aug. 1880. The conclusion I have come to is that it was for the benefit of Milward, and it was the intention of Milward that the term should be kept alive. The result is that the plaintiffs' claim fails and substantial justice is done between the parties. The plaintiffs advanced 8000*l.* on a leasehold interest, which, it now appears, is of no value, and, having declined to accept the lease subject to rent and covenants, they now have no security for their money. But they could have had, if they had wished, the whole estate and interest of the bankrupt in the lease. They do not gain the windfall which they hoped had fallen to their lot. On the other hand, the defendant Thursby, who bought the freehold for 6000*l.*, free from incumbrance, does not suffer the injustice of having a first mortgage for 8000*l.* charged upon the premises in priority to his interest. The action is dismissed with costs.

Solicitors: *Robins, Hay, Waters, and Hay; Hadley and Dain.*

April 27, 28, 29, and May 8.

(Before SWINFEN EADY, J.)

HARRIS v. FLOWER AND SONS. (a)

Right of way — Abandonment — Non-user — Excessive user.

In 1891 certain premises were conveyed to M., together with a right of way over land coloured yellow on the plan on the deed. The land

coloured yellow was subsequently conveyed to J., who covenanted to permit the use of the right of way. M. owned other adjoining premises, and erected assembly rooms partly on the land to which there was a right of way and partly on the adjoining premises. The licensing magistrates objected to a gateway opening on the right of way, but in 1892 a wall was built with an opening for a gateway 6ft. 9in. wide, this opening being temporarily closed with sliding scaffold boards. In 1894 the hereditaments formerly belonging to M. were sold to F., together with the right of way, and in December of that year the scaffold boards were removed to enable building material to be taken along the right of way. In 1896 a further application to the magistrates to allow gates to be placed at the gateway was refused, and the magistrates insisted on the gateway being bricked up. In 1898 the premises, together with the right of way, were conveyed to G. M. In 1903 an opening was made in the wall and a gate 4ft. 4in. wide placed there, and materials for altering the premises were conveyed along the right of way. The only access to the building, at the rear of the assembly rooms, was over the right of way.

The present owners of the land coloured yellow claimed that the right of way had been abandoned, or, if not, as it was used to buildings not wholly erected on the dominant tenement, that the user was excessive. They brought an action against G. M. and his mortgagees claiming to restrain the use of the right of way.

Held, (1) that there had been no abandonment of the right of way; (2) that the user was bonâ fide, although a portion of the building extended beyond the boundary of the land entitled to the right of way; and (3) that the mortgagees were not necessary or proper parties to the action.

ACTION.

Both the plaintiff and the defendants derived title from the London, Chatham, and Dover Railway on the occasion of that company's selling certain surplus lands in 1891. The conveyance to the defendants' predecessor in title, William Murrin, was dated the 1st July 1891; it comprised certain freehold hereditaments then known as No. 80, Royal-hill, Greenwich, coloured pink on the plan on that deed, together with a right of way over certain land coloured yellow and brown on that deed. The grant of the right of way was in the following terms:

The company do hereby grant unto the said William Murrin, his heirs and assigns, full and free right and liberty, in common with the owner and occupier for the time being of the messuages and hereditaments known as No. 90, Royal-hill, aforesaid, of ingress, egress, and regress, passage, and way, into and upon the said hereditaments and premises hereby conveyed or intended so to be, from a certain street called Prior-street, and situate in the parish of Greenwich aforesaid, over and upon certain lands, hereditaments, and premises, more particularly delineated and described in the said plan drawn in the margin of these presents and therein coloured yellow and brown, but so, nevertheless, as not to obstruct or interfere with the occupation or enjoyment of the said messuages and hereditaments, No. 90, Royal-hill, aforesaid.

The land coloured yellow was subsequently—namely, on the 13th July 1891—conveyed to the

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

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plaintiff's predecessor in title, John Jennings; and the conveyance contained a covenant by him for himself, his heirs and assigns, that he would at all times allow the company, their successors and assigns, and the owner and occupier for the time being of the messuage and hereditaments known as No. 80, Royal-hill, full and free right and liberty of ingress, egress, regress, passage, and way over and upon the yellow land. The land coloured brown was retained by the company. The right of way here in dispute was over the yellow land. When William Murrin purchased No. 80, Royal-hill, in 1891, he was already the owner of the Prince Albert, No. 72, Royal-hill, including certain land at the rear, and this land in the rear (which was coloured blue on the conveyance hereinafter referred to of the 13th Nov. 1894) adjoined at the rear the rear portion of No. 80, Royal-hill; but Nos. 72 and 80 were separated by intervening houses on the frontage to Royal-hill. William Murrin, after buying No. 80, determined to build certain assembly rooms at the back of the Prince Albert, partly on the pink land (which formed part of No. 80) and partly on the blue land (which formed part of No. 72). He submitted plans to the licensing magistrates, which had been prepared by Mr. Henry Roberts, an architect and surveyor of Lewisham, and these plans showed a proposed gateway in the side wall of the premises, leading from the back of the house No. 80 to the yellow land and thence to Prior-street, thus giving the premises a back entrance. The magistrates attended and viewed the premises on the 21st July 1891, and were attended by Mr. Henry Roberts. They objected to the proposed gateway and said that they could not allow any opening in the wall, leading from the licensed premises to another street. Mr. Roberts tried to obtain permission for a gate for coals and dust, but the magistrates said, "No; not even for private purposes, lest it might be used by the public." The plan was then altered so as to omit the proposed gateway, and was passed by the magistrates and initialled by the chairman on the 25th Aug. 1891. The new buildings were commenced and proceeded with; but monetary difficulties arose, and the works were stopped in Aug. 1892. At this date the roof was on, and the building partly plastered; but the cross-wall (in which Murrin had wished to leave a gateway) was not built. The materials for the new building had been brought along the right of way. An agreement, dated the 20th April 1892, was entered into between the parties relating to this matter; but as it was expressed to be "without prejudice to the respective rights of the said parties over the said road, as per conditions of sale under which the said parties hold their land," nothing turned on it. William Murrin then conveyed his premises to Messrs. Parker and Thomas; and in March 1894 they instructed Mr. G. G. Pye to prepare plans for the completion of the buildings—that was, the assembly rooms—and the reconstruction of the interior of the Prince Albert. The contract was signed in June 1894, and the works completed in Nov. 1894. The cross-wall was built, and, notwithstanding the view taken by the licensing magistrates, an opening was left for a gateway 6ft. 9in. wide, as the owners were desirous of retaining this back entrance, if it could be managed. The opening so left in the brickwork was tempo-

rarily closed by means of some sliding scaffold boards. On the 10th Nov. 1894 Messrs. Parker and Thomas sold and conveyed to Mrs. Flight the house, No. 80, Royal-hill, with a portion of the pink land at the rear, but not extending to the railway wall, and granted her a right of way out at the back to Prior-street, but in common with the owner and occupier for the time being of the messuage known as the Prince Albert. The plan on that conveyance showed the Prince Albert as including the assembly rooms built at the rear. On the 13th Nov. 1894 Messrs. Parker and Thomas conveyed to the London and Manchester Industrial Assurance Company Limited the Prince Albert, including the completed assembly rooms, together with a right of ingress, egress, and regress over the way in the rear to and from Prior-street. In Dec. 1894 the sliding boards closing the opening in the wall were removed to enable Mr. Comber, the builder, to take away some building plant through the opening, and this was afterwards closed again by replacing the sliding boards. In July 1896 Mr. G. G. Pye, on the instructions of the freeholders of the Prince Albert, made a further attempt to obtain the sanction of the magistrates to an entrance at the rear. He prepared a plan showing an intended pair of gates, to be placed where the sliding boards still were. He attended before the magistrates and supported the application on the 17th July 1896, but the application was refused; and, moreover, the magistrates then required that the opening in the wall should be bricked up; and this was done. Swinfen Eady, J. held that down to this date William Murrin and the persons deriving title through him not only had not shown any intention of abandoning their right of way, but had evinced their determination to retain it. On the 16th Feb. 1898 the Prince Albert, including both the pink and the blue land, was conveyed to the defendant George Robert Murrell, and the conveyance contained an express grant of ingress, egress, and regress into and upon the premises coloured pink on the plan from and to Prior-street. In the summer of 1898 the defendant Murrell again altered the Prince Albert, as shown by a plan marked "W.E.S. 1." All openings between the front portion and the rear portion of the Prince Albert were closed with brickwork, both on the ground floor and the first floor, and all communication between the front portion and the rear portion entirely severed, and the licence confined to the front portion. An opening was made in the cross-wall in or about June 1903 and a gate about 4ft. 4in. wide placed there, and all the materials for the alteration were brought along the right of way and through that gate. At the present time the only access to the building at the rear of the Prince Albert was along the right of way. The plaintiff alleged that the defendants had lost the right of way by abandonment, and asked that they should be restrained from using the right of way as a means of access to a factory and premises which at one time formed part of the licensed premises known as the Prince Albert.

Mickletham, K.C. and Johnston Edwards for the plaintiff.—Although mere non-user from 1894 to 1903 would not be enough to prove abandonment, here something was done preventing the enjoyment of the easement, and indicating to other people that the easement had been abandoned.

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[SWINFEN EADY, J.—Merely blocking up temporarily is not an abandonment. If there was a right of way under an archway, it might be necessary to block the right of way, to rebuild the archway.] Erecting a blank wall is an abandonment of a right to ancient light :

Moore v. Rawson, 3 B. & C. 332.

It must also be an abandonment of a right of way. There is evidence of an intention to abandon or renounce the right of way :

Reg. v. Chorley, 12 Q. B. 513, pp. 518, 519.

In any event the right of way has been used excessively, and imposes a greater burden on the plaintiff's land than is imposed by the conveyance of the 1st July 1891. As it is practically impossible to separate the lawful from the excessive user, the right of way cannot be used at all.

Theobald, K.C. and *Hodge* for the mortgagees. —The mortgagees are not necessary or proper parties to the action. They are not parties to the contract under which the works are executed; all they have done is to advance money to Murrell to enable him to effect alterations in the premises. They have never claimed any right of way over the land in question.

Eve, K.C. and *Martelli* for the defendant Murrell.—There has been no abandonment of the right of way; there has been mere non-user for a short time to comply with the wishes of the licensing magistrates. The grant of a private way to a particular place cannot be restricted to the use required at the time of the grant :

Finch v. Great Western Railway Company, 41 L. T. Rep. 731; 5 Ex. Div. 254 :

United Land Company v. Great Eastern Railway Company, 33 L. T. Rep. 292; L. Rep. 10 Ch. 586;

Newcomen v. Coulson, 36 L. T. Rep. 385; 5 Ch. Div. 133.

Micklem, K.C. replied.

Cur. adv. vult.

May 7.—SWINFEN EADY, J., after stating the facts, said:—Upon these facts the plaintiff, who in 1898 purchased Primrose Villa, which is built upon part of the land comprised in the conveyance to John Jennings of the 13th July 1891, contends that the defendant Murrell and Messrs. Flower and Sons, his mortgagees, or their predecessors in title, have abandoned the right of way granted by the London, Chatham, and Dover Railway Company by the deed of the 1st July 1891. It is necessary to consider whether there has been any intention to abandon or renounce the right by William Murrin or any person claiming through him. As was said by Lord Denman, in delivering the judgment of the Court of Queen's Bench in *Reg. v. Chorley* (12 Q. B., at p. 519), it is not so much the duration of the cesser to use an easement as the nature of the act done by the grantee of the easement and the intention which it indicates which are material for the consideration of the jury. Again, in the case in the Privy Council of *James v. Stevenson* (68 L. T. Rep. 539; (1893) A. C. 162), Sir Edward Fry said (at p. 167) that whether a right of way had been abandoned or not was a question of intention, to be decided upon the facts of each particular case. In the present case I am clearly of opinion that William Murrin and his successors in title, owners of the pink lands, have never

abandoned and never had the slightest intention of abandoning any portion of the right of way granted by the deed of the 1st July 1891. On the contrary, they have persevered in an attempt to induce the magistrates to allow them to use the back entrance even when the premises were licensed, and they only bricked up the wall when absolutely required to do so by the magistrates, reopening it again directly the rear portion was structurally separated from the licensed premises. The cross-wall was not even built at the extremity of the defendants' land, but a strip of the defendants' land intervened between the wall and the right of way, and the only access to this strip was over the right of way. The cesser of the user, from July 1896 to June 1903, which was merely to comply with the imperative requirements of the magistrates, has been fully explained by the evidence, and was without any intention whatever of abandoning the easement. The easement has not, in my judgment, been abandoned. It was then urged that the defendants' predecessors, by building the assembly rooms at the back of the Prince Albert and so adding them on to licensed premises, had made such a substantial alteration in the original object of the right of way as to extinguish the easement; also that, as the rear building (now proposed to be used as a factory) has been erected partly on the pink land and partly on the blue, the user of the right of way as a means of access to the factory would be excessive, and would constitute a greater burden than is imposed on the land of the plaintiff by the indenture of the 1st July 1891, and an injunction was claimed to restrain the user of the right of way as a passage to the factory or any part of it. The case of *Finch v. Great Western Railway Company* (*ubi sup.*) established that where there is an express grant of a private right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant. This case followed the decisions of the Court of Appeal in *United Land Company v. Great Eastern Railway Company* (*ubi sup.*) and *Newcomen v. Coulson* (*ubi sup.*). In the former case Mellish, L.J. stated that when a right of way is created by grant it must depend on the proper construction of the grant whether the right of way is to be used for all purposes, or for only limited purposes, and that if there is no limit in the grant the way may be used for all purposes. In the subsequent case of *Newcomen v. Coulson* (*ubi sup.*) Malins, V.C. (5 Ch. Div., p. 139) referred to the decision in *United Land Company v. Great Eastern Railway Company* (*ubi sup.*) in the following terms: "If there is any other case to refer to, I think it is the case of *United Land Company v. Great Eastern Railway Company* (*ubi sup.*), which I decided originally, and which was affirmed on appeal. What was the case there? There was a piece of land which, at the time of the grant of right of way, was used for agricultural purposes, and which it was in the last degree improbable would ever be used for any other purpose, because it did not at that time seem to be adapted for any other purpose. But in progress of time it was found expedient to build on that land. There was a right of way over a railway, and this argument was again used, that the right

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of way was only a right of way for the purpose for which the land was used at the time the right of way was granted. I took a wider view of the case. I decided it meant a right of way for all purposes for which the land could be lawfully used in all time, and my decision on that subject was affirmed on appeal." The Vice-Chancellor then proceeded to deal with the way in dispute in *Newcomen v. Coulson* (ubi sup.), which was a right of way set out under an inclosure award, and held that it was a right of way over those lands for all purposes to which it could be applied—a right of way to be used in the most beneficial manner in which such right of way could be used for the time being. This decision was affirmed on appeal. In accordance with these decisions I determine that the right of way granted in general terms to the defendants' predecessors in title has not been extinguished by the alterations made in the dominant tenement. In the present case about two third parts of the factory, including the entrance doorway, stand upon the pink land, and the remaining third is upon the blue land, and in my opinion the defendants cannot be restrained from using the right of way as a means of access, and indeed the only means of access, to the factory, because having entered by the doorway they may pass to another portion of the building erected on the blue land. They are using the right of way *bona fide* for the purpose of access to the pink land and to the building thereon, and none the less so because a portion of the building extends beyond the boundary of the pink land. This fact distinguishes the present case from *Skull v. Glenister* (9 L. T. Rep. 763; 16 C. B. N. S. 81), which was observed upon by Mr. Justice Stephen in *Finch v. Great Western Railway Company* (ubi sup.). The result is that the action fails and must be dismissed with costs. I may add that in any case the defendants Flower and Sons were not necessary or proper parties to the action. They are mortgagees of Murrell, but they have not entered into possession. They are not any parties to the contract under which the work was executed of structurally separating the back portion of the building from the front portion and bringing the building materials along the way; they only advanced the money to Murrell to enable him to complete the alterations, and I entirely accept and believe Mr. Potheary's statement that he did not tell Mr. Hoare or lead him to believe that he was claiming any right of way on behalf of Messrs. Flower and Sons; he said that Messrs. Flower and Sons were only mortgagees, and he produced and discussed the draft conveyance to Mr. Murrell dated the 16th Feb. 1898, and said that Murrell had a right of way over the land in question. Mr. Potheary's clerk at the previous interview seems to have said that Murrell was a man of straw, and this probably explains the reason why the plaintiff determined to make Messrs. Flower and Sons defendants as well as Mr. Murrell.

Solicitors: *Edwin Shalless; Potheary and Co.*

KING'S BENCH DIVISION.

Friday, March 4.

(Before Lord ALVERSTONE, C.J., KENNEDY and CHANNELL, JJ.)

TOUGH (app.) v. HOPKINS (resp.). (a)

Metropolis — Smoke from tug — Nuisance — "Chimney" — Prohibition order — Specifying works—Public Health (London) Act 1891 (54 & 55 Vict. c. 76), ss. 5 (4) (5), 23, 24.

The funnel of a tug plying to and fro in the river Thames, within the jurisdiction of the port sanitary authority of London, is a "chimney" within sect. 24 (b) of the Public Health (London) Act 1891.

If a court of summary jurisdiction makes a prohibition order under sect. 5 of the Public Health (London) Act 1891, such order need not specify the works to be done by the person against whom the order is made if in the opinion of the court no works could be done to prevent a recurrence of the nuisance.

CASE stated on an information preferred by the respondent against the appellant under sect. 24 of the Public Health (London) Act 1891 for that on the 24th Aug. 1903, on the Thames and within the port of London, upon a certain vessel—to wit, the steamship *Richmond*—the following nuisance existed—namely, a chimney (not being the chimney of a private dwelling-house) sending forth smoke in such quantity as to be a nuisance—and that the appellant, being the owner of such vessel, had made default in complying with a notice served under such section.

Upon the hearing of the information the following facts were proved or admitted by the appellant:

He was then the owner of a steam-tug known as the *Richmond*.

On the 25th April 1903 a notice was served upon him at the instance of the port sanitary authority of London, a copy whereof is set out below.

On the 24th Aug. 1903 the steam-tug was towing six barges, and was proceeding from below the Custom House to Southwark Bridge and beyond, within the jurisdiction of the port sanitary authority, and while the tug was proceeding between the Custom House and Southwark Bridge there was being sent forth from the funnel thereof dense black smoke for the space of about five minutes in such quantity as to be a nuisance.

The steam-tug was then being navigated by a master, engineer, and crew employed by the appellant, who was not on board, and who had no personal knowledge of such emission of black smoke.

The steam-tug did not stop or lie up at any point of the voyage of the 24th Aug., but was then proceeding to Kingston-on-Thames, where she was in the habit of lying every night. The steam-tug was employed throughout the day in plying for hire as a tug between Woolwich and Kingston-on-Thames.

The engines and boilers on board the steam-tug were of modern construction and of the best known type of marine engines and boilers, and were constructed as to consume as far as possible all the smoke caused therein, having regard to

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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the funnel being a short one, and adapted for passing under bridges at high-water level by hinging backwards nearly to deck level.

The appellant had given strict instructions to his servants to prevent, as far as possible, the production of black smoke on the steam-tug, and good Welsh steam coal procured by the appellant was burnt on board, and the furnaces of the tug had been freshly stoked with such coal at about opposite the Custom House on the 24th Aug., and from three to four minutes was not an unreasonable time to allow the fresh fuel to cease emitting black smoke on such a vessel.

The emission of smoke from the funnel of the tug could have been prevented by the fire being kept bright by frequent and careful stoking or by the use of steam coal.

Upon the above facts it was contended by the appellant: (1) that sect. 24 of the Public Health (London) Act 1891 was inapplicable to a steam-tug such as the *Richmond* while plying to and fro on the river Thames as described above; (2) that the *Richmond* on the 24th Aug. was not a vessel lying within the district of the port sanitary authority within the meaning of art. 3 of an order of the Local Government Board, dated the 25th March 1892, and made under sect. 112 of the Public Health (London) Act 1891; (3) that if by reason of such order of the Local Government Board the sect. 24 of the Public Health (London) Act 1891 was applicable to a vessel used as the steam-tug was being used on the 24th Aug. 1903, then the proceedings under such section should have been taken against the master of the vessel and not against the appellant; (4) that proceedings in respect of smoke from vessels plying on the river Thames could only be taken under the provisions of sect. 23 of the Public Health (London) Act 1891.

On behalf of the respondent it was contended: (1) that the funnel of the steam-tug was a "chimney" within the meaning of that expression in sect. 24 (b) of the Public Health (London) Act 1891; (2) that the alleged nuisance arose owing to the appellant not having used anthracite coal in the furnaces of the tug and from the coal that was used having been carelessly and improperly stoked; (3) that the appellant was liable for the acts of his servants and was a person by whose act, default, or sufferance the nuisance arose; (4) that the magistrate had a discretion as to whether or not he specified on the prohibition order any works to be done by the appellant to prevent the recurrence of the nuisance, and that it was for him to determine whether or not it was desirable to do so.

His attention was called to the case of *Weeks v. King* (15 Cox C. C. 733; 49 J. P. 704).

The magistrate found as a fact that the funnel of the steam-tug was a chimney within the meaning of sect. 24 of the statute and that black smoke had been sent forth from it in such quantities as to be a nuisance at the place and time and on the day mentioned in the information. He also found as a fact that no works that could be ordered would cure the alleged nuisance, but that it was a question of stoking with proper fuel, and that if a bright fire were kept up by frequent and careful stoking the nuisance could be prevented. He was of opinion that the information had been properly laid under sect. 24 (b) of the Public Health (London) Act 1891 and that the appellant

was a person by whose act, default, or sufferance the nuisance arose, and he overruled the contentions of the appellant and convicted him of the nuisance alleged in the information and made an order upon him prohibiting the recurrence of the nuisance.

The appellant, after the magistrate had convicted him as above-mentioned, required him on making the prohibition order against him under sect. 5, sub-sects. 4 and 5, of the Public Health (London) Act 1891, to specify therein the works to be executed by him for the purpose of preventing the recurrence of the nuisance, but the magistrate refused to specify any works in the order, because it was not, in his opinion, desirable to do so, because there was no question of works here involved, but only a question of careful and skilful stoking with proper fuel.

The notice referred to above was as follows:

Take notice that under the provisions of the Public Health (London) Act 1891 the port sanitary authority of the port of London, being satisfied of the existence of a nuisance on the above-mentioned vessel, arising from a chimney—to wit, the funnel of the boiler furnace on the said vessel (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance—do hereby require you, within forty-eight hours from the service of this notice, to abate the same, and to execute such works and do such things as may be necessary for that purpose, and to do what is necessary for preventing the recurrence of the said nuisance. If you make default in complying with the requisitions of this notice within the time above specified a summons will be issued requiring your attendance before a petty sessional court to answer a complaint which will be made for the purpose of enforcing the abatement of the said nuisance or prohibiting the recurrence thereof, or both, and for recovering the costs and penalties that may be incurred thereby.—Dated 25th April 1903.—JAMES BELL, Town Clerk.

By sect. 5 of the Public Health (London) Act 1891 (54 & 55 Vict. c. 76):

(1) If either—(a) the person on whom a notice to abate a nuisance has been served as aforesaid makes default in complying with any of the requisitions thereof within the time specified, or (b) the nuisance, although abated since the service of the notice is, in the opinion of the sanitary authority, likely to recur on the same premises, the sanitary authority shall make a complaint, and the petty sessional court hearing the complaint may make on such person a summary order (in this Act referred to as a nuisance order). (2) A nuisance order may be an abatement order, a prohibition order, or a closing order, or a combination of such orders. (3) An abatement order may require a person to comply with all or any of the requisitions of the notice or otherwise to abate the nuisance within a time specified in the order. (4) A prohibition order may prohibit the recurrence of a nuisance. (5) An abatement order or prohibition order shall, if the person on whom the order is made so requires, or the court considers it desirable, specify the works to be executed by such person for the purpose of abating or preventing the recurrence of the nuisance.

And by sect. 23:

(3) Every steam engine and furnace used in the working of any steam vessel on the river Thames either above London Bridge or plying to and fro between London Bridge and any place on the river Thames westward of the Nore light, shall be constructed so as to consume or burn the smoke arising from such engine and furnace; and if any such steam engine or furnace is not so constructed, or being so constructed is wilfully or negli-

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gently used so that the smoke arising therefrom is not effectually consumed or burnt, the owner or master of such vessel shall be liable to a fine not exceeding 5*l.*, and on a second conviction to a fine of 10*l.*, and on every subsequent conviction to a fine of double the amount of the fine imposed on the last preceding conviction.

And by sect. 24:

(a) Any fireplace or furnace which does not, as far as practicable, consume the smoke arising from the combustible used therein and which is used for working engines by steam, or in any mill, factory, dye-house, brewery, bake-house, or gaswork, or in any manufacturing or trade process whatsoever; and (b) any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance shall be nuisances liable to be dealt with summarily under this Act, and the provisions of the Act relating to those nuisances shall apply accordingly: Provided that the court hearing a complaint against a person in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke arising from the combustible used in such fireplace or furnace shall hold that no nuisance is created and dismiss the complaint, if satisfied that such fireplace or furnace is constructed in such manner as to consume, as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has been carefully attended to by the person having the charge thereof.

J. A. Hamilton, K.C. and *Bigham* for the appellant.—Sect. 24 does not refer to the funnel of a steamboat on the Thames but merely applies to a chimney in the ordinary sense of the word. A case like the present comes under sect. 23 (3). Further, the order made did not specify the works to be done in order to prevent a recurrence of the nuisance which it should have under sect. 5 of the Public Health (London) Act 1891. The mere fact that the powers and duties under sect. 24 of the Act of 1891 are assigned to the port sanitary authority cannot make that section applicable to the funnel of a steam vessel on the Thames.

Danckwerts, K.C. and *R. Cunningham Glen* for the respondent.—The order assigning to the port sanitary authority the powers of an ordinary sanitary authority under the Act of 1891 provides that any vessel lying within the port sanitary authority shall be liable to their jurisdiction as if it were a house. Sect. 24 deals with a nuisance arising from smoke and sect. 23 deals with the construction of the furnace. They therefore deal with different matters, and sect. 24 applies to a nuisance arising from the smoke of a vessel. With regard to the order made in this case, if no actual works are necessary they need not be specified.

LORD ALVERSTONE, C.J.—Notwithstanding the very ingenious argument of Mr. Hamilton and the observations which Mr. Bigham has made, I think that this decision was right. I quite agree with them that the order of the Local Government Board of the 25th March 1892 has not increased the responsibility of persons who own tugs in respect of nuisances from tugs or ships. It merely provided that the port sanitary authority was to take such proceedings as could be taken under the Act in respect of "ships, vessels, boats, waters, or persons within their jurisdiction," and it includes sect. 24 of the Public Health (London) Act 1891. Whatever the opinion of the draftsman may have been,

the mere inclusion in that order would not increase the responsibility if we were of opinion that sect. 24 could not apply to the chimney or funnel of a steam-tug plying on the Thames. The point has admitted of argument, and I think there is some ground for thinking at the first blush that the reading of sect. 24 would indicate that it was intended to apply to chimneys on land in the ordinary sense of the word, but when we look at the object of the legislation, and certain expressions in sect. 24 itself, I think any such construction would be too narrow. It is, as far as this part of the section is concerned, essentially what may be called a black smoke section—that is to say, it is a section which provides that "any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance" shall be a nuisance liable to be dealt with summarily. Sect. 23, the previous section, has undoubtedly dealt specifically with the steam engines and furnaces used in the working of steam vessels which were being worked in the district where this vessel was being worked. It provides that they "shall be constructed so as to consume or burn the smoke arising from such engine and furnace; and if such steam engine or furnace is not so constructed, or being so constructed is wilfully or negligently used so that the smoke arising therefrom is not effectually consumed or burnt, the owner or master of such vessel shall be liable to a fine not exceeding 5*l.*, and on a second conviction to a fine of 10*l.*," and then it goes on: "Provided that in this section the words 'consume or burn the smoke' shall not be held in all cases to mean 'consume or burn all the smoke,' and the court hearing an information against a person may remit the fine if of opinion that such person has so constructed his furnace as to consume or burn as far as possible all the smoke arising from such furnace, and has carefully attended to the same, and consumed or burned as far as possible the smoke arising from such furnace." Those words show that there are special provisions with regard to the construction of furnaces and engines upon the steamers and the negligent use of them, but it is to be observed, and I think the argument of Mr. Glen is of importance, that there is a corresponding provision with regard to furnaces upon land, because sub-sect. 1 of sect. 23 also provides that the furnaces employed in the working of engines by steam and a number of other furnaces, all of which must be on land, "shall be constructed so as to consume or burn the smoke arising from such furnace," and there is a corresponding sub-section with regard to their negligent user. Therefore we have with regard to both furnaces on land and furnaces on ships the sort of provision which goes a certain distance for the proper construction of the engines and furnaces and for the non-negligent user. Then we come to sect. 24, which is unquestionably a nuisance section. I think it is not without importance that it immediately follows sect. 23, and is under the same heading, "Smoke consumption." If the words to which I am about to refer can be fairly applied to a chimney on board a steamship, there is no reason why this should not apply. The first provision of sect. 24 says: "Any fireplace or furnace which does not so far as practicable consume the smoke" shall be a nuisance liable to be dealt

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with summarily. Then comes the important clause: "Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance" shall be a nuisance liable to be dealt with summarily. I think that, quite apart from negligence, is meant to deal with the case, which has not been covered by the previous section, of a chimney other than that of a dwelling-house sending forth black smoke. We have had our attention directed to the other legislation of a similar character with regard to railway engines and with regard to traction engines, and there does not appear to be any black smoke nuisance section in any of them. Therefore one would rather assume that this legislation is something which may be said to be additional protection, unless the words "any chimney (not being the chimney of a private dwelling-house)" are sufficient to show that a steamship would not be included. I think both the purview of this section and the object of the legislation would point to black smoke being emitted within the port from the chimney or funnel of a steamer as constituting an offence. It is quite obvious there may be cases in which the black smoke would come from a chimney which would not ordinarily be called a funnel. I do not think any argument can be based upon the fact that the word "chimney" is used because the word "funnel" is a technical and almost secondary meaning for that kind of chimney. I cannot see any reason why emission of black smoke from steamers constantly plying on the Thames should not be as much prevented as the emitting of black smoke from chimneys on land. I therefore come to the conclusion that sect. 23 does not contain, as Mr. Bigham pressed us that it did, the whole code with regard to nuisances coming from steamships or smoke coming from steamboats. The language of sect. 24 is not enough to enable us to hold that it does not include the chimney of a steamship. Therefore I think this conviction was right. Upon the second point which Mr. Hamilton mentioned, I ought perhaps just to say we held the other day in *Central London Railway Company v. Hammersmith Borough Council* (ante, p. 645), and I think we were right in saying so, that the order was not bad, because it did not specify works to be done, though the defendant asked for the specification of them if there were no works that could be done. I do not think that objection prevails. I think, therefore, that this appeal should be dismissed.

KENNEDY, J.—I am of the same opinion. To my mind the only point which certainly is not wholly free from difficulty I agree is the question as to whether sect. 24 (b), "Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance," includes the funnel of a tug-boat or steamer. Usually, no doubt, "chimney" is a phrase applicable to that through which smoke passes from a fire of some sort in a building. It is not the term which is technically the proper term to describe those passages or flues, or whatever you like to call them, on a steamboat, which convey the smoke from the furnace of the steamer to the upper air, but I see nothing to prevent "chimney" being used in what one may call its natural sense—namely, that of a passage by which smoke from a fire is carried away upwards.

Otherwise you would have no "black smoke section," as my Lord has described it shortly, with regard to the description of thing which may send out smoke in quite as great quantities with quite as great mischief if it is enough to create a nuisance, as what may be more usually described by the word "chimney"—namely, the smoke passage from the roof of a building." There is no definite clause relating to the word "chimney" in this Act, as far as I know, and certainly one would expect it to have been referred to if there was one after the care that Mr. Hamilton and Mr. Bigham have shown in arguing this case. We have not heard that chimney is anywhere defined, and if it is not defined it seems to me naturally enough intended to cover here that which it may cover in a popular though not in a technical sense. I need not add anything on the other point to that which my Lord has said.

CHANNELL, J.—I agree. I think "chimney" in this section is used simply as the thing from which smoke does issue into the open air. It might quite well be found that the cases of funnels of steam vessels or of funnels of locomotive engines or other movable smoke-producing apparatus might be so dealt with elsewhere in the Act as to lead one to come to the conclusion that they were not intended to be included in these general words in sect. 24 (b), but in fact the operation of sect. 24 is only to apply the particular summary procedure in reference to certain cases of smoke nuisances, cases coming under (a) and coming under (b). The other sections deal with the construction and user of apparatus producing smoke, and do not deal, as sect. 24 does, with the consequences or results of it, which in certain cases may be dealt with under the summary procedure in reference to nuisances. The result seems to me to be that sect. 24 and sect. 23 are dealing not with different subject-matters but with different consequences of the subject-matter, and there is no reason, therefore, because steam vessels are specially dealt with under sect. 23 to say they cannot come under sect. 24. I see no reason for cutting down what seems to me the primary meaning of the word "chimney" in sect. 24. *Appeal dismissed.*

Solicitors: J. A. Roberts; The City Solicitor.

March 8 and 9.

(Before CHANNELL, J.)

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BELL (resp.). (a)

Revenue—Income tax—Company resident in United Kingdom—Income Tax Act 1853 (16 & 17 Vict. c. 34), s. 2, sched. D.

The appellant company was registered as a joint stock company at Pretoria, in the South African Republic, but had never been registered in the United Kingdom.

The business of the appellant company consisted in the purchase and prospecting of lands with mining possibilities, or the obtaining of options over such lands with the view to the formation and flotation of companies for the purpose of

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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working the same and the making of a market for the shares.

The profits made by the appellant company were directly obtained (inter alia) by the sale and realisation of shares in subsidiary companies. The bulk of the company's capital was invested in South African shares and in mining properties in South Africa.

The evidence produced showed that with regard to the purchase and sale of shares by the company, 56½ per cent. of the purchases of shares, and 49 per cent. of the sale of shares by the company were carried out in London during the year in question.

The first general meeting of the company was held in April 1899 in Johannesburg. The second general meeting was held in London in June 1901, subsequent to the year of assessment. With regard to the directors' meetings, the directors' minute-book kept in London, which was the only minute-book of the company, was produced and showed that almost every transaction of importance affecting the management, control, and direction of the company was dealt with, controlled, and decided at the board meetings of the directors in London.

A considerable number of important matters requiring local management were carried out by the managing director in Johannesburg on behalf of the board under powers delegated by the board in London. A copy of the minutes of the board meetings in London were forwarded after each meeting to Johannesburg. With regard to the staff, the chairman and three of the nine directors were resident in England. The directors held monthly meetings at the company's office in London. Only one meeting was held out of England. The accounts of the Johannesburg, Paris, and Berlin offices were brought to London where the balance-sheets and accounts of the company were made up and audited. The dividends were fixed and authorised by resolutions of the directors at meetings held in London for that purpose, and the dividend warrants in respect of certain registered shares were also issued in London.

Held, that the appellant company was a person residing in the United Kingdom and liable as such to be assessed under sect. 2 of the Income Tax Act 1853, sched. D.

CASE stated under the statute 43 & 44 Vict. c. 19, s. 59, by the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

At meetings of the commissioners held at the Guildhall in the City on the 9th May 1901, the 4th July, and the 11th July 1901, A. Goerz and Co. Limited (hereinafter termed the appellant company), of 20, Bishopsgate-street Within, in the City of London, appealed against an assessment made upon them in respect of their estimated profits as merchants and financiers from the 5th April 1899 to the 5th April 1900 of the sum of 75,000*l.* increased by the commissioners on the hearing of the appeals under the provisions of the Taxes Management Act, s. 57, sub-s. 8, to 142,429*l.*

The appellant company was registered as a joint stock company at Pretoria, in the South African Republic, on the 8th Dec. 1897, according to the laws then subsisting in the Republic.

The appellant company is not and has never been registered in the United Kingdom as a joint stock company.

The articles of association, which were passed at Johannesburg on the 7th Dec. 1897, provided (inter alia) as follows:

NAME AND CONSTITUTION.

3. The head office of the company shall be either in London or elsewhere on the continent of Europe, or in Johannesburg in the South African Republic, or at such other place elsewhere with such branch or branches in this Republic and elsewhere as the directors may from time to time determine.

OBJECTS.

5. The objects for which the company is established are: (a) To adopt a certain agreement bearing date the 7th Dec. 1897, entered into between Ad. Goerz and Co. (a company limited under German law) of the first part, the Deutsche Bank of Berlin of the second part, and Henry Charles Hall, acting as trustees for this company, of the third part, and to carry the same into effect, with full power, nevertheless, from time to time to agree to any modification thereof. Such adoption shall take place at the first meeting of the board of directors. (b) To carry on the business of merchants, dealers in shares, stocks, and other securities, financial and general agents, miners and mining in all its branches, and generally to carry on and undertake any business transaction or operation commonly carried on by capitalists, promoters, and financiers, contractors for public and other works or agents. (c) To acquire by purchase, concession, lease, or otherwise, any lands, farms, houses, buildings, mining properties, mines, claims, water rights, and other rights, properties, and privileges of every description, and also any metals, minerals, quartz, ores, machinery, plant, utensils, patents for inventions, licences to use patents of every kind, real and personal property of every description in South Africa and elsewhere, and to deal with, develop, and turn the same or any of them into account. (d) To form, promote, reconstruct, reform, subsidise, and assist any companies, syndicates, or partnerships of all kinds. (e) To sell the whole or any part of the assets, property, and undertaking of this company for such consideration as the company may deem fit, and in particular for money and shares or stock of any company having objects similar or partly similar to the objects of this company, or for the debentures of any company, or wholly for such shares or stock, also to let, mortgage, abandon, dispose of, or otherwise deal with all or any part of this company's property and rights, and also to reconstruct, reformat, reform, or otherwise deal with the company with all or any of its rights, property, and assets. (f) To lend, invest, put out at interest, or otherwise deal with any funds and moneys belonging to the company, and to discount and deal in bills of exchange, promissory notes, and other securities. (g) To promote and aid in the promotion of measures for the protection of the mining industry in the South African Republic and elsewhere, and to promote or oppose legislative and other measures affecting the said industry.

CAPITAL AND SHARES.

6. The present nominal capital of the company is the sum of one million and fifteen thousand pounds (1,015,000*l.*) sterling, divided into 15,000 founders' shares of 1*l.* each, and into one million ordinary shares of 1*l.* each, which shares are in respect of dividends and otherwise subject to the provisions of the agreement referred to in sub-sect. (a) of sect. 5 of these presents.

GENERAL MEETINGS.

40. All meetings of the company shall, until otherwise determined by the company or by the board, be held in Johannesburg.

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DIRECTORS.

64. The directors shall not be less than five or more than fifteen, and they may reside in the South African Republic, in Europe, or elsewhere.

PROCEEDINGS OF DIRECTORS.

81. The directors may meet together at such place or places in Berlin, London, Johannesburg, Paris, or elsewhere, for the dispatch of business, adjourn or otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. Until otherwise determined two directors shall be a quorum. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote.

POWERS OF DIRECTORS.

87. The management of the business, and the control of the company shall be vested in the directors, who may exercise all such powers and do all such acts and things as are not hereby or by statute expressly required or directed to be done by the company in general meeting, but subject, nevertheless, to such management not being inconsistent with these presents nor to any resolution passed at any meeting of shareholders, but no resolution passed by the company shall invalidate any prior act of the directors which would have been valid if such resolution had not been passed.

88. Without prejudice to the general powers conferred upon the directors by these presents it is hereby declared that the directors shall be intrusted with the following powers: (c) To sell, let, or otherwise dispose of, deal with, or abandon the whole or any part or parts of the company's present or future property upon such terms and conditions as they may think fit, but the directors shall have no power to liquidate the company, except with the consent of the shareholders as mentioned in sect. 113 hereof. (e) To borrow and raise money and to execute in the name of the company any mortgages, deeds of sale, leases, debentures, and other contracts, and also to make, draw, accept and indorse, bills, notes, and other instruments, provided that the amount borrowed shall not exceed in the aggregate one half of the amount of the issued capital of the company for the time being. (d) To appoint any person to accept and hold in trust property belonging to the company. Also to appoint a managing director or directors, and to remunerate such person or managing director either by way of salary or commission, or participation in profits, or by any or all of these as they think fit. (h) To delegate all or any of their powers to any person or persons and to appoint attorneys and agents to represent the company.

LOCAL BOARD.

89. The directors may from time to time provide for the management and transaction of the affairs of the company, either in the South African Republic or elsewhere, in such manner as they think fit, and the provisions contained in the next three following clauses shall be without prejudice to the general powers conferred by this clause.

90. The directors may from time to time and at any time establish any local board or agency for managing any of the affairs of the company, and may appoint any person to be members of such local board, or managers, or agents, and may fix their remuneration. And the directors may from time to time and at any time delegate to any person so appointed any of the powers, authorities, and discretions for the time being vested in directors other than their power to make calls, and may authorise the members for the time being of any such local board or any of them to fill up any vacancies therein, and to act notwithstanding vacancies, and any such appointment or delegation may be made on such terms and subject to such conditions as the directors

think fit, and the directors may at any time remove any person so appointed, and may annul or vary any such delegation.

91. The directors may at any time and from time to time by power of attorney appoint any person or persons to be the attorney or attorneys of the company for such purposes and with such powers, authorities, and discretions (not exceeding those vested in or exercisable by the directors under these presents), and for such period and subject to such conditions as the directors may from time to time think fit, and any such appointment may (if the directors think fit) be made in favour of the members or any of the members of any local board established as aforesaid in favour of any company or of the members, directors, nominees, or managers of any company or firm or otherwise, in favour of any fluctuating body of persons, whether nominated directly or indirectly by the directors, and any such power of attorney may contain such powers for the protection or convenience of persons dealing with such attorney as the directors may think fit.

92. Any such delegates or attorneys as aforesaid may be authorised by the directors to sub-delegate all or any of the powers, authorities, and discretions for the time being vested in them.

93. Without prejudice to the powers of the directors to grant additional powers to a local board or boards as from time to time appointed and from time to time to vary such powers, any local board if and when appointed by the directors shall be intrusted with the following powers—namely: (a) To open a branch office of the company in such towns or cities as the directors may appoint, and to pay the rent and other expenses connected therewith. (b) To engage and at the discretion of the local board to remove or suspend a local secretary, clerks, or servants in connection with the business of the company, and to determine their duties and pay their salaries as fixed by the directors of the company. (c) To obtain an official recognition and quotation of the shares, stocks, and debentures of the company upon any stock or share exchange or bourse in Europe, and to subscribe and to comply with rules and regulations of every such exchange and bourse, and to make all such payments as may from time to time be due and payable to any such exchange and bourse.

ACCOUNTS.

101. The directors shall cause true account to be kept of the money received and expended by the company, and the matters in respect of which such receipts and expenditure take place, and of the assets, credits, and liabilities of the company.

102. Such of the books of account as shall be in the South African Republic shall be kept at the office of the company in the said Republic or such other place or places as the directors may think fit. All other books of the company shall be kept at such offices and places either in this Republic, England, or elsewhere in Europe as the board may from time to time determine.

The business of the appellant company consists in the purchase and prospecting of lands with mining possibilities or the obtaining of options over such lands with a view to the formation and flotation of companies for the purpose of working the same, the formation and flotation of such subsidiary companies either alone or in participation with others, and the making of a market for the shares of these subsidiary companies in London, Berlin, Paris, and Johannesburg, and dealing in and selling such shares, also in dealing in the other shares, principally of South African companies, including the sale and realisation of the shares and other assets taken over under the agreement of the 7th Dec. 1897.

The working capital of the subsidiary companies is provided by the appellant company, either alone

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or in conjunction with others as a syndicate in agreed proportions, and the nominal share capital of the subsidiary companies is then either taken as a whole by the appellant company or distributed *pro rata* among the members of the syndicate. The working capital of the subsidiary companies is almost invariably subscribed by the syndicate to enable them to be floated fully equipped. The syndicates usually consisted of capitalists and financiers carrying on business in Europe and South Africa. No prospectuses are issued by the subsidiary companies, but a market is made and the shares then distributed and dealt in and gradually realised on the stock markets of London, Paris, Berlin, and Johannesburg. The profits made by the appellant company were directly obtained by the sale and realisation of shares in such subsidiary companies as aforesaid, but additional profit was made on ordinary purchases and sales of shares in various other companies.

Some additional sources of profit by the appellant company were interest on money lent, dividends on shares held by it, agency fees from other companies, and the like. The bulk of the company's capital is invested in the South African shares and in mining properties in the Witwatersrand district in South Africa.

The company's interests outside of South Africa only stand at about 50,000*l.*, and half of this amount is invested in the United States and Mexico, and the other half in shares in various mining companies in Western Australia and Chili. An option for the purchase and working of certain lands and interests in British India was acquired, but not during the year of assessment, but after prospecting the lands and interests the option and operations were not carried out.

On the 31st Dec. 1899 the value of the shares and debentures in other companies held by the appellant company, as shown by the balance-sheet, amounted to the sum of 719,365*l.* 9*s.* 8*d.* The value of claim holdings, participations, and interests amounted to 224,395*l.* 15*s.* 1*d.* The value of the temporary advances against securities (including shares and stocks taken in) amounted to the sum of 144,520*l.* 6*s.* 3*d.* Such advances were made in London to the extent of 37,900*l.* 9*s.* 3*d.* and in Paris to the extent of 106,619*l.* 17*s.* The amount of cash on deposit accounts and in hand amounted to 326,884*l.* 19*s.* 4*d.* and was held in London to the extent of 171,819*l.* 11*s.* 10*d.*, in Berlin to the extent of 123,301*l.* 19*s.* 3*d.*, in Paris to the extent of 9205*l.* 19*s.* 1*d.*, and in Johannesburg to the extent of 22,557*l.* 9*s.* 2*d.*

During 1898, 1899, 1900, with regard to the purchase and sale of shares by the company, 56½ per cent. of the purchases of shares and 49 per cent. of the sale of shares were carried out in London.

The profits, the subject of the assessment, were made in the mode described above.

The transaction of the affairs of the appellant company was effected in the manner shown, as follows:

With regard to the general meetings of the company, the first general meeting of the appellant company was held on the 28th of April 1899 at the company's office in Johannesburg in the above-named Republic and was adjourned to the 5th May 1899 when the same was held at the office. From that date till the end of the year of

assessment no further general meeting was held by reason of the war with the United Kingdom which was declared by the South African Republic on the 11th Oct. 1899.

The second general meeting was held in London on the 26th June 1901, subsequent to the year of assessment.

With regard to the directors' meetings, the directors' minute-book kept in London, which is the only minute-book of the company, was produced in evidence, and contained a great number of items and minutes of resolutions relating to the affairs of the company which, in the opinion of the commissioners, showed that almost every transaction of importance affecting the management, control, and direction of the company was dealt with, controlled, and decided at the board meetings of the directors in London.

A considerable number of important matters requiring local management and dealing were carried out by the managing director in Johannesburg on behalf of the board, under powers delegated by the board in London, and under powers of attorney sealed and executed by the board in London, and in some instances such matters, though reported to the managing director in London, were not formally reported to the board until settled. A copy of the minutes of the board meetings in London was forwarded after each meeting to Johannesburg. No other minute-book was kept at Johannesburg.

With regard to the staff, the chairman and three directors of the company were resident in in England, four directors (all of whom were permanent directors nominated by the vendors in accordance with clause 66 of the articles of association) were resident in Germany, one director was resident in Paris, and one director in the South African Republic. The directors resident in Germany and Paris attended the board meetings in London.

In the year 1899, being the year of assessment, there was one managing director of the company—viz., Mr. Adolf Goerz—who was resident in London. Mr. Brakhan was appointed managing director in Johannesburg, and was there resident. The board appointed also two managers in London, two in Johannesburg, one in Paris, and one in Berlin. The Johannesburg staff of the company numbered twenty-five, including surveyors and engineers, and received salaries, commissions, and bonuses totalling 24,322*l.* for the year. The London staff numbered twenty-six, and received salaries, commissions, and bonuses totalling 17,374*l.* for the year. The Berlin staff numbered thirteen, and received salaries, commissions, and bonuses totalling 4609*l.* for the year; and the Paris staff numbered nine, and received salaries, commissions, and bonuses totalling 4643*l.* for the year.

All the meetings of the directors took place (with the exception hereinafter mentioned) at the company's offices at 20, Bishopsgate-street Within, in the city of London, where the London staff was located.

Since the 1st Feb. 1898 the directors have held monthly meetings in London, and not elsewhere, with the exception of one meeting held at Paris on the 4th April 1901, which was expressed in the minute-book to be called in furtherance of "the idea being to hold meetings on the Continent instead of in London, say once a year.

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The accounts of the Johannesburg, Paris, and Berlin offices are brought to London, where the full balance-sheet and profit and loss accounts of the company are made up and audited, and where alone the full accounts of the company are kept. In the preparation of accounts it has been usual for the Berlin office accounts to be audited in Berlin, and for these and the Paris office accounts to be brought to London. The Johannesburg office accounts are audited in Johannesburg, and the whole of these branch accounts are then incorporated in the full accounts, which are made up and audited in London.

The complete accounts with a directors' report are prepared, approved, and passed in London by the board of directors in the first instance in English, and are then translated into French and German for the use of the shareholders resident in those countries.

The dividends were fixed and authorised by resolutions of the directors at meetings held in London for that purpose, and the dividend warrants in respect of 801,524 registered shares were also issued by them from London. The coupons on bearer shares were paid in 1899 as to 52,294 shares in Berlin and Paris, and as to 11,182 shares in London, and eventually were brought to account in London.

The appellants contended that the appellant company should be assessed as a person not resident within the United Kingdom drawing profit from a trade exercised in the United Kingdom, and on such profits only. They cited and relied on the decision of *Attorney-General v. Alexander* (31 L. T. Rep. 694; L. Rep. 10 Ex. 20).

The commissioners having heard counsel for the appellants and the surveyor of taxes for the Inland Revenue, and having taken the evidence of various witnesses, found as facts (1) that the trade and business of the company constituted one trade or business, and was carried on and exercised by the appellants within the United Kingdom at their London office; (2) that the head and seat and directing power of affairs of the appellant company were at the office of the company in London, from whence the whole of the operations of the company both in the United Kingdom and elsewhere were controlled and directed.

The commissioners having considered the cases of *Cesena Sulphur Company Limited v. Nicholson* and *Calcutta Jute Mills Company Limited v. Nicholson* (35 L. T. Rep. 275; 1 Ex. Div. 428; 1 Tax Cas. 83), *San Paulo Brazilian Railway Company Limited v. Carter* (73 L. T. Rep. 538; (1896) A. C. 31; 3 Tax Cas. 407), *Attorney-General v. Alexander* (31 L. T. Rep. 694; L. Rep. 10 Ex. 20), and other cases determined that the appellant company was a person residing in the United Kingdom, and liable as such to be assessed under sect. 2 of the Income Tax Act 1853, sched. D, first paragraph, on the whole of the annual profits or gains arising or accruing from any trade, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and accordingly confirmed the assessment in the sum of 142,429l.

The commissioners on the hearing of the 11th July 1901, when giving their decision on the appeal and communicating their intention to confirm the assessment, stated that they found

as facts that the trade, employment, and vocation of the company were carried on and exercised by the appellants within the United Kingdom at their London office, and that the head and seat and directing power of the affairs of the appellant company were at the office of the company in London.

The appellants on the settlement of the draft case raised the objection that the words so used were not identical with the formal statement of the findings set forth above, and that the commissioners had no power to alter, vary, or enlarge such words above set out.

With regard to this objection the commissioners reported that the statement was merely a concise statement of their decision, and was not intended to be a full, complete, or formal statement, or to embody the whole of their findings, whether of law or of fact, nor was it intended that other material findings or statements should be excluded from the final written statement of this case. The statements set out above are correct, and, after hearing the evidence, the commissioners found the facts, and arrived at the determination set out therein. They were of opinion that they had power to amplify and explain in this special case the basis on which they confirmed the assessment; but to avoid the expense and delay consequent on a reference back by the High Court the commissioners reported the objection so raised on behalf of the appellants and their explanation by way of reply thereto.

By the Income Tax Act 1853 (16 & 17 Vict. c. 34), s. 2:

For the purpose of classifying and distinguishing the several properties, profits, and gains, for and in respect of which the said duties are by this Act granted, and for the purposes of the provisions for assessing, raising, levying, and collecting such duties respectively, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains respectively described or comprised in the several schedules contained in this Act, and marked respectively (A), (B), (C), (D), and (E), and to be charged under such respective schedules; (that is to say) Schedule D. For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every 20s. share of the annual amount of such profits and gains. And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation, exercised within the United Kingdom, and to be charged for every 20s. share of the annual amount of such profits and gains. And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act, and to be charged for every 20s. share of the annual amount thereof.

Asquith, K.C., Scrutton, K.C. and J. R. Atkin for the appellants.—It has never been held that a company incorporated and registered in a foreign country is resident in the United Kingdom. In all the cases on this point which have been before

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the courts the company has either been found to be English or residing in England. They referred to

Cesena Sulphur Company Limited v. Nicholson,
35 L. T. Rep. 275; 1 Ex. Div. 428;
San Paulo Brazilian Railway Company v. Carter,
73 L. T. 538; (1896) A. C. 31.

In both those cases the company was registered in England, and so clearly was resident here, and the same fact—namely, that they were registered in England—is to be found in *Frank Jones Brewing Company v. Apthorpe* (15 Times L. Rep. 113; 4 Tax Cas. 6), *United States Brewing Company v. Apthorpe* (4 Tax Cas. 17), *St. Louis Breweries Limited v. Apthorpe* (79 L. T. Rep. 551), and *Apthorpe v. Peter Schoenhofen Brewing Company* (80 L. T. Rep. 395). When one looks at the whole of the facts in the case it is clear that this company resides, if a company can be said to reside anywhere, in South Africa, for it was incorporated there, it was registered there, the general meetings of the company are to be held there, and for the purpose of the Income Tax Acts, which is the only purpose to be considered in this case, it resides there. A company may reside in one place and carry on business elsewhere. That this is so is plain from sched. D to the Income Tax Act 1853. They referred to

Attorney-General v. Alexander, 31 L. T. Rep. 694;
L. Rep. 10 Ex. 20;

Wingate v. Inland Revenue, 24 Ct. Sess. Cas. 4th
Rettie, 939; 34 So. L. Rep. 699; 3 Tax Cas.
569.

The *Attorney-General* (Sir R. Finlay, K.C.) and *Rowlatt* for the respondent.—Incorporation and registration does not determine the residence of a company. A company resides where its place of business is, and here its head office was in London; the board meetings of the directors are held in London, and the accounts are kept and the dividends declared also in London. In fact, the whole of the control of the business is in London. How, then, can it be said that the company does not carry on business here? And if it carries on business, not merely by means of agents, as in *Wingate v. Inland Revenue* (sup.), then it is "residing in the United Kingdom" within sched. D. of the Income Tax Act 1853. In *Attorney-General v. Alexander* (sup.) the company could not have any residence outside the Ottoman Empire, because it was prevented by its charter, but here by the articles of association the head office, which may be said to be the business of the company, may be in London, or in any other place that the directors may determine.

Asquith, K.C. in reply.

CHANNELL, J.—In this case I have come to a conclusion as to what my judgment should be, and although, as it is not very likely that the case will stop here and be in any sense an authority, I might desire to put my judgment into writing so that the words in which I express it might possibly be more accurate, yet I think I can explain my views sufficiently for the assistance of the parties to enable them to go anywhere else they desire to go to, and also to comply with the requirements of the Court of Appeal, who I believe desire to have a judge express some sort of reasons, good or bad, for his judgment rather than pass it on to them simply for them to

decide. I think it convenient first to dispose of the sort of preliminary point that is raised by the last paragraph of the case, as to the mode in which the case is stated, and as to how far the findings which appear to be there are to be taken as binding. The tax commissioners announced their decision, and made a short statement of some findings. Upon that they were asked to state a case and agreed to do so, and then, when the case was stated, there were further findings in it which the appellants objected to, and eventually this paragraph comes into the case, as the commissioners state, in order to avoid the possibility of it going back to be restated. The objection is that the matters that appear in the case are different from those that were stated at the time. I think that is what the objections must come to. I think, on the one hand, it is clear that when any tribunal which gives a decision to which there can be an appeal states its determination and agrees to state the case, it cannot afterwards revise its decision and improve upon it, but I think it may amplify it and explain it more clearly, and that is what the commissioners say they have done. As to some of the objections, I think it is quite clear that is what they have done. For instance, they gave their decision in this way: The commissioners on "communicating their intention to confirm the assessment stated that they found as facts that the trade, employment, and vocation of the company were carried on and exercised by the appellants within the United Kingdom at their London office, and that the head and seat and directing powers of the affairs of the appellant company were at the office of the company in London." That has been amplified into: "That the trade and business of the company constituted one trade and business and was carried on by the appellants." It is only adding "one business," and they call it before "the business." I do not think it is more than an amplification, and no court would send the case back to be restated by striking out that allegation that it is "one business." It is quite consistent with what they found and stated they found. If it had been inconsistent with their findings it would have been different. The other paragraph is nearly the same: "That the head and seat and directing power of the affairs of the appellant company were at the office of the company in London, from whence the whole of the operations of the company, both in the United Kingdom and elsewhere, were controlled and directed." It is that latter part which does not appear in terms in the other statement of their finding, although they had "directing power" in. There is very little difference there except different words. The other and more important thing is that they have now distinctly found, and it does not appear upon their original statement whether they intended to find it or not, that the appellant company was a person residing in the United Kingdom. That is the real importance of any alteration or any addition to the finding that there is. But, in the first place, I think they must have intended to find that, although they did not state it, because these others are the grounds on which they found it, and in the next place, that is the point upon which the case is stated, and this finding of residence, having regard to the fact

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that it is the finding of residence of a company, is certainly a mixed question of law and fact, and not a mere finding of fact by which I should be bound. I consider that what I have to do mainly in this case is to consider that finding, if necessary review it and set it aside, and, consequently, that it is not a matter upon which the case could be sent back to the tax commissioners to restate as far as regards the facts. It is a point of law open upon the case, and it ought to be open upon the case, and is open. If it had been stated as a fact, so as to conclude it as a matter of fact, then I think that somehow or other the case would require altering, but as it is put in a shape in which it can be reviewed, I think there can be no real objection taken to the case. That disposes of what I call the subsidiary point, and leaves one free to go to what is really the main point in the case. I know there are, in certain views of the case, two points, but the main point in the case is as to whether or not this company is residing in the United Kingdom for the purpose of this taxation. Mr. Asquith began by calling my attention to a dictum of James, L.J. in *Ex parte Breull* (43 L. T. Rep. 580; 16 Ch. Div. 484), in which he pointed out that a word like "residence" might be, and probably is, used in different statutes with different meanings, and, for instance, that which constitutes residence for registration purposes, or anything of that sort, might not necessarily amount to residence for the purposes of this taxation. I entirely accept that, and I think that makes it desirable to look at the Act that I have to construe, and to consider what the meaning of introducing "residence in the United Kingdom" is. What it says in the first clause is that a person residing in the United Kingdom is to be taxed for income tax to the whole extent of the profits and gains arising from any profession, trade, employment, or vocation exercised by him, whether carried on in the United Kingdom or elsewhere. That is, whether in the United Kingdom entirely, whether elsewhere entirely, or whether partly in one and partly in the other, and he is to be taxed to the entire extent of his profit in reference to that. On the other hand, if he is not resident within the United Kingdom, then he is only to be taxed to the extent, speaking roughly, and not going into it very accurately, of the trade that he does in the United Kingdom. That seems to mean this, that if a person is resident in the United Kingdom he takes the benefit of the Government of the country, the security to his life and limb, and liberty, and the opportunity of doing his business in the way in which the Government of a settled and civilised country enables it to be done. He is taking the benefit of the Government of the country, and accordingly he has to pay, like other inhabitants in the country, his full share towards the expenses of that Government in taxation. On the other hand, if he is not resident in the country, and does not thereby get the full benefit of the expenses incurred in governing the country, then he does not pay taxes in reference to his full income, like the other inhabitants of the country, but he only pays a sort of toll, as it were, in respect of the use which he does make of the Government of the country by coming into this country and doing business here. That appears to be the policy of the Act, and it assists one possibly in understanding how to apply it in

the case of individuals, but unfortunately I do not think it throws a very great deal of light upon the question that I have to deal with, as to how to decide the question whether or not there is residence within the United Kingdom of this company, this artificial entity, as it has been called, which has not a physical existence in one sense, and does not dwell in the ordinary sense in any particular place. It does not assist one much, but it does assist a little, I think. The company does get the benefit of the Government of the country, and the rights which it gets by that registration. It gets a certain amount of benefit, and that, of course, is the main consideration which the appellants here rely on to say that their real residence is in the South African Republic, where the company was registered, and not in this country. On the other hand, the company, by having its head office here, and doing its business here through the board of directors here, does also get a certain amount of benefit from the law and order of the country and from the Government of the country, and therefore, so far as those considerations apply, there is something to be said in reference to either view, and I do not think it helps one a great deal, but I think it does help just a little. As I have said, the contentions on the one side and the other mainly are as to the effect of the registration and incorporation of the company in the one country and as to it having its head office in the other. Each side, perhaps, has got a little more. Mr. Asquith relied upon the company meetings, or company meeting, at any rate, having been at Johannesburg, and the Attorney-General probably had some other things besides the head office, but those are the main things on each side. To a certain extent it is a question which of them prevails, but I think it is rather more accurate to say that the question is whether the registration and incorporation of the company in the foreign country prevents it being resident in this country because it is possible—I do not decide one way or the other—that the company may have two residences. I think it is certainly possible that an individual may have two residences; for many purposes undoubtedly he may have, and I think for tax purposes he may have. In most cases, or the great majority of cases, it is provided for in the incidence of taxation. In reference to this I see, in a book handed up to me, there has been at least one Scotch case which says that a man may have residence within the United Kingdom notwithstanding he has a residence elsewhere. That is a "man," and I should think the condition of things might be the same in reference to a company. So that the most accurate way, I think, of stating the question before me is whether the incorporation of this company in a foreign country prevents it having a residence in this country, and whether, if it does not so prevent it, it is shown in this case that it has a residence in this country. The difficulty is created, as I said just now, by the fact that I have to deal with an artificial entity which in the ordinary sense has not got a residence at all, and what is one to attribute to it as being its residence. Such a body for some purposes must have what I call a local habitation. It must be communicated with. People must know where to find it who want

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to deal with it. So that certainly in some sense it must have a local habitation. Now, our law provides in one sense for that, because it provides that every company, at any rate under what are called "The Companies Acts," must have a registered office, and the registered office is the place where anybody who wants officially as it were to find the company has to go. So far as I can judge, the law of the South African Republic did not provide necessarily that there should be a registered office. We discussed yesterday what the presumptions of English law as to foreign law were, and it may be, if I had nothing whatever to guide me, I ought to presume that the law of the Transvaal, as our law, did require that every company should register its office. But, even if that is so, it is a very artificial presumption, and I think I have enough before me to show that the law of the Transvaal does not do so, because I think that the articles of association registered under that law must be presumed to be in accordance with it, and they do not state any registered office, but they do something that is somewhat like it. They deal with the head office of the company, and in art. 119, which corresponds to what would be found in all articles of association in an English company, there is this statement that services of all summonses, processes, notices, and the like, are to be valid and effectual if served at the head office of the company. That seems to me to be equivalent to saying—and there are other clauses, I think, also in the articles which show it—that if you want to go and find this company, the place where to go and find them is the head office of the company—which is very much the same as saying that, so far as the company has a local habitation, it is at the head office. The head office is to be subject to the determination of the directors from time to time. Then there is the clause as to meetings of the company or the directors, but the clause as to that is a little different from the clause as to the head office, because the meetings of the company are to be in Johannesburg until otherwise determined. The clause as to the head office of the company is that it is to be "either in London or elsewhere on the Continent of Europe, or in Johannesburg in the South African Republic, or at such other place elsewhere with such branch or branches in this Republic and elsewhere as the directors may from time to time determine." It puts London first there. I do not know that there is any great difference in putting London first; but the fact is that these directors did immediately commence to meet in London and continued to meet in London, with a few exceptions, when they occasionally accommodated their foreign colleagues by going over once a year to Paris. Still they habitually met here. There is a finding which I think I must take as a finding of fact as to the head office; but whether that is a finding of fact that I am bound by or not, it seems to me that the evidence fully supports it and that the office which they had here undoubtedly was, as between that office and any other office that the company had, in point of fact the head office. The result therefore, so far as the document which is the constitution of this company tells us anything about it—so far as it tells people who want to find this company where they can find it, what it tells them is that they

can find it in London because it tells them that they can find it at the head office and that head office is assumed to be probably London and is in fact London. It is subject to the determination of the directors, and the directors have either determined that it should not be elsewhere or determined that it should be here by acting on it and it being here. So far as the constitution of the company indicates where its locality is to be, what it indicates is that its locality, if the head office is its locality, is to be in such place as the directors determine, and they have determined London. Then it undoubtedly contemplates that it should be a company which does business nearly all over the world—certainly in the principal countries of the world. It is contemplated that it should have a head office. It is contemplated that it should have branches. Although one would think from its being incorporated in the South African Republic that most likely that would be its principal place of business, it most distinctly contemplates that its principal place of business may be elsewhere and that in the Republic there may be nothing but a branch. That is the light which the document forming the constitution of the company throws upon it. Then, so far as regards the facts they are in accordance with that. The directors of the company in the general control of its affairs undoubtedly proceeded from the board in London. They gave powers of attorney to the people who were to do the business for them in the Transvaal, and although I do not know that it is clear that they exactly treated their business in the Transvaal as a branch only, still, they very nearly did that, and they treated it rather as a branch than as the main business. Those are the facts. Under those circumstances, does the fact that it was incorporated in the South African Republic show that its residence was necessarily there and not elsewhere? The next thing, I think, is to come to the light that the cases throw upon it. It is the fact that there is no case reported, that I am aware of, in which a company incorporated in one country has been held to be registered in another. But there is also no case, as far as I know, which has come before the courts in reference to these matters in which the company has been incorporated in one country and has not had its head office in the same country. In the *Ottoman Bank* case—*Attorney-General v. Alexander* (31 L. T. Rep. 694; L. Rep. 10 Ex. 20)—it is quite clear that the head office in fact was in Constantinople. It is equally clear that the constitution of the company provided that it should be there, and consequently you have there the two matters as to which I have apparently to decide here which is the overriding one on the same side. Then the Scotch case of the Norwegian company—*Wingate v. Inland Revenue* (24 Ct. Sess. Cas. 4th Rettie, 939; 34 Sc. L. Rep. 699; 3 Tax Cas. 569)—is possibly the nearest to this, but there the company, being registered in Norway, had also, as was stated in the case, its registered office in Norway, and it in fact did all its company business as distinguished from its trading business in Norway, and although it did its main business—namely, its trading business—in Glasgow, it did it there by an agent; a firm who were agents for the company did the business, and it happened that they did the entire profitable business, but they did it as agents of the company, and not as

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officers of the company. All companies must in one sense act by agents. The directors, the secretary, and everybody are agents of the company, but I think there is a distinction between persons who are officers of the company who directly represent the company and firms who are mere agents for the company, and when one considers within which branch of this Income Tax Act a particular company is to fall, that question of agency seems to me to be of some importance. The 1st clause, "resident in this country," contemplates the resident carrying on his business, whether here or elsewhere, but carrying it on himself. The 2nd clause, referring to a person not resident in this country, but, nevertheless, carrying on a profession, trade, or employment in this country, obviously refers mainly to cases where the resident abroad carries on something in this country by agents in this country, and the Tax Acts provide—it is, I think, the 41st section of the Act of 1842—for the agents being accountable in cases coming within the 2nd clause of this sched. D. There you go to the agent, and in this case of *Wingate v. Inland Revenue* what was held by the court was that the Glasgow agents were accountable, but accountable for the whole profits of the Norwegian company, because the whole profits of the Norwegian company were made in Glasgow. It was the agent that was in Glasgow, not the company. Now, the question is, which is it that is here? What is here is the head office, the directing power, persons who are in one sense agents of the company—directors and managing director, and so on—but those persons, the agents of the company, are also officers of the company. They are the company, so far as the company has a corporal existence other than the corporation by name after being incorporated. It seems to me that what is here is the company, and not merely agents of the company. Therefore, I think that the true inference is that here the company must be held to be resident in this country within the 1st clause. I think that the considerations which go to make up that which is the local habitation of such a body as this, go more to show, if it was necessary to decide between Johannesburg and London, that this company is in fact to be found in London, and not to be found in Johannesburg; but there are agents to be found in Johannesburg and the company is to be found here, whereas in the Scotch case it was the company to be found in Norway and the agents of the company to be found in Glasgow. I think I must come to that conclusion. As I have said, I do not think the cases throw a very great deal of light upon it, because of the fact that in all the cases the considerations which in this case go on the one side or on the other in those cases all went on the one side, and therefore they do not really help us. I cannot help thinking that, although the company, by getting itself registered in the South African Republic, undoubtedly desired, so far as the company before its incorporation would have any desire, to take advantage of the law of the Transvaal, yet, having regard to the constitution of the company as framed there, I cannot see that it was prevented, after it had become incorporated, from residing elsewhere, either instead of the Transvaal or as well as the Transvaal. I think it did, or the promoters of it did intend to get the benefit of

the Transvaal law, and did get it. There can be no doubt about that. So far as the company could be either, it was intended that this company should be a "Boer" and not an "Uitlander"—there is no doubt about that; and I have no doubt it got very substantial advantages in its operations by being incorporated in that country instead of being incorporated here; but it was incorporated in that country for that purpose. It shows, in my view, that it was intended from the first that its operations might be mainly out of the Transvaal, and that, in fact, they were mainly outside the Transvaal. I think that upon the various dicta—they are nothing more—it must be taken to be resident within this country. On those grounds I think I must affirm the decision. Under these circumstances I do not think it is necessary for me to say anything about the second point, which it was agreed in certain events I should deal with, but deal with separately. I do not think it is necessary. I only want just to say that in approaching that point it confirms my view upon the other point, because I think if one were to deal with this case under the 2nd clause as a non-resident company, what one would look to would be to find who you were to make answerable for such part of the business as was done within this country. If you were to look for the agents of this non-resident company, and when you went to look for them, you would find not them, because you would find the company itself. That goes to confirm the view that the case really comes within the first clause, and not within the second. On those grounds I think my judgment must be for the Crown.

Judgment accordingly.

Solicitors: *Herbert Smith, Goss, King, and Gregory*; *The Solicitor of Inland Revenue.*

Tuesday, May 3.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

HAGMAIER (app.) v. OVERSEERS OF WILLESSEN (resps.). (a)

Justices—Summary jurisdiction—Lists of persons liable to serve on juries—Justices sitting in "special petty sessions" for revising jury lists—Power of justices to state special case—Juries Act 1825 (6 Geo. 4, c. 50), s. 10—Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), s. 33—Interpretation Act 1889 (52 & 53 Vict. c. 63), s. 13, sub-ss. 11, 12.

Justices sitting in special petty sessions under sect. 10 of the Juries Act 1825, for revising the lists of jurors, are not a court of summary jurisdiction within the meaning of sect. 13, sub-sect. 11, of the Interpretation Act 1889, and have no power under sect. 33 of the Summary Jurisdiction Act 1879, or otherwise, to state a special case for the opinion of the High Court, upon the application of a person aggrieved by their decision.

CASE stated upon the application of the appellant by four justices of the peace sitting and acting on the 24th Sept. 1903, under the Juries Act 1825 (6 Geo. 4, c. 50), s. 10, at a special petty sessions in and for the division of Willesden

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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in the county of Middlesex, for the purpose of reviewing and allowing the lists of persons liable to serve on juries for that county, subject first to the decision of the court as to whether under the circumstances the justices sitting as a special petty sessions under sect. 10 of the Juries Act 1825 had the power to state a special case.

On the date aforesaid the respondents, the overseers of the parish of Willesden, submitted to the justices a list of persons in the parish for settlement and approval as being liable to serve on juries in and for the county of Middlesex, and therein was included the name of the appellant, with his description as veterinary surgeon.

The appellant, who was a member of the Royal College of Veterinary Surgeons, and who was carrying on practice as a veterinary surgeon in the parish, appeared by his solicitor and claimed exemption from service on juries on the ground that, being on the register of veterinary surgeons, he was a registered medical practitioner within the meaning of the Juries Act 1870, and was thereby exempt from service on juries.

The justices, after hearing the parties, found and determined that the appellant was not a "registered medical practitioner" within the meaning of the words in the Juries Act 1870, being of opinion that those words meant a person registered under the provisions of the Medical Act 1858, and defined by sect. 34 of that Act, and they declined to remove the appellant's name from the list.

They then stated this case for the opinion of the court as to whether the appellant was exempt from service on juries by virtue of his being in actual practice as a veterinary surgeon, but subject to the preliminary question as to whether they had power to state a case.

The following were the reasons which in the opinion of the justices rendered it doubtful whether they had power to state a special case upon this matter: (a) there was no hearing of an "information or complaint," as required by sect. 2 of 20 & 21 Vict. c. 43 (the Summary Jurisdiction Act 1857); (b) they were not a "court of summary jurisdiction," as provided by sect. 33 of 42 & 43 Vict. c. 49 (the Summary Jurisdiction Act 1879).

The Interpretation Act 1889 (52 & 53 Vict. c. 63) enacts as follows:

Sect. 13 (11). The expression "court of summary jurisdiction" shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law.

The justices conceived that this definition of "court of summary jurisdiction" must be governed by the words "to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts"; otherwise the words at the end of the section would mean justices acting in any capacity whatever.

Their jurisdiction was not given to them in this matter under the Summary Jurisdiction Acts, but under special Acts relating to jurors. They could only sit in special sessions within the last seven days of September (6 Geo. 4, c. 50, s. 10), with an

adjournment thereof within another seven days (25 & 26 Vict. c. 107, the Juries Act 1862, s. 8).

It was held that justices sitting in special sessions for licensing matters were not a court of summary jurisdiction (*Boulter v. Kent Justices*, 77 L. T. Rep. 288; (1897) A. C. 556); nor were justices sitting at special sessions for granting game licences (*Reg. v. Bird and others*, 62 J. P. 309).

For these reasons the justices considered it doubtful whether, sitting as they were at a special petty sessions under sect. 10 of the Juries Act 1825 for reviewing the lists of jurors, they had power to state a special case for the opinion of the court, and they submitted that point for the decision of the court.

Sect. 8 of the Juries Act 1825 (6 Geo. 4, c. 50) provides that churchwardens and overseers are to make out lists of every man residing within their parishes or townships who shall be qualified and liable to serve on juries; and sect. 9 provides that, having made out the list, the churchwardens and overseers shall fix a true copy of the same upon the church doors, with a notice subjoined thereto stating that all objections to the list will be heard by the justices at a time and place to be mentioned in such notice, and shall sign their names at the foot of such copy.

Sect. 10 provides:

The justices of the peace in every division in England and Wales shall hold a special petty sessions for the purposes herein mentioned, within the last seven days of September in every year, on some day and at some place, of which notice shall be given by their clerk before the 20th day of August next preceding, to the churchwardens and overseers of every parish, and to the overseers of every township, within such division, and the churchwardens and overseers of each parish, and the overseers of each township, shall then and there produce the list of men qualified and liable to serve on juries as aforesaid, within their respective parishes or townships, by them prepared and made out, as hereinbefore directed, and shall answer upon oath such questions touching the same as shall be put to them, or any of them, by the justices then present; and if any man, not qualified and liable to serve on juries as aforesaid, is inserted in any such list, it shall be lawful for the said justices, upon satisfaction from the oath of the party complaining, or other proof, or upon their own knowledge, that he is not qualified and liable to serve on juries, to strike his name out of such list, and also to strike thereout the names of men disabled by lunacy or imbecility of mind, or by deafness, blindness, or other permanent infirmity of body, from serving on juries; and it shall also be lawful for such justices to insert in such list the name of any man omitted therein, and likewise to reform any errors or omissions which shall appear to them to have been committed in respect to the name, place of abode, title, quality, calling, business, or the nature of the qualification of any man included in any such list. . . ."

Morton Smith for the appellant.—The preliminary question is whether the justices had power to state a special case. The justices were sitting as a court of summary jurisdiction, and they had power to state a case. They were sitting and acting under the provisions of sect. 10 of the Juries Act 1825 as a "special petty sessions" for revising the jurors' lists; and they were therefore a court of summary jurisdiction within the meaning of the Summary Jurisdiction Acts. A "special petty sessions" is simply a "petty

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sessions" held for special purposes. The old term for a court of summary jurisdiction was a petty sessions court, and every petty sessions court is a court of summary jurisdiction. At the time this Act was passed in the reign of George IV. justices sitting together were called justices sitting in special petty sessions, and the court was called a special petty sessions court or a petty sessions court. Now they are called a court of summary jurisdiction, but the former was the title they held until the Summary Jurisdiction Acts clothed them with the name of "court of summary jurisdiction." The definition of "court of summary jurisdiction" is given in sect. 13, sub-sect. 11, of the Interpretation Act 1889 (52 & 53 Vict. c. 63), and that definition includes any justice or justices, whether acting under the Summary Jurisdiction Acts, "or under any other Act," or by virtue of his commission, or under the common law. That definition could scarcely be more comprehensive, and it shows that justices may be a court of summary jurisdiction, not only when they are acting under the Summary Jurisdiction Acts, but also when they are acting "under any other Act." Here the justices were sitting and acting under some other Act—namely, the Juries Act 1825. The definition of "court of summary jurisdiction" in force before the Interpretation Act of 1889 was given in sect. 50 of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), which was: "Any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is or are authorised to act under, the Summary Jurisdiction Acts or any of such Acts. This definition was added to by the Interpretation Act 1889, by adding on the words: "Or under any other Act, or by virtue of his commission, or under the common law"; showing the clear intention of the Legislature that a court of summary jurisdiction should not be confined to justices acting under the Summary Jurisdiction Acts, but should be extended so as to include justices acting under any other Act whatever. In the next sub-section (sub-sect. 12 of sect. 13 of the Act of 1889) "petty sessional court" is defined as meaning "a court of summary jurisdiction, consisting of two or more justices when sitting in a petty sessional court-house," and so forth. The justices in the present case come within that definition and are a court of summary jurisdiction, and being a court of summary jurisdiction, they have power to state a case, under sect. 33 of the Summary Jurisdiction Act 1879, on the application of any person aggrieved by their order. The two cases which seem to have been decided against the appellant's contention are *Boulter v. Kent Justices* (77 L. T. Rep. 288; (1897) A. C. 556) and *Reg. v. Bird and others* (62 J. P. 309). Those cases are distinguishable. In *Boulter v. Kent Justices* (*ubi sup.*) the justices were sitting at the general annual licensing meeting, and the decision of the House of Lords was that they were not a court at all, and therefore not a court of summary jurisdiction, and Lord Halsbury, L.C. in his judgment says that they were not a court at all. That case, therefore, is distinguishable on the ground that the justices were sitting as an administrative body, and were not a court. The next time the question arose whether justices were a court of summary jurisdiction was in

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Reg. v. Bird and others (*ubi sup.*), in which an application was made to licensing justices for a licence to deal in game, and the same answer applies. The only other case in which the question seems to have arisen as to the power to state a case is *Re Bethel* (63 J. P. 453), which was an application made to justices by William Bethel for an order under sect. 299 of the Lunacy Act 1890. There it was held that the justices were not a court of summary jurisdiction, and therefore had no power to state a case. The answer to that case is that the application under that section was one that could be made to one justice sitting alone, and one justice sitting alone cannot be a court of summary jurisdiction except specially made so by statute, as in the case of metropolitan police and stipendiary magistrates. [Lord ALVERSTONE, C.J.—That case seems to show that the court, to state a case under these sections, must be sitting as a court of summary jurisdiction, and therefore, if you can show that this court was sitting as a court of summary jurisdiction, it carries you a long way.] Under this sub-section of the Act of 1889, justices sitting to hear an application for the issue of a distress warrant for nonpayment of poor rates have power to state a case:

Fourth City Mutual Building Society v. Churchwardens, &c., of East Ham, (1892) 1 Q. B. 661.

[Lord ALVERSTONE, C.J.—The point is whether the justices were acting as a court of summary jurisdiction in settling this list. I presume there is no other power given to them to state a case except that given in sect. 33 of the Summary Jurisdiction Act 1879.] That seems to be so, as under sect. 2 of the Summary Jurisdiction Act 1857 (20 & 21 Vict. c. 43) a case could only be stated on the hearing of an "information or complaint," and the present case would not come within those words. Unless by case stated there can be no appeal, as by the Juries Act 1870, s. 12, the list, when revised by the justices, is made absolutely conclusive.

The respondents did not appear.

Lord ALVERSTONE, C.J.—The point raised by the magistrates as to their power to state a special case, which counsel has argued before us, is certainly one of difficulty; and, if our decision that there is no power to state a special case should be found to be right, it is desirable that the matter should be made plain, if it is thought advisable that there should be means of questioning the discretion or the exercise of jurisdiction of the magistrates under sect. 10 of the Juries Act 1825. The power to state a special case is now given by the words of sect. 33 of the Summary Jurisdiction Act 1879: "Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case." Those words are wider than the words of the former section giving power to state a case—namely, sect. 2 of the Summary Jurisdiction Act 1857. They are a re-enactment of the provisions of the old Summary Jurisdiction Act of 1857, with the subsequent Act, and they contain the words, not "information or complaint," as the earlier Act did, but "conviction, order, determination, or other proceeding of a court of sum-

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HAGMAIER (app.) v. OVERSEERS OF WILLESDEN (resps.).

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mary jurisdiction"; but they still leave untouched the question of whether or not the body that is acting, or is called upon to state a special case, is a court of summary jurisdiction. Then, in order to make out that this court was a court of summary jurisdiction, counsel has called our attention to sub-sect. 11 of sect. 13 of the Interpretation Act of 1889, which says: "The expression 'court of summary jurisdiction' shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts"—it is not, of course, contended that the justices in the present case fulfil or come within those words—"whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law." In my opinion, that latter part of the section practically implies that the justices are acting as a court of summary jurisdiction; that they are, so to speak, exercising the same sort of jurisdiction as is intended to be exercised by a court of summary jurisdiction, though that jurisdiction may be given by some other Act, or by common law, and not directly under the Summary Jurisdiction Acts or any of them. The question which we have to consider is whether or not, when the justices sit in special petty sessions under sect. 10 of the Juries Act of 1825, for revising the lists of persons liable to serve on juries, that is a court of summary jurisdiction within the meaning of the Interpretation Act 1889, s. 13, sub-s. 11. I do not think that the question can be answered simply by the suggestion that they are a court of petty sessions. I quite agree that courts of petty sessions may have powers under the Summary Jurisdiction Acts and may act under the Summary Jurisdiction Acts; but it seems to me that courts of petty sessions were perfectly well known at the time of the Interpretation Act of 1889; and the next sub-section of sect. 13 of the Interpretation Act deals with petty sessional courts and refers to them as being courts of summary jurisdiction consisting of two or more justices, when sitting in a petty sessional court-house, and so on. If it had been intended in the Summary Jurisdiction Act of 1879 to say that all magistrates sitting in petty sessions should have power to state a case, one would not expect to find the language "Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction." Looking at the purview of sect. 10 of the Juries Act of 1825, and the object of that section, it seems to me, speaking for myself, that the class or sort of jurisdiction there exercised is not such jurisdiction as would be rightly described as being under the Summary Jurisdiction Acts, or under other Acts giving what I may call similar powers to the Summary Jurisdiction Acts. The overseers have to sign the list (sect. 9). They have to justify it by being present there and answering any questions upon it, and, if any man not qualified and liable to serve is inserted in such list, "it shall be lawful for the justices, upon satisfaction from the oath of the party complaining, or other proof, or upon their own knowledge, that he is not qualified and liable to serve on juries, to strike his name out of such list," and

so on. It seems to me that that is a class of jurisdiction which can scarcely be aptly described as the proceeding of a court of summary jurisdiction. It is like a public authority who know the neighbourhood, who are allowed to act upon their own knowledge, and who really are not bound and fettered by the ordinary rules of evidence, as, of course, they ought not to be when they are proceeding to revise this list, as to which they have a good deal of personal knowledge; and I cannot help thinking that it would require clearer words than are contained even in the extended provisions of the Summary Jurisdiction Act of 1879 to justify us in coming to the conclusion that these justices constituted that class of court which has power to state a special case. In my opinion, therefore, the objection raised by the magistrates—namely, that they had no power to state a special case—is one to which we must give effect, and consequently we ought not to entertain this special case.

WILLS, J.—I am of the same opinion. I only wish to add to what my Lord has said by pointing out that the expression "petty sessional court," as used in sub-sect. 12 of sect. 13 of the Interpretation Act 1889, is a comparatively modern phrase. I doubt exceedingly whether it could even be found in any Act passed more than fifty years ago, although there are expressions to be found in Acts passed long before—for instance, in this Juries Act—namely, "petty sessions," or "special petty sessions." I cannot help thinking that if the Interpretation Act, properly considered, had intended to include those expressions as well as "petty sessional court," it would have said so. I think there is a reason for the distinction—that is to say, "petty sessional court" being a phrase of modern origin, in all probability it will be found that it never is used unless the tribunal or meeting of justices, to which it is applied, was really exercising judicial powers and judicial functions. Therefore there may be a very good reason for saying that, wherever the term "petty sessional court" is used, the phrase shall mean and shall involve that the tribunal is a court of summary jurisdiction, whereas it would be a very considerable extension of the existing notions upon the subject to bring all meetings of justices in petty sessions into the same category and say that they are to be looked upon as having the same power as a court of summary jurisdiction, which would, of course, give them the power of stating a case. If the Juries Act of 1825, instead of saying "special petty sessions," had said that they shall hold a "petty sessional court," there would have been no doubt that the Interpretation Act of 1889 would have made them a court of summary jurisdiction. I am quite confident that in the year 1825, when the Juries Act was passed, the phraseology "petty sessional court" was never used.

KENNEDY, J.—I concur in the judgment of my Lord.

Judgment accordingly. Case struck out.
Solicitor for the appellant, *George Thatcher.*

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House of Lords.

May 15, 18, 19, 22, Dec. 8, 10, 11, 1903, and
May 2, 1904.

(Before the LORD CHANCELLOR (Halsbury),
Lords MACNAGHTEN, DAVEY, ROBERTSON,
and LINDLEY.) (a)

COLLS v. HOME AND COLONIAL STORES
LIMITED. (b)

ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

Easement—Ancient lights—Substantial interference—Sufficient light for ordinary purposes—Prescription Act 1832 (2 & 3 Will. 4, c. 71).

Where the light which the respondents had enjoyed for more than twenty years had been interfered with by the appellant's building, but not to such an extent as to make it insufficient for ordinary purposes of inhabitancy or business:

Held (reversing the judgment of the court below), that they were not entitled to relief.

The Prescription Act has not in any way altered the pre-existing law in that respect.

APPEAL from a judgment of the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.J.J.), reported 85 L. T. Rep. 701; (1902) 1 Ch. 302, who had reversed a decision of Joyce, J., reported 83 L. T. Rep. 759.

The respondents brought the action against the appellant claiming an injunction to restrain him from erecting in Worship-street, in the city of London, any building which would darken, injure, or obstruct any ancient lights of the plaintiffs.

The question in dispute related to the windows on the ground-floor of the plaintiffs' building, which was used as a clerk's office, and had, as was admitted, enjoyed light for more than twenty years. The room was an unusually long one, with no window at the back, and in ordinary weather it was usually necessary to use artificial light at the back part of the room. It was admitted that the erection of the defendant's building would diminish the amount of light previously enjoyed, but it was proved that it would leave sufficient light for all ordinary business purposes.

Joyce, J. gave judgment for the defendant, but his judgment was reversed as above mentioned.

The defendant appealed to the House of Lords.

May 15, 18, 19, and 22, 1903.—The case was argued before the Lord Chancellor (Halsbury), Lords Shand, Davey, and Robertson.

R. Bray, K.C., O. L. Clare, and Nutter appeared for the appellant, and contended that the owner of the dominant tenement was only entitled to a reasonable amount of light for ordinary purposes, and the burden of proof of damage is on him. The evidence here is that there was sufficient light for an ordinary room, but not for this particular room, which was unusually large and deep. The Prescription Act 1832 (2 & 3 Will. 4, c. 71) has not affected the extent of the right, but only the method of establishing it. See the series of authorities beginning with

Aldred's case, 9 Rep. 57a, in 1611;

Fishmongers' Company v. East India Company, 1 Dickens, 163;

(a) Lord Shand was present during the argument, but died before their Lordships gave judgment.

(b) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Lewis v. Price, 2 Wms. Saunders, 504n, edit. 1871;

Attorney-General v. Nichol, 16 Ves. 338;

Moore v. Rawson, 3 B. & C. 332;

Back v. Stacey, 2 C. & P. 465; 31 R. R. 679;

Clarks v. Clark, 13 L. T. Rep. 482; L. Rep. 1 Ch. 16;

Robson v. Whittingham, 13 L. T. Rep. 730; L. Rep. 1 Ch. 442;

Dent v. Auction Mart Company, 14 L. T. Rep. 827; L. Rep. 2 Eq. 238;

Lanfranchi v. Mackenzie, 16 L. T. Rep. 114; L. Rep. 4 Eq. 421;

Adamson v. Gatty, W. N. 1870, 184;

Kelk v. Pearson, 24 L. T. Rep. 890; L. Rep. 6 Ch. 809;

Dickinson v. Harbottle, 28 L. T. Rep. 186;

City of London Brewery Company v. Tennant, 29 L. T. Rep. 755; L. Rep. 9 Ch. 212;

Leech v. Schweder, 39 L. T. Rep. 586; L. Rep. 9 Ch. 463, which followed *Kelk v. Pearson*;

Aynsley v. Glover, 31 L. T. Rep. 219; L. Rep. 18 Eq. 544; affirmed on appeal, 32 L. T. Rep. 345; L. Rep. 10 Ch. 283;

Moore v. Hall, 38 L. T. Rep. 419; 3 Q. B. Div. 178;

Scott v. Pape, 54 L. T. Rep. 399; 31 Ch. Div. 554.

The respondents rely on *Yates v. Jack* (14 L. T. Rep. 151; L. Rep. 1 Ch. 295), but the headnote goes further than the facts of the case warrant. See also *Martin v. Goble* (1 Camp. 320), which unfavourably commented on the later cases. In this case Joyce, J. followed the decision of Wright, J. in *Warren v. Brown* (83 L. T. Rep. 318; (1900) 2 Q. B. 722), which we say is correct, and the Court of Appeal, in reversing his decision, followed their own decision in *Warren v. Brown* (85 L. T. Rep. 444; (1902) 1 K. B. 15).

Haldane, K.C., T. R. Hughes, K.C., and Vernon, for the respondents, argued that the decision in *Warren v. Brown* shows that a right to an extraordinary amount of light may be acquired by prescription, but this case does not go as far as that case. See also

Tapling v. Jones, 12 L. T. Rep. 555; 11 H. L. C. 290;

Aynsley v. Glover (ubi sup.), and the judgment of Bowen, L.J. in *Scott v. Pape* (ubi sup.).

Lanfranchi v. Mackenzie (ubi sup.) is criticised by Kekewich, J. in *Attorney-General v. Queen Anne Garden and Mansions Company* (60 L. T. Rep. 759). [Lord ROBERTSON.—In Roman law a negative servitude cannot be acquired by prescription.] The effect of the Prescription Act is to alter the basis of the right in English law. See also

Mackey v. Scottish Widows' Life Assurance Society, 11 Ir. Rep. Eq. 541.

[The LORD CHANCELLOR.—That seems rather a surprising decision.] The effect of the authorities is that if a building, apart from its use for any special purpose, has enjoyed light for twenty years, and a neighbour's building operations cause a material diminution of that light, which makes the building less habitable, or more uncomfortable, or less fitted for ordinary business purposes, then there is a right of action; and the evidence shows that to be the case in this case.

Bray, K.C. was heard in reply.

Dec. 8, 10, and 11, 1903.—Their Lordships required further argument, and the case was

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reargued before the same noble and learned Lords, with the addition of Lords Macnaghten and Lindley.

B. Bray, K.C. (O. L. Clare and Nutter with him) appeared for the appellant.

Haldane, K.C. (T. R. Hughes, K.C. and Vernon with him) for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 2, 1904.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case, which was tried before Joyce, J., the learned judge gave judgment for the defendants upon the ground that the plaintiff had failed to prove any actionable wrong, although he found that the erection of the buildings of which the plaintiff complained had appreciably diminished the light which the plaintiff had previously enjoyed. The Court of Appeal, as I understand their judgment, thought this wrong, and ordered a mandatory injunction to pull the premises down so as to restore all the light that had been previously enjoyed. If this principle should be sanctioned by your Lordships, it would be for the first time that, in this House at all events, such a principle had been determined. I do not deny that authorities may be found for it, some of which have been cited at the Bar; but I do not think that the exact question which is now in debate has ever been brought before this House until now. The question may be very simply stated thus: After an enjoyment of light for twenty years, or if the question arose before the Act for such a period as would justify the presumption of a lost grant, would the owner of the tenement in respect of which such enjoyment had been possessed be entitled to all the light without any diminution whatsoever at the end of such a period? If that were the law it would be very far-reaching in its consequences, and the application of it to its strict logical conclusion would render it almost impossible for towns to grow, and would formidably restrict the rights of people to utilise their own land. Strictly applied it would undoubtedly prevent many buildings which have hitherto been admitted to be too far removed from others to be actionable; but if the broad proposition which underlies the judgment of the Court of Appeal be true, it is not a question of 45 degrees, but any appreciable diminution of light which has been enjoyed (that is to say, has existed uninterruptedly) for twenty years constitutes a right of action, and gives a right to the proprietor of a tenement that has had this enjoyment to prevent his neighbour from building on his own land. I do not think that this is the law. The argument seems to me to rest upon a false analogy, as though the access to and enjoyment of light constituted a sort of proprietary right in the light itself. Light, like air, is the common property of all, or, to speak more accurately, it is the common right of all to enjoy it, but it is the exclusive property of none. If the same proposition against which I am protesting could be maintained in respect of air, the progressive building of any town would be impossible. The access of air is undoubtedly interfered with by the buildings which are being built every day round London. The difference between the town and

country is very appreciable to the dweller in cities when he goes to the open country or to the top of a mountain or even a small hill in the country, but would the possessor for twenty years of a house on the edge of a town be at liberty to restrain his neighbour from building near him because he had enjoyed the free access of air without buildings near him for twenty years? No doubt this is an extreme case, but it is one of the extreme cases which tries the principle. The truth is that, though there were objections to asking a jury whether the enjoyment *talis qualis* was such that they might presume a lost grant when nobody supposed that such a grant was ever really made, yet it gave the opportunity of considering what was the extent of the supposed grant, and if anything so extreme as I have just supposed were claimed no jurymen in their senses would have affirmed such a grant. The statute upon which reliance is placed in this case illustrates the danger of attempting to put a principle of law into the iron framework of a statute. The statute literally construed by the use of the words "the light" would mean all the light which for twenty years has existed in the surroundings of the tenement which has enjoyed it; yet, singularly enough, there has been a complete uniformity of decision upon the construction of the statute that it has made no difference in the right conferred, but is only concerned with the mode of proof; but though I quite concur with this construction, which is supported by an overwhelming body of authority, yet I cannot but think that the language of the statute has led to some of the decisions which your Lordships are now called upon to review. Certainly, in the older decisions which have been brought to your Lordships' notice in Mr. Bray's very able argument the proposition which, as I have said, underlies the judgment now under appeal finds no place. Lord Hardwicke, long ago in 1752 (*Fishmongers' Company v. East India Company*, 1 Dickens, 163), dealing with this very question, the alleged obstruction to light, laid down what I believe to be law to-day. "It is not sufficient," he said, "to say that it will alter the plaintiff's light, for then no vacant piece of ground could be built on in the city, and here there will be 17ft. distance, and the law says it must be so near as to be a nuisance." Lord Cranworth, in *Clarke v. Clark* (13 L. T. Rep. 482; L. Rep. 1 Ch. 16), adopted the same test, and his observation, though a subsequent decision of his seemed to throw doubt upon it, has received the assent of some of the most learned judges who ever sat upon the English Bench. I think that the whole subject has been confused by certain decisions which were dependent on the facts proved, and were incautiously reported as laying down principles of law, when they were, in my view, only intended to be findings of fact in that particular case. At all events, I am prepared to hold that the test given by Lord Hardwicke is the true one, and I do not think that a better example could be found than the present case to show to what extravagant results the other theory leads. The owner of a tenement on one side of a street 40ft. wide seeks to restrain his opposite neighbour from erecting a house which, when erected, will not then be of the same height as the house belonging to the complaining neighbour, and the only plausible ground on which the complaint rests is that on the ground-floor he has a

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room not built in the ordinary way of rooms in an ordinary dwelling-house, but built so that one long room goes through the whole width of the house to a back wall and has no window at the back or sides, and was, therefore, at the back of it, too dark for some purposes without the use of artificial light even before the building on the other side of the street was erected. I think that no tribunal ought to find as a fact that the building is a nuisance; and altogether apart from the inappropriateness of the remedy by injunction, I am of opinion that the plaintiff has no cause of action against the defendant. The test of the right is, I think, whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as the question of the proximity of the building complained of. What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and whether in each case it amounts to a nuisance which will give a right of action. I have not thought it necessary to enter into a discussion of the authorities, because I think that it has been most carefully and accurately done by Wright, J. in *Warren v. Brown* (83 L. T. Rep. 313; (1900) 2 Q. B. 722). Of course, it must be taken that the foundation of this judgment rests upon the finding of fact by Joyce, J., that the buildings of the defendant had not so materially interfered with the light previously enjoyed by the plaintiff as to amount to a nuisance. It follows that, in my judgment, the case of *Warren v. Brown* was rightly decided by Wright, J., and ought to have been affirmed by the Court of Appeal. It was, however, reversed in accordance with the same views which guided that court in the case now under review. For the reasons which I have given I have to move your Lordships that the judgment of the Court of Appeal be reversed, and the judgment of Joyce, J. restored, and that the respondents do pay to the appellant the costs both here and below.

LORD MACNAGHTEN.—My Lords: The right of a person who is owner or occupier of a building with windows in it, privileged as ancient lights, in regard to the protection of the light coming to those windows is a purely legal right. It is an easement belonging to the class known as negative easements. It is nothing more or less than the right to prevent the owner or occupier of an adjoining tenement from building or placing on his own land anything which has the effect of illegally obstructing or obscuring the light of the dominant tenement. This right in early times was vindicated by an action on the case for nuisance, in which damages might be recovered and judgment had for removal or abatement of the nuisance: (*Baten's case*, 9 Rep. 53). In *Aldred's case* (9 Rep. 57a) Lord Coke says that an action lies for nuisance done to light as one of the three essential requisites of habitation. "An action lies," he says, "for hindrance of the light, for the

ancient form of the action was significant, *sc.*—*quod messuagium horridâ tenebritate obscuravit.*" It was not every diminution of light that would support such an action. The form of the action itself shows that. In later times when an action for the protection of ancient lights came to be regarded rather as an action for disturbance of an easement than an action grounded on nuisance—as an action to prevent the infringement of a right rather than an action to redress a wrong—the necessity of showing the gravity of the injury complained of was not so obviously apparent. Still the principle was the same, and it must always be the same. "It is not sufficient," as Lord Hardwicke observed in *Fishmongers' Company v. East India Company*, "to say it will alter the plaintiff's lights. . . . The law says it must be so near as to be a nuisance": (1 Dickens, 163). Probably the most satisfactory statement of the rule to be applied in all cases of ancient lights is to be found in *Back v. Stacey* (2 C. & P. 465) and *Parker v. Smith* (5 C. & P. 438). *Back v. Stacey* was an issue directed by the Lord Chancellor to try two questions—(1) Whether the ancient lights of the plaintiff in his dwelling-house in Norwich had been "illegally" obstructed by a building of the defendant; and (2), if so, what damage the plaintiff had sustained in respect of the injury. So that if the jury had found that the obstruction complained of was an illegal obstruction the damages would have gone to the whole of the injury and not merely to the loss sustained up to the date of the writ. It was contended there that as it was evident that the quantity of light previously enjoyed had been diminished the plaintiff was at any rate entitled to a verdict on the first issue, any obstruction of ancient lights being illegal. But according to the report, "Best, C.J. told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone. It was not sufficient, to constitute an illegal obstruction, that the plaintiff had in fact less light than before, nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action and sustain the issue there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done. His Lordship added that it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises." *Back v. Stacey* was determined in 1826. *Parker v. Smith* was heard during the sittings after Michaelmas Term 1832. It is, I think, the earliest reported case dealing with the question of light after the passing of the Prescription Act, which came into operation on the first day of Michaelmas Term 1832. It was tried before Tindal, C.J. The marginal note states, accurately I think, the effect of the decision in these words: "That diminution of light and air which the law recognises as the ground of an action against a party who builds near another's premises is such as really

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makes them to a sensible degree less fit for the purposes of business or occupation." It does not seem to have been suggested either by the counsel or by the judge that the Prescription Act had made the slightest alteration in the nature of the right to light or the principle on which the question of an alleged infringement of that right ought to be determined. To these two cases I would only add the case of *Wells v. Ody* (7 C. & P. 410), before Parke, B. in 1836. In his charge to the jury the learned judge said that he entirely adopted the law as laid down by Tindal, C.J. in *Parker v. Smith*. And then, after reading a passage from *Parker v. Smith*, he concluded his address to the jury by saying: "The question, therefore, which I shall leave to you is whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises and make them less fit for occupation." So much for the right at law. Courts of equity had no original jurisdiction in the matter. Their province was simply to grant an injunction in aid of the legal right where there was danger of irreparable mischief or where an injunction was required to prevent multiplicity of actions. Under Lord Cairns' Act (21 & 22 Vict. c. 27), the court was empowered, in all cases in which it had jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, to award damages to the party injured, either in addition to or in substitution for such injunction. The Act commonly known as Sir John Rolt's Act (25 & 26 Vict. c. 42) provided that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery was sought, whether the title to such relief or remedy was or was not incident to or dependent upon a legal right, every question of law or fact cognisable in a court of common law on the determination of which the title to such relief or remedy depended, should be determined by or before the same court. These Acts are superseded by the Judicature Act, and now the High Court has all the jurisdiction of the Court of Chancery and of the several courts of law. But still, so far as the right in question is a legal right, the court, in the exercise of its jurisdiction, must be guided by the principles established at law. And those principles, in my opinion, are still to be found most clearly and most concisely exhibited in the cases before Best, C.J. and Tindal, C.J. to which I have already referred. Although the question thus stated appears tolerably simple, it cannot be disputed that the reported cases on questions of light in recent times are not altogether consistent. There seem to be two divergent views, neither of which, I think, is absolutely accurate. The extreme view on one side is that the right which is acquired by so-called statutory prescription is a right to a continuance of the whole or substantially the whole quantity of light which has come to the windows during a period of twenty years. This view is conspicuous in *Calcraft v. Thompson* (15 W. R. 387, before Lord Chelmsford, L.C., and in *Scott v. Pape* (54 L. T. Rep. 399; 31 Ch. Div. 554), where Cotton, L.J. speaks of a "cone of light" and Bowen, L.J. of "a specific quantity of light" as the measure of the plaintiff's right. The extreme view on the other side is that the right is limited to a sufficient quantity of light

for ordinary purposes. I think that this divergence of view comes from a difference of opinion, consciously or unconsciously entertained, as to the meaning and effect of the provisions of the Prescription Act 1832 (2 & 3 Will. 4, c. 71), and if I am not mistaken it may be traced to certain expressions, not; perhaps sufficiently guarded, which are to be found in judgments delivered in this House in the case of *Tapling v. Jones* (12 L. T. Rep. 555; 11 H. L. 290). In that case Lord Westbury, Lord Cranworth, and Lord Chelmsford all assume that a period of twenty years' enjoyment of the access and use of light to a building creates an absolute and indefeasible right immediately on the expiration of the period of twenty years. No doubt sect. 3 says so in terms, but sect. 4 must be read in connection with sect. 3, and if the two sections are read together it will be seen that the period is not a period in gross, but a period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question. Unless and until the claim or matter is thus brought into question no absolute or indefeasible right can arise under the Act. There is what has been described as an inchoate right. The owner of the dominant tenement after twenty years' uninterrupted enjoyment is in a position to avail himself of the Act if his claim is brought into question. But in the meantime, however long the enjoyment may have been, his right is just the same, and the origin of his right is just the same as if the Act had never been passed. No title is as yet acquired under the Act. This point seems to have been much discussed shortly after the Act was passed. It was finally settled in a series of cases at common law, beginning, I think, with *Wright v. Williams* (1 M. & W. 77), and including *Richards v. Fry* (7 A. & E. 698) and *Cooper v. Hubback* (12 C. B. N. S. 456), in which there is an interesting controversy between Willes and Williams, J.J. on the question whether the twenty years' uninterrupted enjoyment under the 3rd section is the period of twenty years before any suit or action or twenty years before each suit or action in which the point may from time to time arise. The former construction, in which Erle, C.J. and Byles, J. concurred with Willes, J., eventually prevailed. The question is of little or no practical importance. But the construction established by the series of decisions to which I have referred, in accordance with the express language of the statute, goes, I think, a long way to show that the view taken by James and Mellish, L.J.J. and Lord Selborne as to the effect of the Act is absolutely correct, and that the qualification suggested by Bowen, L.J. in *Scott v. Pape* (*ubi sup.*) is not well founded. It certainly would be strange if the court had been compelled to hold that the Prescription Act confers upon a person whose right is questionable, at least to this extent that it has been actually brought into question, a higher and a larger right than that possessed by a person whose prescriptive claim to the enjoyment of light is so clear as to be beyond all question. I have, therefore, no doubt that the Prescription Act has not in the slightest degree altered the pre-existing law as to the nature and extent of the right of access of light or the principle on which it is to be determined in any particular case whether the right has been in-

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fringed. Now, if this be so, it seems to me, in accordance with the opinion expressed by James and Brett, L.JJ. in *Ecclesiastical Commissioners v. Kino* (42 L. T. Rep. 201; 14 Ch. Div. 213), and by many other judges, that the direction given by Best, C.J. in *Back v. Stacey* is the direction which a court exercising the functions of both judge and jury ought to keep steadily in view. Having come to this conclusion, I do not propose to trouble your Lordships with any comments upon the mass of cases by which in comparatively modern times the question has been elucidated or obscured. It is enough, I think, to refer to what was said in *Kelk v. Pearson* (*ubi sup.*), *City of London Brewery Company v. Tennant* (*ubi sup.*), and *Ecclesiastical Commissioners v. Kino* (*ubi sup.*). Speaking for myself I doubt very much whether it is a profitable task to re-try actions which depend simply on questions of fact or to review and endeavour to reconcile or distinguish a number of cases that naturally enough contain some statements which, taken by themselves and apart from the context, may seem to be contradictory, but must all proceed upon the same principle. It would only be another link in the embarrassing chain of authority, or, if I may venture to say so, only another handful of dust to be cast into one scale or the other when the claims of opposing litigants come to be weighed in the balance. I think there is much good sense in the observations of Brett, L.J. in *Ecclesiastical Commissioners v. Kino*: "To my mind," said his Lordship, "the taking some expression of a judge used in deciding a question of fact as to his own view of some one fact being material on a particular occasion as laying down a rule of conduct for other judges in considering a similar state of facts in another case is a false mode of treating authority. It appears to me that the view of a learned judge in a particular case as to the value of a particular piece of evidence is of no use to other judges who have to determine a similar question of fact in other cases where there may be many different circumstances to be taken into consideration." If I may trespass for a few minutes longer on your Lordships' attention, I would rather spend the time in making one or two practical suggestions. I do not put them forward as carrying any authority. But they may possibly be of use to those who have to try such questions as this, if and so far as they appear to be consistent with good sense. It will be observed that in *Back v. Stacey* the learned judge told the jury who had viewed the buildings that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient light had undergone. Now, a judge who exercises the functions of both judge and jury cannot be expected to view the buildings himself, even if he considers himself an expert in such matters. But I have often wondered why the court does not more frequently avail itself of the power of calling in a competent adviser to report to the court upon the question. There are plenty of experienced surveyors accustomed to deal with large properties in London who might be trusted to make a perfectly fair and impartial report, subject, of course, to examination in court if required. I am not in the least surprised that the plaintiffs in the

present case objected to a report from a disinterested surveyor; but, in my opinion, the court ought to have obtained such a report for its own guidance. Then, with regard to giving damages in addition to or substitution for an injunction—that, no doubt, is a delicate matter. It is a matter for the discretion of the court, and the discretion is a judicial discretion. It has been said that an injunction ought to be granted when substantial damages would be given at law. I have some difficulty in following out this rule. I observe that in some cases juries have been directed to give 1s. damages as a notice to the defendant to remove the obstruction complained of. And then, if the obstruction was not removed, in a subsequent action the damages were largely increased. In others a substantial sum has been awarded to be reduced to nominal damages on removal of the obstruction. But the recovery of damages, whatever the amount may be, indicates a violation of right, and in former times, unless there were something special in the case, would have entitled the plaintiff as of course to an injunction in equity. I rather doubt whether the amount of the damages which may be supposed to be recoverable at law affords a satisfactory test. In some cases, of course, an injunction is necessary—if, for instance, the injury cannot fairly be compensated by money; if the defendant has acted in a high-handed manner; if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money. Often a person who is engaged in a large building scheme has to pay money right and left in order to avoid litigation, which will put him to even greater expense by delaying his proceedings. As far as my own experience goes, there is quite as much oppression on the part of those who invoke the assistance of the court to protect some ancient lights which they have never before considered of any great value as there is on the part of those who are improving the neighbourhood by the erection of buildings that must necessarily to some extent interfere with the light of adjoining premises. The common form of injunction which has been in use since the case of *Yates v. Jack* (14 L. T. Rep. 151; L. Rep. 1 Ch. 295) is not, I think, altogether free from objection. I think it would be better that the order, when expressed in general terms, should restrain the defendant from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows, as the same existed previously to the taking down of the house which formerly stood on the site of the defendant's new buildings. If the action is brought to a hearing before the defendant's new buildings are completed, and there seems to be good ground for

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the plaintiff's apprehensions, an order, I think, might be conveniently made in that form, with costs up to the hearing, and liberty to the plaintiff within a fixed time after completion to apply for further relief by way of mandatory injunction or damages as he might be advised. With the present case I may deal very briefly. It cannot be disputed that some diminution of light is caused by the defendant's buildings, but such as it is I think it is exactly what Best, C.J. described as partial inconvenience rather than serious injury. I am satisfied that if the case had been tried at law before the question was so much embarrassed by the multiplicity of decisions no jury would have given any damages. Perhaps I ought to add a word about *Warren v. Brown* (*ubi sup.*), which is referred to in both the judgments below. I cannot say that that case is quite satisfactory to my mind either as dealt with in the court of first instance or in the Court of Appeal. In the court of first instance the learned judge who tried the case found a special verdict, which is not very easy to understand. The room in which the light has been materially diminished "in its present state is," he says, "better lighted than the ground-floor front rooms in many of the principal streets." I do not see what bearing that fact had on the question at issue. Then, instead of keeping in view the direction which judges over and over again have said ought to be kept in view, the learned judge embarks on an inquiry to determine which of two extreme views is correct. I doubt whether either the one or the other can be accepted as a safe guide without qualification. The Court of Appeal in their turn, instead of dealing with the facts of the case before them, combat a particular view, which rightly or wrongly they attribute to Wright, J. I do not think that *Warren v. Brown* helps one much. I think that the appeal ought to be allowed with costs here and below.

LORD DAVEY.—My Lords: I am of opinion that the finding of the learned judge who tried this action as to the facts of this case is borne out by the evidence, and I accept his finding as the basis of my judgment. After describing the dimensions of the room on the ground-floor of the plaintiffs' house, which is used as an office, Joyce, J. says: "It is, I think, the result of the evidence that it has ordinarily, if not always, been the practice to make use of the electric light in the back part of the room, and a most extraordinary amount of light from the windows in Worship-street would be required to enable the use of the electric light in the back part of the room to be dispensed with, even on ordinary days. Practically, I think, it may be taken that the use of electric or some other artificial light is now and must always be necessary in order to light the back part of the room, even in the daytime. There is no evidence to show that such an extraordinary amount of light has been enjoyed or acquired for anything like the period of twenty years." And the learned judge sums up his finding in these words: "Apart from any question with respect to the back part of the plaintiffs' premises and to the extraordinary light required if it be possible to be obtained so far back in the absence of illumination by electric light, the plaintiffs' premises would still, in my opinion, after the erection of the defendant's building be well and sufficiently lighted for all ordinary pur-

poses of occupancy as a place of business. For all ordinary days they have amply sufficient light—at present they have abundance of light, and are in my opinion unusually well lighted. If, as it is contended on behalf of the plaintiffs, they are entitled to the full amount of light now enjoyed without appreciable diminution, the plaintiffs would have a good cause of action upon the erection of the defendant's building, though it might perhaps be doubted whether the diminution that would be caused by the defendant's building if and when erected is sufficiently serious to entitle the plaintiffs to an injunction." On these findings the learned judge, following the judgment of Wright, J. in *Warren v. Brown* (83 L. T. Rep. 318; (1900) 2 Q. B. 722), which had not then been reversed by the Court of Appeal, held that the action failed and must be dismissed. The Court of Appeal reversed this judgment. The legal grounds of their judgment are contained in a single sentence. "If ancient lights," says Cozens-Hardy, L.J., "are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief." By the expression "interfered with substantially" I understand the Lord Justice to mean "if the amount of light having access to the premises by means of the ancient lights is substantially diminished." This proposition appears to me to assume or imply that the owner of the dominant tenement is entitled to have the full amount of light which has gained access to the tenement by the ancient windows during the previous twenty years maintained without substantial diminution. The "real damage" may be occasioned by an alteration in the internal structure of the dominant tenement which has been made within the period of twenty years or its adaptation within that period to some special use for which an extraordinary amount of light is required, but, nevertheless, if the proposition be sound, the owner or occupier of the tenement is entitled to be protected in the enjoyment of the light required for his altered buildings or for the special use to which he has put them. In perfect consistency with this view of the law, Vaughan Williams, L.J. expressed a doubt whether the rule of 45 degrees can any longer be applied even as a rough measure. The question for your Lordships to determine is whether this view of the law is correct—or, in other words, what is the true nature and extent in English law of the easement of light. It must be regretfully admitted that the numerous decisions on this subject in the courts are not easily reconcilable and are not infrequently contradictory. No judgment of this House has been referred to, except that in the case of *Tapling v. Jones* (12 L. T. Rep. 555; 11 H. L. 290), the decision in which does not directly affect the point now before your Lordships. I do not propose to travel through the long catena of authorities. They were copiously referred to at the Bar, and the principal cases are stated and carefully analysed in the judgment of Wright, J. in *Warren v. Brown*. You will find that in the earlier authorities the obscuration of light to a tenement having ancient lights is dealt with on the footing of a nuisance. In *Aldred's case* (9 Rep. 57a) the "hindrance of light" is treated in the same category as the nuisance of fouling the air by pigstyes. In *Fishmongers'*

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Company v. East India Company (1 Dickens, 163) Lord Hardwicke said: "As to the question whether the plaintiffs' messuage is an ancient building so as to entitle them to the right of the lights, and whether the plaintiffs' lights will be darkened, I will not determine it here, for if it clearly appeared that what the defendants are doing is what the law considers as a nuisance, I would put it in a way to be tried. . . . But I am of opinion that it is not a nuisance contrary to law, for it is not sufficient to say it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on the City, and here there will be 17ft. distance, and the law says it must be so near as to be a nuisance. It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant, but there is no reason to hinder a man from building on his own ground." Consistent with this view is the direction of Best, C.J. to the jury in the oft-quoted case of *Back v. Stacey* (*ubi sup.*). The learned judge said: "It is not sufficient to constitute an illegal obstruction that the plaintiff has in fact less light than before; nor that his warehouse, the part of his house principally affected, cannot be used for all the purposes to which it might otherwise be applied. In order to give a right of action there must be a substantial privation of light, sufficient to render the occupation uncomfortable, and to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he has formerly done." In *Clarke v. Clark* (13 L. T. Rep. 482; L. Rep. 1 Ch. 16) Lord Cranworth stated the question thus: "Whether the obstruction is such as to deprive the party of such a supply of light as he might reasonably calculate on enjoying." After saying that the plaintiffs' rooms were rendered less cheerful, he adds, "but I cannot think that this is such an obstruction of light as to amount to a nuisance. . . . What the plaintiff is bound to show is that the buildings cause such an obstruction of light as to interfere with the ordinary occupations of life." In *Robson v. Whittingham*, decided in the following year (13 L. T. Rep. 730; L. Rep. 1 Ch. 442), Knight Bruce and Turner, L.JJ. expressed themselves as entirely satisfied with Lord Cranworth's judgment, and Turner, L.J. accentuated his approval by saying that he thought this class of cases had been carried too far before the decision in *Clarke v. Clark* was pronounced. Nothing that I can say will add to the respect and authority which the opinions of those two learned and experienced judges must command with your Lordships. It has been thought that the 3rd section of the Prescription Act 1832 (2 & 3 Will. 4, c. 71) altered substantially the previously existing law as to ancient lights, and had the effect of conferring on the owner of the dominant tenement, by twenty years' enjoyment, an absolute and indefeasible right to the full amount of the light enjoyed during that period. And it must be admitted that the language of the section lends some plausibility to that opinion. It is, however, not consistent with the language of Lord Cranworth in *Clarke v. Clark*, and the point was expressly determined by James and Mellish, L.JJ. in *Kelk v. Pearson* (24 L. T. Rep. 390; L. Rep. 6 Ch. 809), decided by the year 1871. James, L.J. there says: "I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature

and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, or for the beneficial use and occupation of the house if it were a warehouse, shop, or other place of business. That was the extent of the easement, a right to prevent your neighbour from building on his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and convenient." The statute, in fact, has only altered the conditions or length of user by which the right may be acquired, but not the nature of the right. In the case of *City of London Brewery Company v. Tennant* (29 L. T. Rep. 755; L. Rep. 9 Ch. 212), Lord Selborne, L.C. expressed his complete adherence to the view of the law taken in the case of *Kelk v. Pearson*, correcting some impressions which might have arisen from the language used in some former cases by some learned judges. This doctrine, however, has not been unchallenged. In an Irish case of *Mackey v. Scottish Widows' Society* (Ir. Rep. 11 Eq. 541), decided in 1877, Christian, L.J. criticised in vigorous language the judgments of James, L.J. and Lord Selborne, and held that the right is to an average maximum of the light which nature has been shedding upon the window for twenty years before the defendant interrupted it. It is also difficult to reconcile the language used by Cotton and Bowen, L.JJ. in the case of *Scott v. Pope* (54 L. T. Rep. 399; 31 Ch. Div. 554), or the language of the Queen's Bench judges in *Moore v. Hall* (38 L. T. Rep. 419; 3 Q. B. Div. 178), with the decisions in *Kelk v. Pearson* and *City of London Brewery Company v. Tennant*, though the authority of those cases was not in terms questioned by them. I regard the decisions in *Kelk v. Pearson* and *City of London Brewery Company v. Tennant* as complementary to, and on the same lines with, Lord Cranworth's judgment in *Clarke v. Clark*. And, so regarding it, I entirely approve of it. Romer, L.J., however, in delivering the judgment of the court in *Warren v. Brown* (85 L. T. Rep. 444; (1902) 1 K. B. 15), seems to have taken a different view of the effect of *Kelk v. Pearson*. He says: "Since *Kelk v. Pearson* it is impossible to hold properly that the statutory right is not interfered with merely because after the interference the house comes up to a supposed standard as to what a house ordinarily requires by way of light for purposes of inhabitancy or business," and he quotes some words used by Mellish, L.J. I must remark that the particular point which was under discussion in *Warren v. Brown*, and in another form in the present case, was not before the court in *Kelk v. Pearson*. There was no question there of a claim for protection in the use of an extraordinary amount of light required for some special purpose, or required by some unusual peculiarity in the internal structure of the building. And I regard what was said by Mellish, L.J. as directed to the arguments addressed to the court in that case. According to any standard short of holding that the right is to all the light which has come through the window, the right to light has a ragged edge to it, and it is impossible to assert that any man has a right to a fixed amount of light ascertainable

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by metes and bounds. I do not think that Mellish, L.J. intended to differ from James, L.J., and in *City of London Brewery Company v. Tennant*, when James, L.J. repeated the substance of what he had said in the earlier case, Mellish, L.J., according to the report, contented himself with a simple concurrence. I must advert for a few moments to an impression which has been entertained by some distinguished judges, and was the subject of argument at the Bar, to the effect that within the space of a few months Lord Cranworth overruled himself. The judgment in *Clarke v. Clark* was delivered on the 25th Nov. 1865, and that in *Yates v. Jack* was delivered on the 24th March 1866. It was thought by Lord Chelmsford in *Catcraft v. Thompson* that the effect of the later case was to hold the dominant tenement entitled to the whole light that had previously been enjoyed, and Wood, V.C. in *Dent v. Auction Mart Company* (*ubi sup.*) to a certain extent shared the same impression. There is not a hint in the judgment in *Yates v. Jack* which indicates that Lord Cranworth thought that he was departing from the law as laid down in his earlier judgment. Both cases were decided and probably reported before *Robson v. Whittingham*, but the Lords Justices, as we have seen, adopted *Clarke v. Clark* as an authority which had their approval. And if the question at issue in *Yates v. Jack* be looked at, it will be seen that the argument to which Lord Cranworth's judgment was directed was that it was not necessary for the plaintiff to have the ordinary quantity of light because the business which he was carrying on required a diminished quantity only. That was the argument to which Lord Cranworth could not accede. So understood, and reading it by the light of *Clarke v. Clark*, I do not dissent from the language used by Lord Cranworth in *Yates v. Jack*: "The right conferred by the statute 2 & 3 Will. 4, c. 71, is an absolute indefeasible right to the enjoyment of the light without reference to the purposes for which it has been used." Your Lordships were told, and my experience at the Bar confirms it, that the order made in *Yates v. Jack* has been adopted as a common form of order in cases of this description. I think this unfortunate. It was a very proper order to make in that case, and in nineteen cases out of twenty, or perhaps ninety-nine out of 100, where no question arises such as that in the present case, it would be sufficient and appropriate. But it is an erroneous proceeding to deduce an absolute rule of law from the form of an order made in a particular case. In *Lanfranchi v. Mackenzie* (16 L. T. Rep. 114; L. Rep. 4 Eq. 421) Malins, V.C. held that a person could not, by using the dominant tenement for a period less than twenty years for some special purpose requiring an extraordinary amount of light in excess of what was required for the ordinary purposes of inhabitancy or business, entitle himself to protection for such extraordinary requirements, and thereby impose an additional restriction on his neighbour's use of his own land. In that case, as in the present one, it was not proved that the extraordinary amount of light had been used for twenty years. "No man," said the Vice-Chancellor, quoting the words of another judge, "can by any act of his own suddenly impose a new restriction on his neighbour." In their judgment in *Warren v. Brown* the Court

of Appeal dissented from this decision, and their opinion was the logical conclusion from the views which they expressed as to the nature and extent of the easement. I do not concur with the opinion of the Court of Appeal, for I think that the case of *Lanfranchi v. Mackenzie* was rightly decided. I agree with the Vice-Chancellor that it would be contrary to the principles of the law relating to easements that the burden on the servient tenement should be increased or varied from time to time at the will of the owner of the dominant tenement. The easement is for access of light to the building, and if the building retains its substantial identity, or if the ancient lights retain their substantial identity, it does not seem to me to depend on the use which is made of the chambers in it, or to be varied by any alteration which may be made in the internal structure of it. I do not propose to discuss at length the question how far a variation in a tenement will destroy an easement appurtenant to it. The law on that subject is as old as *Luttrell's* case (4 Rep. 86a). In the case of *Martin v. Goble* (1 Camp. 320) a malthouse had been converted into a workhouse, and it was held that the house was entitled to the degree of light necessary for a malthouse, not for a dwelling-house. That case has been the subject of much criticism, and I think that some judges have thought that the language of the Lord Chief Baron had a wider scope than it was intended to have. Following the suggestion of Wood, V.C., it may be supported on the ground that (to use the language of *Luttrell's* case) the alteration affected the substance and not only the quality of the tenement. But while agreeing that a person does not lose his easement by any change in the internal structure of his building or the use to which it is put, and that regard may be had not only to the present use, but also to any ordinary uses to which the tenement is adapted, I think it quite another question whether he is entitled to be protected at the expense of his neighbour in the enjoyment of the light for some special or extraordinary purpose. It is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient lights or by not using the full measure of light which the law permits. If that measure be by common law or by the statute, the whole amount of light which has had access to his windows, *cadit questio*. But if this view of the law be not accepted, you must introduce that "supposed standard" which Romer, L.J. repudiates. If the actual user is not the test where the use falls below the standard of what may reasonably be required for the ordinary uses of inhabitancy and business, why (it may be asked) should it be made a test where the use has been of a special or extraordinary character in excess of that standard. It does seem to me unreasonable to hold that where a man for his own convenience or profit converts two or more rooms of his house into one without making provision for lighting them, or converts a portion of his house into a photographic studio, or puts it to some similar purpose, he can suddenly call upon his neighbour to leave him a supply of light which is rendered necessary only by such alterations, and thereby impose what is in substance and in truth an increased burden on his neighbour. If the action be brought a month before the change it would be dismissed. If it be

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brought a month afterwards an injunction would be granted. I am of opinion that the courts have gone too far in this question of lights, and have imposed undue restrictions on persons in the exercise of their lawful right to build on their own land. In the second argument before your Lordships the leading counsel for the respondents contended that his clients had for more than twenty years enjoyed the access of light over the appellant's land to their ground-floor office in its present condition. I believe that all your Lordships are agreed with Joyce, J. that there is no proof to support such a contention. The fact relied on was not put in issue at the trial, and the evidence was not directed to it. If the plaintiffs had intended to claim and rely on a special easement of that description, it was for them to state their claim and prove the facts to support it. It is unnecessary to say, therefore, whether such a claim would be good in law. Malins, V.C. thought that it could be sustained if the special user was had with the knowledge of the owner of the servient tenement. I will only say that I see some difficulties in the way, and reserve my opinion. I must apologise for the length at which I have trespassed on your attention. According to both principle and authority, I am of opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, and that the question for what purpose he has thought fit to use that light, or the mode in which he finds it convenient to arrange the internal structure of his tenement, does not affect the question. The actual user will neither increase nor diminish the right. The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon, whether the obstruction complained of is a nuisance. I do not myself think that this rule is difficult of application in practice. In the majority of cases no such questions as those which have been raised in *Warren v. Brown* and the present case occur. The experience of surveyors who are practically conversant with this matter is entitled to great respect. As is stated in the evidence, they have adopted a working rule for the purpose of advising those who consult them and settling differences by negotiation. The rule of 45 degrees is not, of course, a rule of law, and is not applicable to every case. But I agree with Lord Selborne in *City of London Brewery Company v. Tennant* (*ubi sup.*) that it may properly be used as *prima facie* evidence. For these reasons I think that the appeal should be allowed, and the decree of Joyce, J. restored with costs here and below.

Lord ROBERTSON.—My Lords: I agree with the judgment of Lord Davey.

Lord LINDLEY.—My Lords: Joyce, J., who was asked to grant an injunction before the defendant's building had been erected, considered that, although the building would sensibly diminish the plaintiffs' light, the diminution would not materially affect their comfort or convenience, and would not be sufficient to entitle the plaintiffs to any relief, and he dismissed their action. The Court of Appeal, however, took a

different view, and granted a mandatory injunction ordering the defendant to pull down part of his building which had been completed after the injunction had been refused. Hence this appeal. The language of sect. 3 of the Prescription Act 1832 shows that in order to acquire a right to light there must be: First, access and use of light, not access alone. Access here is understood to refer to free passage of light over the servient tenement: (see per Fry, L.J. in *Scott v. Pape*, *ubi sup.*, and per Kay, J. in *Cooper v. Straker*, 59 L. T. Rep. 849; 40 Ch. Div. 21). Secondly, such access and use must be to and for some dwelling-house, workshop, or other building (as to which see *Harris v. De Pinna*, 54 L. T. Rep. 38, 770; 31 Ch. Div. 238.) Thirdly, such access and use must be actually enjoyed therewith. Fourthly, such enjoyment must be without interruption for twenty years. Fifthly, if all these are proved, the right to the access and use of light so enjoyed becomes absolute and indefeasible unless it can be explained by some deed or writing. Pausing here for a moment, it will be observed that the statute does not in terms confer a right to light, but rather assumes its acquisition by use and enjoyment, and declares it to be "absolute and indefeasible." Again, it will be observed that nothing is said about enjoyment as of right; and notwithstanding sect. 5 of the Act, which refers to the enjoyment as of right, it was early decided that as regards light claimed under sect. 3 enjoyment as of right need not be alleged or proved; and that the right, whatever it may be, is acquired by twenty years' use and enjoyment without interruption and without written consent: (see *Truscott v. Merchant Taylors' Company*, 11 Ex. 855; *Frewen v. Phillips*, 11 C. B. N. S. 449; *Simper v. Foley*, 2 J. & H. 555, and *Harbidge v. Warwick*, 3 Ex. 552). This was not so under the old law. As regards use and enjoyment there are some instructive decisions on unfinished and uninhabited houses, and on windows kept closed by shutters. These decisions show that a right to light may be acquired in respect of a house which has stood for twenty years without being occupied or even finished so as to be fit for occupation; and that the fact that shutters have been closed for some months at a time does not prevent the acquisition of a right to light through the windows: (see *Courtauld v. Legh*, 20 L. T. Rep. 496; L. Rep. 4 Ex. 126; *Cooper v. Straker* (*ubi sup.*); *Collis v. Laugher*, 71 L. T. Rep. 226; (1894) 3 Ch. 659; and *Smith v. Baxter*, 82 L. T. Rep. 650; (1900) 2 Ch. 138). These decisions did not, however, turn upon or settle with any precision the amount of light to which a right is acquired by twenty years' user. Nor is the statute clear upon this point. At one time it appears to have been considered that in all cases the size and situation of the aperture through which light had come for twenty years formed both the maximum and minimum measure of the right acquired, without reference to the use and enjoyment of the light which had so come. This view was based on some observations made by Lord Westbury in *Tapling v. Jones*, and on Lord Cranworth's judgment in *Yates v. Jack*, which I will notice presently. Lord Chelmsford took the same view in *Calcraft v. Thompson*. But this view was emphatically negatived by the Court of Appeal in Chancery in *Kelk v. Pearson*, *City of London Brewery Company v. Tennant*, and

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Leech v. Schweder. In *Moore v. Hall*, however, both Mellor and Manisty, JJ. adopted the interpretation thus repudiated, but it does not appear that they were aware of the repudiation. *Kelk v. Pearson* shows that in ordinary cases a person does not necessarily acquire a right to all the light which he has had for twenty years. He may have had more than he reasonably required either for domestic or business purposes; and in that case his right is limited to the amount of light reasonably required. There can be no doubt that Lord Cranworth's language in *Yates v. Jack* and the form of injunction granted have been regarded as authorities for the view that in all cases the statute confers a right to all the light which has come to a window for twenty years; and there are passages in the judgments of Cotton and Bowen, L.JJ. in *Scott v. Pape* which support the same view. This is to be regretted, as it has tended to unsettle the rule laid down in *Kelk v. Pearson*. The decision in *Yates v. Jack* did not, however, really go so far as has been supposed, for the plaintiff's windows were darkened to such an extent as to render the house much less convenient for purposes of business than it was before. The case did not turn on the mere fact that some diminution of light was proved. The plaintiff's right to light was clearly infringed, whether the measure of the light to which he was entitled was all that had come through his windows, or only so much as was reasonably necessary for business purposes. If these facts are borne in mind, nothing will be found in the actual decision which conflicts with the views previously expressed by Lord Cranworth in *Clarke v. Clark*, and adopted by the Court of Appeal in the cases already mentioned. The common form of injunction in these cases is that adopted in *Yates v. Jack* and *Dent v. Auction Mart Company*. It is to restrain the defendant from erecting any building so as to obstruct the free access of light to the ancient windows of the plaintiff as such access was enjoyed previously to the taking down of the house which formerly stood on the site of the defendant's new buildings. This form is framed upon the supposition that the plaintiff has established his right to the amount of light which he in fact enjoyed before the obstruction complained of. But it by no means follows from the form that everyone is entitled to an injunction who can prove that he has been deprived of some of the light which he in fact had before it was interfered with. He may have had more than he can acquire a right to use and enjoy in future. I am, however, under the impression that this inference has been drawn, and that the form has been regarded as strengthening the view of the law repudiated in *Kelk v. Pearson*. So to regard the form is, in my opinion, a mistake. The doctrine laid down in *Back v. Stacey*, as I understand it, is the same as that laid down, although in somewhat different language, by the Court of Appeal in *Kelk v. Pearson* and *City of London Brewery Company v. Tennant*, and must, I think, be taken as finally established and as good sound law which this House should adopt, notwithstanding the observations in the Irish case of *Mackey v. Scottish Widows' Company*. That doctrine, as stated in *City of London Brewery Company v. Tennant*, is that, generally speaking, an owner of ancient lights is entitled to sufficient light according to

the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, a shop, or other place of business. The expressions "the ordinary notions of mankind," "comfortable use and enjoyment," and "beneficial use and occupation," introduce elements of uncertainty; but similar uncertainty has always existed, and exists still, in all cases of nuisance; and in this country an obstruction of light has commonly been regarded as a nuisance, although the right to light has been regarded as a peculiar kind of easement. If a more absolute standard had been adopted in all cases certainty would, no doubt, have been gained; but the consequences would frequently have been very oppressive to the owner of the servient tenement, and far more so than under the old law. The owner of the servient tenement could have done nothing on his own land which in fact diminished the light acquired by his neighbour, even if all of it was not wanted for comfortable enjoyment or business purposes. It would follow that the owner of a piece of vacant land opposite to a house in an ordinary street could not build upon it at all after twenty years. The adherence to the old but uncertain standard of comfort and convenience avoids the danger of oppression and extortion, and renders it necessary to take a wider view of each case, especially when an injunction is asked for. The decision in *Kelk v. Pearson* has a far-reaching effect. If there is no absolute right to all the light which comes to a given window, no action will lie for an obstruction to that light unless the obstruction amounts to a nuisance. If there is no right of action, *a fortiori*, there is no right to an injunction to prevent a permanent diminution of light unless it amounts to a nuisance. But in considering what is an actionable nuisance regard is had not to special circumstances which cause something to be an annoyance to a particular person, but to the habits and requirements of ordinary people, and it is by no means to be taken for granted that a person who wants an extraordinary amount of light for a particular business can maintain an action for diminution of light if only his special requirements are interfered with: (see, as to nuisances to persons carrying on delicate trades or requiring more comfort or freedom from annoyance than ordinary people, *Walter v. Selfe*, 4 De G. & Sm. 315; *Crump v. Lambert*, 17 L. T. Rep. 133; L. Rep. 3 Eq. 409; and *Eastern and South African Telegraph Company v. Cape Town Tramways Company*, 86 L. T. Rep. 457; (1902) A. C. 381; and as to the character of the neighbourhood, see *St. Helens Smelting Company v. Tipping*, 11 H. L. C. 642). The expression "right to light" is sanctioned by the Prescription Act, and is convenient; but its use is apt to lead to error and to forgetfulness of the burden thrown on the servient tenement. This burden, however, ought never to be lost sight of in considering the extent of the right claimed in respect of the dominant tenement. But the adoption of the more flexible standard of comfort and convenience has introduced difficulties of a serious nature, especially when dealing with places of business; and it is not surprising that different views on this subject should have been taken, and that the decisions

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upon it should be inconsistent with each other. That they are inconsistent is apparent from the careful review of them by Wright, J. in *Warren v. Brown*. In applying the rule laid down in *Kelk v. Pearson* it is impossible to avoid considering how much light is left and where it comes from. But the question to be decided is not how much light is left, but whether the plaintiff has been deprived of so much as to constitute an actionable nuisance. If he has, it is no defence to say that he has as much light left as most other people: (see *Dent v. Auction Mart Company*, *ubi sup.*). Too much weight may have been given by Wright, J. to the amount of light left in *Warren v. Brown*, and this explains the reversal of his decision by the Court of Appeal. There is no rule of law that if a person has 45 degrees of unobstructed light through a particular window left to him he cannot maintain an action for a nuisance caused by diminishing the light which formerly came through that window: (*Theed v. Debenham*, 2 Ch. Div. 165). But experience shows that it is, generally speaking, a fair working rule to consider that no substantial injury is done to him where an angle of 45 degrees is left to him, especially if there is good light from other directions as well. Cotton, L.J. pointed this out in *Ecclesiastical Commissioners v. Kino* (*ubi sup.*); see also *Parker v. First Avenue Hotel Company* (49 L. T. Rep. 318; 24 Ch. Div. 282). As regards light from other quarters, such light cannot be disregarded; for, as pointed out by James, V.C. in *Dyers' Company v. King* (L. Rep. 9 Eq. 438), the light from other quarters and the light the obstruction of which is complained of may be so much in excess of what is protected by law as to render the interference complained of non-actionable. I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account. The purpose for which a person may desire to use a particular room or building in future does not either enlarge or diminish the easement which he has acquired. If he chooses in future to use a well-lighted room or building for a lumber room, for which little light is required, he does not lose his right to use the same room or building for some other purpose for which more light is required. *Aynsley v. Glover* (*ubi sup.*) is in accordance with this view. But if a room or building has been so built as to be badly lighted, the owner or occupier cannot by enlarging the windows or altering the purpose for which he uses it increase the burden on the servient tenement. *Martin v. Goble*, where a malthouse was turned into a workhouse, may, I think, be upheld on this principle, and the observations of Wood, V.C. on *Martin v. Goble* in *Dent v. Auction Mart Company* support this view. There was in fact no substantial interference with the light to which they were entitled. Coming now to the present case, I am clearly of opinion that no injunction, and certainly no mandatory injunction, ought to have been granted. Joyce, J. was asked for an injunction and he refused it, and, in my opinion, quite rightly. He came to the conclusion that, although there would be a sensible diminution of light and some inconvenience to the plaintiffs, yet they had not established by twenty years' user a right to all the light which they had had, and that

the obstruction complained of would not amount to an actionable nuisance, and so infringe the plaintiffs' right. The Court of Appeal, taking a different view of the amount of light to which the plaintiffs were entitled, reversed this decision, and ordered a partial demolition of the buildings erected by the defendant. For the reasons already given, I have come to the conclusion that this was wrong. I should stop here, were it not that I feel very strongly that in any view of the case it was not one for a mandatory injunction. I am convinced that, even if the plaintiffs have a cause of action, the damages which could properly be awarded them would be very small, and to grant a mandatory injunction in such a case as this would be unduly oppressive and not in accordance with the principles on which equitable relief has been usually granted—see *Curriers' Company v. Corbett* (2 Dr. & Sm. 355), *Robson v. Whittingham* (*ubi sup.*), and *National Provincial Plate-Glass Insurance Company v. Prudential Assurance Company* (37 L. T. Rep. 91; 6 Ch. Div. 757), in all of which an injunction was refused, although the plaintiff's legal right had been infringed. In *Warren v. Brown* the Court of Appeal only gave damages. The present case is eminently one in which damages would be an adequate remedy, even assuming that the plaintiffs could prove a small nuisance for which some damages could be properly given; and where that is the case an injunction, and especially a mandatory injunction, ought not to issue. The doctrine that where a legal right is continuously infringed an injunction to protect it ought to be granted is subject to qualification, as was carefully explained by Jessel, M.R. in *Aynsley v. Glover*, and more recently by the Court of Appeal in *Shelfer v. City of London Electric Lighting Company* (72 L. T. Rep. 34; (1895) 2 Ch. 388). The result of the foregoing review of the authorities is not altogether satisfactory. The general principle deducible from them appears to be that the right to light is in truth no more than a right to be protected against a particular form of nuisance, and that an action for the obstruction of light which has in fact been used and enjoyed for twenty years without interruption or written consent, cannot be sustained unless the obstruction amounts to an actionable nuisance; and this often depends upon considerations wider than facts applicable to the particular case. There are elements of uncertainty which render it impossible to lay down any definite rule applicable to all cases. First, there is the uncertainty as to what amount of obstruction constitutes an actionable nuisance; and, secondly, there is the uncertainty as to whether the proper remedy is an injunction or damages. But, notwithstanding these elements of uncertainty, the good sense of judges and juries may be relied upon for adequately protecting rights to light on the one hand, and freedom from unnecessary burdens on the other. There must be consideration for both sides in all these controversies. In this case the Court of Appeal have, in my opinion, gone too far, and the appeal ought to be allowed, with costs here and below.

Judgment appealed from reversed. Judgment of Joyce J. restored. Respondents to pay the appellant his costs both here and below.

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Solicitors for the appellant, *Hyde, Tandy, Mahon, and Sayer.*

Solicitors for the respondents, *Slaughter and May.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 19, 20, 22, and March 30.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re DENTON; LICENSES INSURANCE CORPORATION AND GUARANTEE FUND LIMITED v. DENTON. (a)

APPEAL FROM THE CHANCERY DIVISION.

Principal and surety—Mortgage—Insurance of mortgage debt—Contract of insurance or suretyship—Covenant by surety with limited liability—Contribution.

By an indenture made between H. of the first part, D. of the second part, and a bank of the third part, H. mortgaged a public-house to secure 4000*l.* and interest, and H. and D. covenanted to pay the 4000*l.* and interest. There was a proviso that D., who was a surety, should not be liable for more than 1000*l.* and interest. H. covenanted to insure the security in the name of the bank with an assurance company. In the proposal for a policy it was stated "D. will join in the mortgage for the purpose of guaranteeing 1000*l.* of the mortgage money."

An insurance was accordingly effected with the plaintiff company, and by the policy it was provided that the proposal was to be deemed to be incorporated with the policy, and the company agreed that if the mortgagor made default the company would pay the principal and interest; and it was provided that thereupon the bank (therein called the insured) should assign the mortgage debt and all securities to the company, and do all things necessary for the purpose of enforcing any rights or remedies, or of obtaining relief or indemnity from other parties to which the company should be subrogated upon payment under the policy.

The mortgagor having made default, the company paid the mortgage debt, interest, and costs, and moneys expended in preservation of the property, amounting in all to nearly 5000*l.* They realised 4000*l.*, and claimed the balance from D.

Held, that the plaintiff company and D. were not co-sureties; that the company had guaranteed the payment of the money, and D. was liable for the amount claimed.

Decision of Swinfen Eady, J. (89 L. T. Rep. 62; (1903) 2 Ch. 670) reversed.

Dane v. Mortgage Insurance Corporation Limited (70 L. T. Rep. 83; (1894) 1 Q. B. 54) and Craythorne v. Swinburne (14 Ves. 160) followed.

By an indenture dated the 2nd Nov. 1899, made between Maude Harvey of the first part, George Denton of the second part, and the London, City, and Midland Bank of the third part, Maude

Harvey demised to the bank a leasehold public-house known as the Lord Palmerston, at Highgate, for the residue of the term for which she held the same, less one day, by way of mortgage to secure the repayment of 4000*l.* and interest. The mortgagor and Denton jointly and severally covenanted with the bank that they or one of them would pay to the bank on demand by them left at the public-house the sum of 4000*l.* with interest, subject, however, to a proviso that Denton should not be liable under the covenant to pay a larger sum in the whole in respect of the principal and interest taken together than 1000*l.*, together with interest on such sum from the time of demand being made on Denton until payment. The mortgagor also covenanted with the bank that she would insure, and at all times during the continuance of the security keep insured, the principal moneys and interest thereby secured against loss in the name of the bank with the plaintiffs, and would not at any time do any act or commit any default whereby the policy of mortgage insurance might be rendered void or voidable; and, in case the policy or any new policy to be effected as aforesaid should by any means become void, forthwith at her own cost effect a new policy for securing the repayment of the said principal sum and interest "as hereinbefore mentioned." It was provided that the powers of sale conferred upon mortgagees by the Conveyancing and Law of Property Act 1881 should be exercisable by the bank at any time after such demand should have been left as aforesaid (whether any of the aforesaid powers should have been exercised or not), without the necessity for giving any such notice requiring payment of the mortgage money as is provided for by the said Act or any notice whatever. The deed concluded with a stipulation that although as between the mortgagor and Denton the latter was a surety only, yet as between him and the bank he was to be considered a principal debtor to the extent of 1000*l.*

A proposal for insurance had already been made by the mortgagor, dated the 28th Oct. 1899, in which it was stated that Denton would "join in the mortgage for the purpose of guaranteeing 1000*l.* of the mortgage money."

The policy was headed "Mortgage Insurance Policy," and recited that the bank (therein called the insured) was entitled to 4000*l.* secured by the mortgage and had delivered to the plaintiff company a proposal in writing "for guaranteeing the mortgage debt and interest," and which proposal contained full particulars of the said mortgage and was to be deemed to be incorporated in the policy and to be the basis of the contract of insurance, and had paid the first year's premium; and it was witnessed that:

The corporation agree with the insured (subject to the conditions on the back hereof, which are to be taken as part of this policy) that if the insured shall become entitled under the power of sale conferred by the said mortgage deed or otherwise to sell the mortgaged property, and shall give notice in writing thereof to the corporation, while this policy is in force the corporation will, after the expiration of six calendar months from the receipt by the corporation of a claim in writing by the insured requiring payment, pay to the insured the principal money for the time being due under the said mortgage with any interest thereon payable as therein mentioned.

(a) Reported by W. C. Bies, Esq., Barrister-at-Law.

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The material conditions were:

5. The insured shall before selling or contracting to sell, or advertising for sale, or being party or privy to the sale or advertisement for sale of the whole or any part of the mortgaged property, give not less than one calendar month's notice in writing to the corporation; and the insured shall not at any time sell, or contract to sell, or advertise for sale or be party or privy to the sale or advertisement for sale of, the whole or any part of the mortgaged property for any sum less than the amount due and owing for principal, interest, and costs and otherwise in connection with the mortgage without previously obtaining the consent in writing of the corporation.

7. The corporation may, within three months after the receipt of a claim under this policy, require the insured forthwith to realise the securities for the mortgage debt, and to give authority in writing to the corporation, or to any person or persons nominated by the corporation, to act as agent or agents of the insured for the purpose of realising the securities, but without prejudice to the right of the insured to require the corporation to pay the amount payable under this policy, notwithstanding that the securities, or some of them, have not been fully realised at the expiration of the time provided for payment by the terms of this policy.

8. If at the time a claim is made under this policy there be any other subsisting insurance or insurances, whether effected by the insured or any other person, covering the same interest in the mortgaged property, the corporation shall not be liable to pay or contribute more than their rateable proportion.

9. Upon payment of the amount which may become payable under this policy, the insured shall assign or transfer to the corporation, or their nominee or nominees, the mortgage debt and interest and all securities held by the insured for the same.

10. The insured and any claimant under this policy shall, at the expense of the corporation, do and concur in doing all such acts and things as may be necessary or reasonably required by the corporation for the purpose of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which the corporation shall be or would become entitled or subrogated upon payment under this policy, whether such acts and things shall be or become necessary or required before or after payment by the corporation.

The mortgagor made default. The plaintiff company paid the bank the mortgage debt, interest, and costs, and moneys expended in the preservation of the property, which amounted in all to nearly 5000*l.* They realised the security, and there was a deficiency amounting to 984*l.* 12*s.* 6*d.*

Denton was then dead, and the plaintiff company claimed the deficiency from his executors.

Swinfen Eady, J. held that Denton was a co-surety with the company, and that there must be contribution by the plaintiff company in the proportion that 4000*l.* with the sum actually due for costs, &c., bore to 1000*l.*, and the plaintiffs appealed.

Haldane, K.C. and *Owen Thompson* for the appellant company.—The company was not a co-surety with Denton, and he has no right to call on them to contribute. Denton was a surety for the whole debt, but his liability was limited to 1000*l.* The company can only be called on to pay if both Denton and the mortgagor fail to do so. This is shown by the fact that the company bargained by condition 9 of the policy that they should on payment of the amount which should

become payable have all the securities assigned or transferred to them:

Craythorne v. Swinburne, 14 Ves. 160:

White and Tudor's Lead. Cas., vol. 2, 7th edit., p. 340.

There is a difference between a case where the surety joins for the whole debt and where his liability is limited to a particular amount:

Ellis v. Emmanuel, 34 L. T. Rep. 553; 1 Ex. Div. 157.

The form of the obligation undertaken by the company towards the bank shows the company did not enter into a contract of suretyship, but only of insurance or indemnity:

Dane v. Mortgage Insurance Corporation Limited, 70 L. T. Rep. 83; (1894) 1 Q. B. 54, 60;

Finlay v. Mexican Investment Corporation, 76 L. T. Rep. 257; (1897) 1 Q. B. 517.

If the form of the contract is consistent with the relationship of co-sureties, the facts and the form of the mortgage deed negative any such contract, and show that all the company did was to guarantee the bank against any default:

Craythorne v. Swinburne, 14 Ves. 160.

In *Seaton v. Heath* (80 L. T. Rep. 579; (1899) 1 Q. B. 782, 792) *Romer, L.J.* discussed the difference between contracts of "insurance" and contracts of "guarantee," and said the difference between those two classes did not depend on the use of those words. The decision of the Court of Appeal in that case was reversed by the House of Lords (82 L. T. Rep. 205; (1900) A. C. 135), but that part of the judgment of *Romer, L.J.* was not affected. They also referred to

Castellain v. Preston, 49 L. T. Rep. 29; 11 Q. B. Div. 380, 387:

Rowlatt on Principal and Surety, p. 165.

Eve, K.C. and *J. Henderson* for the respondent.

—This was really one transaction, and the documents show that the plaintiff company and Denton were co-sureties for the mortgagor, and therefore Denton is entitled to contribution from the company as between two sureties, as decided by *Swinfen Eady, J.* This is so though the sureties covenanted to pay the whole sum:

Steel v. Dixon, 45 L. T. Rep. 142; 17 Ch. Div. 825;

Ellesmere Brewery Company v. Cooper, 73 L. T. Rep. 567; (1896) 1 Q. B. 75.

Thompson in reply.

Cur. adv. vult.

March 30.—*VAUGHAN WILLIAMS, L.J.*—This is a claim made by the Licenses Insurance and Guarantee Fund Corporation, as assignees of a mortgage deed, against the estate of Denton (deceased), a party to the mortgage deed, on a covenant therein contained. The only defence raised is that the corporation and Denton are co-sureties for Miss Harvey, the mortgagor, and that Denton is therefore entitled to deduct from the claim of the plaintiff corporation the contribution due as between two co-sureties. The corporation contends that it is not a co-surety with Denton, but is surety both for the principal debtor, the mortgagor, and for Denton, the surety, under the terms of the mortgage deed; and that, this being so, there is no contribution according to the authority of the decision of Lord Eldon in *Craythorne v. Swinburne* (*ubi sup.*). The question whether the plaintiffs and

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defendants stand, or do not stand, in the relation of co-sureties within the meaning of this decision is the only question in the case. Swinfen Eady, J. has decided that the relation is that of co-sureties, and that Denton has a right of contribution. He bases this conclusion, as I understand, on the ground that, according to the terms of the policy of insurance which embodies the guarantee of the plaintiff corporation, both the corporation and Denton are liable for the same debt upon the same default of the mortgagor. I think that the plaintiff and defendant are liable for the same debt upon the same default of the mortgagor for the reasons given by Swinfen Eady, J. in his judgment; but there is this difference, that, whereas the liability of Denton to pay arises directly on demand left at the mortgaged premises, the liability of the corporation is only to pay after the expiration of six calendar months from the mortgagee, the bank, becoming entitled to exercise the power of sale conferred by the mortgage deed and giving notice thereof to the corporation; so that, even assuming the occasion of the liability arising to be the same because the power of sale is conferred upon leaving a demand for payment at the mortgaged premises without any further demand or not (thus departing from the provisions of the Conveyancing Act 1881), yet the time when payment will accrue due differs by six months, and I do not think that this difference can be left out of consideration when determining whether the corporation and Denton are co-sureties. [His Lordship then stated the effect of the mortgage, and continued:] A "Mortgage Insurance Policy" was executed by the corporation on the 7th March 1900, and it is alleged by the plaintiff corporation that this policy was effected in pursuance of a proposal for insurance dated the 28th Oct. 1899. There is some little difficulty about this, as the proposal and the policy do not quite accord, the proposal relating to a debt repayable by annual instalments, which is not the case with the mortgage debt. But I think that the proposal is sufficient evidence that the insurance was effected by the corporation on the basis that the mortgage debt which the corporation was insuring would be secured by a mortgage deed in which Denton would join for the purpose of guaranteeing the repayment of 1000*l.* of the principal money. The policy, however, makes no mention of Denton being a party to the mortgage deed. On the contrary, it describes the mortgage deed as made between Maude Harvey of the one part and the "insured" (i.e., the bank) of the other part. It refers, however, to a proposal in writing of the 28th Oct. 1899 for guaranteeing the said mortgage debt and interest, and recites that it is agreed "that the said proposal shall be the basis of the contract of insurance intended." The premium of 18*l.* 15*s.* is recited as the first premium for guaranteeing the said mortgage debt and interest, and the policy goes on to witness "that the corporation agree with the insured . . . that if the insured shall become entitled under the power of sale conferred by the said mortgage deed or otherwise to sell the mortgaged property, and shall give notice in writing thereof to the corporation, while this policy is in force the corporation will, after the expiration of six calendar months from the receipt by the corporation of a claim in writing by the insured requir-

ing payment, pay to the insured the principal money for the time being due under the said mortgage with any interest thereon." I think that the proper inference of fact to draw from the proposal of the 28th Oct. 1899, the mortgage deed of the 2nd Nov. 1899, and the policy of the 7th March 1900 is that the mortgagor and mortgagee, Denton and the corporation, knew, at the date both of the mortgage deed and of the policy, that it was intended that Denton should join in the mortgage as surety, and that the mortgage debt and interest should be guaranteed or insured by the corporation. The words "guarantee" and "insure" are used as synonymous in the policy. I mention this inference because I think that the fact that there was one transaction only, to the details of which all were privy, may not be immaterial when one is considering whether the corporation ought to be regarded as co-surety with Denton for the mortgagor, or as surety for both the mortgagor and Denton under a distinct collateral security. The summons claims that the plaintiffs by virtue of a covenant of one Denton contained in a deed of mortgage of the 2nd Nov. 1899, which covenant had been assigned to them, are creditors of the estate of Denton for the sum of 984*l.* 12*s.* 6*d.* The facts as to that sum are these: The bank having left a demand at the mortgaged premises, after giving notice to the corporation under condition 5 of the policy of their intention to exercise the power of sale, proceeded, not strictly in accordance with the conditions of the policy, to sell the property. This sale realised 4000*l.*, and discharged the whole of the principal money owing on the mortgage. The source of the money thus discharging the principal, although it may have passed through the hands of the insurance corporation, was the proceeds of sale. The plaintiff corporation, in the meanwhile, expended the 984*l.* 12*s.* 6*d.* sought to be recovered on this summons on matters such as repairs, &c., clearly necessary and proper for the maintenance of the mortgage security. The utterly unbusinesslike manner in which the business of the corporation was done makes it difficult to ascertain the true facts. It might be suggested that this was a voluntary expenditure by the corporation, who had a clear interest, as Denton also had, that the mortgage security should not be wasted. But I think on the evidence that this expenditure may fairly be taken to be expenditure by the corporation at the request of the bank, and thus expenditure by the bank as mortgagee. If the expenditure cannot be so regarded, there is an end of the claim, but, if it can be so regarded, the only question is, as I have already stated, Are Denton and the corporation co-sureties so as to entitle Denton to contribution? In the first place, I will deal with a contention raised by the corporation and based on the decision of the Court of Appeal in *Dane v. Mortgage Insurance Corporation* (*ubi sup.*). This contention is that, apart from anything else which might negative co-suretyship between the corporation and Denton, the very form of the obligation which they had undertaken towards the bank was sufficient to show that the corporation had not entered into a contract of suretyship, but into a contract of insurance. No doubt the form is that of a policy of insurance. But I think there is nothing in the form of the contract between the bank and the corporation being that

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of a policy of insurance to prevent the contract being one of guarantee, and I would refer to the judgment of Romer, L.J. in *Seaton v. Heath* (*ubi sup.*), which on this point is unaffected by the reversal in the House of Lords of the judgment of the Court of Appeal. Romer, L.J., in discussing the difference in substance between these two classes of contract, says: "The difference between these two classes of contract does not depend upon any essential difference between the word 'insurance' and the word 'guarantee.' There is no magic in the use of those words. The words to a great extent have the same meaning and effect, and many contracts, like the one in the case now before us, may with equal propriety be called contracts of insurance or contracts of guarantee." The distinction in substance in cases in which the loss insured against is simply the event of the nonpayment of a debt seems to be, as I read the judgment of Romer, L.J., between contracts in which the person desiring to be insured has means of knowledge as to the risk and the insurer has not the same means and those cases in which the insurer has the same means. Now, it seems to me that, in the case of this mortgage debt, the insurance corporation, knowing the terms of the mortgage deed and the exact nature of the property forming the security, had just as much means of ascertaining the nature of the risk as the bank had, and I do not think that the mere fact that the contract was made between the creditor and the insurance corporation and not between the mortgagor debtor, Miss Harvey, and the corporation would of itself determine the character of the contract to be that of insurance and not of suretyship. This being so, the form and circumstances of the contract being consistent with the relation of co-suretyship between the plaintiff corporation and Denton, are the facts, dates, or the contents of the mortgage deed such as to negative this contract, which according to its terms is a contract of suretyship guaranteeing payment by the mortgagor, being a contract of suretyship constituting co-suretyship in relation to the contract of suretyship taken by Denton on himself by the mortgage deed? If the policy is looked at, it will be seen that, in form at all events, both the insurance company and Denton guarantee the payment of the mortgage debt by the mortgagor, Miss Harvey. The event upon which the obligation to pay arises is the same in each case, and, although the insurance company have six months within which to pay, yet the obligation neither of the insurance company nor of Denton is dependent on what the mortgage security realises. Taking these matters into consideration, there seems much to support the conclusion in fact of Swinfen Eady, J. that the insurance corporation were sureties for and guaranteed the debt of Miss Harvey, and were not sureties only in the event that neither Miss Harvey nor Denton paid. If this conclusion, which seems to me to be a conclusion in fact, is right, it puts the case outside the case of *Craythorne v. Swinburne* (*ubi sup.*). It seems plain from the judgment of Lord Eldon in that case that, in considering the question whether the contract of insurance, the second contract in point of date, is to be considered as a collateral or supplemental security, the court may take into consideration evidence as well as the words of the respective contracts. Still, sitting by myself, I should have

hesitated to differ from the conclusion of the learned judge, especially as I do not think that the mere fact that the insurance company knew at the time at which the policy was effected, from the mortgage deed or the proposal, that Denton was a surety is sufficient to negative the relation of co-suretyship, and it is certainly a case in which I should have wished to have applied the maxim that equality is equity if the facts allowed it. But, as my brothers take a contrary view of the facts, I do not think that in such a doubtful case, turning largely on inferences of fact, I ought to refuse to concur in the judgment of the court.

STIRLING, L.J.—The question in this case is what is the true nature of the contract entered into between the London, City, and Midland Bank (the mortgagees of a public-house for 4000*l.* and interest, George Denton being surety for the mortgage to the extent of 1000*l.*) and the plaintiffs in the action. The defendant in the action, who is the legal personal representative of George Denton, contends that the contract was one of suretyship, and that by virtue of it the plaintiffs became co-sureties with George Denton; and this is the view which has been taken by Swinfen Eady, J. The plaintiffs, on the other hand, insist that the contract is not one of suretyship at all, but is one of insurance or indemnity, such as was held by Lord Esher, M.R. to exist in *Dane v. Mortgage Insurance Corporation* (*ubi sup.*); but they also urge that, even if the contract was one of suretyship, the plaintiffs did not become co-sureties with Denton, but in fact guaranteed the bank against Denton's default, as was held to be the case in *Craythorne v. Swinburne* (*ubi sup.*). The answer to the question depends to a great extent on the construction of a document dated the 7th March 1900 and headed "Mortgage Insurance Policy," but, before dealing with it, I think it desirable to refer shortly to the main provisions of the mortgage deed, which bears date the 2nd Nov. 1899. [His Lordship then stated the effects of the mortgage, and continued:] On the 28th Oct. 1899, before the mortgage had been executed, the solicitors of the mortgagor submitted to the plaintiffs a "proposal to insure first mortgage of 4000*l.*" In this document various particulars are given as to the terms of the mortgage, which are inaccurate, but the following statement occurs: "Mr. G. Denton will join in the mortgage for the purpose of guaranteeing the repayment of 1000*l.* of the principal money." It is not disputed that the document of the 7th March 1900 was the result of this proposal. The document, as I have already mentioned, is headed "Mortgage Insurance Policy," and in the recitals the proposal of the 28th Oct. 1899 is recited, and "it is agreed that the said proposal shall be the basis of the contract of insurance hereby intended." On the other hand, the proposal is recited as being one "for guaranteeing" the mortgage debt and interest; and the premium is stated to be "for guaranteeing" the mortgage debt and interest. The mortgage deed is stated to be dated the 2nd Nov. 1899, and to be made between Maude Harvey of the one part and the insured of the other part, and it does not appear on the face of the document itself that Denton was a surety for the debt. Still, notwithstanding all inaccuracies in the proposal and in the recitals, there is no question that

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the mortgage of the 2nd Nov. 1899, as executed by the mortgagor and Denton, was that to which the document of the 7th March 1900 was intended to refer, and with reference to which it must be construed. I think, therefore, that the document must be read as relating to a mortgage in respect of which Denton was to a limited extent surety for payment of principal and interest. [His Lordship then read the operative part of the document and also conditions 8, 9, and 10.] In order that the plaintiffs may become liable under the policy, it is necessary (1) that the insured, the bank, should become entitled, under the power of sale in the mortgage or otherwise, to sell, and it will be remembered that the power of sale in the mortgage becomes exercisable upon a demand for payment in accordance with the covenant of the mortgagor and the surety, being left at the public-house; and that the mortgagor and the surety both became liable upon such demand being so left; (2) that the insured should give notice in writing to the plaintiffs of their having become entitled to exercise the power of sale; (3) that the insured should make a claim in writing on the plaintiffs requiring payment. These conditions being satisfied, the plaintiffs bind themselves after the expiration of six calendar months from the receipt of the claim in writing to pay to the insured the principal money for the time being due on the security with interest. In arriving at this sum there would be taken into account all sums had by the mortgagor or by the surety or realised out of the mortgaged property. Upon payment by the plaintiffs of the amount payable, they are entitled under condition 9 to have assigned or transferred to them the mortgage debt and interest and all securities held by the insured for the same; and this would, according to the natural meaning of conditions 9 and 10, include, in my opinion, the benefit of the covenant by the surety to the full extent to which the mortgagees were entitled thereto. The result is that a period of six months is to elapse between claim made on the plaintiffs and payment. During that period the bank were left to realise their securities, as they saw fit, unless the plaintiffs chose to intervene under the provisions of condition 7. At the expiration of the period the plaintiffs were bound to pay the principal and interest remaining due on the security, quite irrespective of any question whether loss had occurred or was likely to occur. Upon payment, however, the plaintiffs, as it seems to me, became entitled to all the rights and remedies of the mortgagees, and to enforce them just as the mortgagees might have done, as well against the surety as against the mortgagor. Swinfen Eady, J. held that the instrument of the 7th March 1900 was not merely an insurance against loss; and in that respect I agree with him, but it does not follow that the instrument created a mere contract of co-suretyship with Denton. The learned judge, however, does not appear to have had presented to him the second contention raised on behalf of the plaintiffs and strongly urged in this court; at all events, he does not deal with it explicitly in his judgment. The question is, in my opinion, one of difficulty, occasioned by the inaccuracies and ambiguities which are found in the instrument of the 7th March 1900, an instrument framed by the plaintiffs themselves. I have, however,

come to the conclusion that, regard being had to all the circumstances, the true meaning of the parties to the transaction was not that the plaintiffs were to become co-sureties with Denton, but that, as between themselves and the bank, Denton should be in the position of a principal; or, in other words, that the transaction was of the same nature as that which was the subject of decision in *Craythorne v. Swinburne* (*ubi sup.*). Taking this view, I think that the appeal ought to be allowed.

COZENS-HARDY, L.J.—This is a claim by the Licenses Insurance Corporation (hereinafter called the corporation) against the estate of Denton, who joined as surety in a mortgage by Harvey to a bank. The mortgaged property has been sold for less than the amount due to the bank. The deficiency, which is less than 1000*l.*, has been paid by the corporation to the bank, and a transfer has been executed by the bank to the corporation of the mortgage debt and all securities for the same. There is no answer to this claim, unless it can be established that the corporation and Denton were co-sureties, in which case a right of contribution only would arise. Swinfen Eady, J. has adopted this view, and has made a declaration accordingly. The corporation appeal against this order, and they contend (1) that their contract with the bank was properly a contract of insurance, and not of suretyship; and (2), in the alternative, that, if they were not insurers, they were sureties for both Harvey and Denton, and not co-sureties with Denton for Harvey. The first contention was overruled by the learned judge. The second contention, although raised, seems not to have been strongly insisted upon before him, and it is not directly dealt with in his judgment, but it has been forcibly pressed upon us, particularly by Mr. Owen Thompson in his able argument. It is based upon *Craythorne v. Swinburne* (*ubi sup.*). In that case Lord Eldon held that parol evidence was admissible to show whether in truth the defendant was a co-surety with the plaintiff for the principal debtor and as such bound to contribute; or was a surety for both the principal debtor and the plaintiff and as such under no liability to contribute. The principles there laid down are clear, but I have found great difficulty in applying them to the very peculiar circumstances of the present case. There are three documents which, and which alone, have to be considered: Firstly, there is the mortgage dated the 2nd Nov. 1899. [His Lordship then stated the material provisions of that document, and continued:] Denton plainly joins as surety. It is apparent on the face of the mortgage deed that it was part of the bargain with the bank that a security of some kind should be procured from the corporation. Secondly, there is the "proposal to insure first mortgage of 4000*l.*" dated the 28th Oct. 1899. It is obviously inaccurate in some respects. It refers to the mortgage as dated the 2nd Nov. 1899, and states the mortgage debt as repayable by instalments, although this is not the fact. It mentions, however, that Denton will join in the mortgage for the purpose of guaranteeing the repayment of 1000*l.* of the principal money. Thirdly, there is the document imposing a liability on the corporation towards the bank, which is dated the 7th March 1900, four months after the mortgage. It is headed "Mortgage Insurance Policy." It in-

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accurately recites the mortgage as made between Harvey of the one part and the bank of the other part, and omits all reference to Denton. [His Lordship then read the material parts of the policy and the indorsed conditions Nos. 7, 8, 9, and 10.] It will be observed that the obligation of the corporation to pay does not arise for six months after Denton's obligation to pay arises, and, further, that the corporation stipulates with the bank for transfer of all securities held by the bank, and to be subrogated to all rights and remedies of the bank against other parties as soon as the corporation pays under the policy, an event which has happened. Now, on the construction of this document, I agree with Swinfen Eady, J. that it was not an insurance against loss, but was a guarantee of the mortgage debt, and I adopt the reasoning contained in his very careful judgment on this point. It only remains to consider the second, or what I may call the *Craythorne v. Swinburne*, point. What was it that the corporation guaranteed? If I look only at the policy, it is reasonably clear that the corporation guaranteed the debt due from Harvey, the principal debtor, and nothing more. If, however, I look at the proposal, which is "deemed to be incorporated in the policy," and also at the mortgage deed, I think it appears that the corporation guaranteed a partially guaranteed debt, or, in other words, guaranteed that Harvey, to the full extent, and Denton, to the extent of 1000*l.*, would pay the bank, Harvey and Denton being as between themselves and the corporation both principal debtors. It is of no moment that Denton is not shown to have been party or privy to the proposal or the policy, for the only obligation imposed on Harvey by the covenant in the mortgage deed, to which Denton was a party, was to insure against loss. This obligation would have been exactly satisfied by a policy of insurance strictly so called. Denton had no right to expect to be relieved by having the corporation as a co-surety. He must accept the position, whatever it may be, as between the bank and the corporation. Upon the whole, I think the appellants' contention on this point must prevail, notwithstanding the difficulties created by the forms of the instruments.

Solicitors: *Jennings, Son, and Allen; Loxley, Elam, and Gardner.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, May 5.

(Before KEKEWICH, J.)

RAY v. HAZELDINE. (a)

Easement—Light—Implied reservation on grant by common owner—Easement of necessity—Easement necessary to the reasonable enjoyment of property.

By conveyance dated in 1895 the premises (subsequently conveyed to the plaintiff) were conveyed by the defendant, who retained a messuage also belonging to him at that time immediately adjoining. A portion of the retained premises (containing one window on the ground floor and

one window on the first floor) overlooked a yard forming part of the hereditaments conveyed in 1895.

By that conveyance the plaintiff's predecessor in title covenanted with the defendant to permit him at all times to enter upon the land thereby conveyed to point or otherwise repair the buildings erected on his retained adjoining land, but defendant expressly reserved no right of light to his windows.

Plaintiff erected a wall in her yard to obstruct the defendant's windows, and the defendant knocked it down, for the purpose of asserting an easement of necessity in respect of the light to his two windows, alleging that there was no other means by which natural light could enter them, and that the access of light through them was absolutely necessary for the enjoyment of his room and landing in which they were placed.

Held, in accordance with the distinction taken by Stirling, L.J. in Union Lighterage Company Limited v. London Graving Dock Company Limited (87 L. T. Rep. 381, at p. 386; (1902) 2 Ch. 557), that the defendant had not shown that he was entitled by right to an easement of necessity in respect of the light to his windows, but claimed only an easement which was necessary to the reasonable enjoyment of his property, which latter right not having been expressly reserved in the conveyance of 1895, the plaintiff was entitled to build so as to obstruct the light to the two windows, but so as not to trespass on defendant's wall or to infringe the covenant by plaintiff's predecessor in title in the conveyances to him as to pointing or otherwise repairing the buildings on defendant's adjoining land.

ACTION with witnesses in which the plaintiff, Mrs. Isabella Mary Ray, claimed a declaration that she was entitled to build on her hereditaments fronting on Ravenoak-road, Cheadle Hulme, in such a manner as to obstruct the light to two windows in the defendant's hereditaments overlooking a yard forming part of the plaintiff's hereditaments, and an injunction restraining the defendant, his servants or agents, from pulling down any wall on the plaintiff's hereditaments, and other incidental relief.

On the 18th Oct. 1895 the hereditaments conveyed by the indenture next stated were (together with the defendant's hereditaments hereinafter mentioned) owned by the defendant in fee simple subject to yearly rents and to mortgages.

By conveyance dated the 18th Oct. 1895 land situated in Cheadle Hulme or Cheadle Mosley, Cheshire, with the messuage and buildings therein mentioned (hereinafter referred to as the plaintiff's hereditaments) were conveyed to Edward Arthur Ray and his heirs subject to a yearly rentcharge and free from certain mortgages. This conveyance contained no reservation of a right to access of light to the two windows in defendant's hereditaments, but it contained a covenant by the purchaser, Edward A. Ray, that he, his heirs and assigns, would from time to time and at all times thereafter permit the defendant, his heirs and assigns, to enter upon the plaintiff's hereditaments or any part thereof for the purpose of pointing or otherwise repairing the buildings for the time being erected on the defendant's adjoining land.

(a) Reported by W. P. PAIR, Esq., Barrister-at-Law.

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By conveyance dated the 19th Sept. 1902, the plaintiff's hereditaments were conveyed by Edward A. Ray unto and to the use of the plaintiff in fee simple subject to the rentcharge, and at the time of the issue of the writ in this action were still vested in her for such estate.

The messuage (hereinafter called the defendant's hereditaments) immediately adjoining the plaintiff's hereditaments on the south-eastern boundary thereof still belongs to the defendant; and a portion of it (facing west and containing one window on the ground floor and one window on the first floor) overlooks a yard forming part of the plaintiff's hereditaments.

No right of light was reserved by or in favour of the defendant when the plaintiff's hereditaments were sold and conveyed by him, and it was denied by the plaintiff that either of the said windows is an ancient light.

Plaintiff in alleged exercise of her rights, after the 19th Sept. 1902, erected a wall in her yard close to the defendant's two windows, which was carried up to the glazed roof of the yard, but defendant knocked it down from inside his own house through the window.

Plaintiff caused the wall to be partly built again in the same way, i.e. from the face of the wall, opposite the window, keeping clear of the lower window, but defendant put his head out of the window and again pushed it down.

Minor questions of fact in the case, in respect of which by his counter-claim the defendant claimed an injunction, were whether in building these walls plaintiff had built upon the footings of, and trespassed upon the footings of, the defendant's walls, or bonded his walls to defendant's walls, and whether the erection of the wall close to the defendant's buildings would prevent him enjoying the benefit of the covenant as to pointing or repairing his buildings contained in the conveyance of the 18th Oct. 1895, these questions being dealt with in the judgment, but, as stated at the hearing by defendant's counsel, the real question in the action was whether the light to the lower of the two windows was an easement of necessity. As to the two windows, the facts in evidence, most of them being admitted, were as follows:—

The lower window opened into a pantry or store; the window on the first floor lighted a landing and stairs in the defendant's messuage. Before action plaintiff's solicitors wrote to the defendant asking for an acknowledgment in respect of the light on the first floor, and, as regards the light on the lower floor, asked for an intimation that the defendant did not question the plaintiff's right to block it up. In reply the defendant's solicitor wrote that the windows were necessary for the health and comfort of the occupants; that the defendant had no available means of obtaining light and air to the pantry of his house except through the lower window; that the windows were glazed with obscure glass, and that they were small.

Plaintiff alleged that by reason of the windows (and more particularly the pantry window) overlooking her yard the privacy of her premises was destroyed and their value depreciated, and she adduced evidence of her surveyor that the landing could be lighted through a skylight in the roof; also that light could be obtained for the pantry by defendant opening a window on

his premises into his scullery and obtaining a borrowed light through the scullery, or in another way by opening a window at the end of the pantry and obtaining light from the entrance into the house.

A fresh-air inlet as shown on the surveyor's plan would, he stated, provide for ventilation. But plaintiff's surveyor in cross-examination admitted that the room as a pantry would be useless if the defendant's wall was permitted to stand; and also said that if the upper window were blocked it would darken the whole staircase.

D. Stewart-Smith, K.C. and Hon. F. Russell for the plaintiff.—We assert the right to build so as to obstruct the access of light over plaintiff's yard to the defendant's windows. The defendant asserts that, although he has reserved no express right to light over the premises he granted in 1895, his case falls within the exception to the rules laid down by the Court of Appeal in *Wheeldon v. Burrows* (39 L. T. Rep. 558; on appeal, 41 L. T. Rep. 327, at p. 329; 12 Ch. Div. 31) as being an easement of light of necessity. The question whether light can be got from another source is a question of fact. The plaintiff does not claim to interfere in any way with the exercise by defendant of his admitted rights under the covenant as to pointing and repairing, and submits to any order of the court safeguarding those rights. The means of support of the obstructing wall was that it was bonded into the plaintiff's wall. The defendant's sole ground of objection was the wrongful interruption of the access of light alleged before action. *Theisiger, L.J.* in *Wheeldon v. Burrows* (*ubi sup.*) lays down the two rules governing cases of this kind, and is reported to have said that "if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant." This rule is subject to exception in cases of easements of necessity, and his Lordship says there may be certain other exceptions. This passage refers to cases in which there are reciprocal easements as in the cases of *Pyer v. Carter* (28 L. T. Rep. O. S. 371; 1 H. & N. 916), *Compton v. Richards* (1 Pri. 27), and *Richards v. Ross* (9 Exch. 218), which seem to be the only ones to be found relating to easements of that nature. *Stirling, L.J.* draws the distinction which we say governs this case in *Union Lighterage Company Limited v. London Graving Dock Company Limited* (87 L. T. Rep. 381, at p. 386; (1902) 2 Ch. 557; *vide also per Romer, L.J.*, at p. 385). In *Wheeldon v. Burrows* (*ubi sup.*) the lights which were the subject of discussion were certainly reasonably necessary to the enjoyment of the property retained, and the grantor was held not entitled to an easement in respect of them. If the property cannot be used at all without the easement, then in that case only is there an implied reservation. Applying that principle to the present case, the windows might be darkened, but the defendant's house could be used. In this case the common ownership, conveyance, and the erecting and pulling down of the wall are admitted. [*Lawrence, K.C.*—We say the wall was built "hush" with our wall. *KEKEWICH, J.*—The real question is not one of trespass.]

P. O. Lawrence, K.C. and T. T. Methold for the defendant.—The real question is whether we

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have got the right to light to this bottom window—whether the light to this pantry is an easement of necessity. *Wheeldon v. Burrows* (*ubi sup.*) was not the case of an easement of necessity, since the three lights there were not all necessary to the enjoyment of the workshop: (per Bacon, V.C., at p. 562 of 39 L. T. Rep.). On the admitted facts we cannot light that room except through another badly-lighted room, the scullery. This is an easement of necessity necessary to the enjoyment of this part of the property. The test is whether you can enjoy the property in the state in which it is with the obstruction. Stirling, L.J. does not mean that the whole of the property is to be rendered useless before such a reservation is implied. His Lordship means that particular part of the property which is affected. Defendant was justified in knocking down the wall. We have a right to an easement of necessity, and, according to *Nicholas v. Chamberlain* (1607, Cro. Jac. 121), referred to in Gale on Easements, pp. 103, 138, 7th edit., a right to go on plaintiff's land to repair our wall.

A reply was not called for on the main question.

KEKEWICH, J.—If a vendor of land desires to reserve any right in the character of an easement so as to prevent building in such a way as to do injury to his adjacent land which he has not parted with he must do it by express words. That is settled law and expresses the result of the decision in *Wheeldon v. Burrows* (*ubi sup.*), where the Court of Appeal affirmed Bacon, V.C. That is a general rule governing cases of this kind, but the rule is subject to certain exceptions. One of them is the well-known exception which attaches to cases of what are known as easements of necessity—that is to say, where the enjoyment of the alleged right over the adjoining land is necessary to the property which is not conveyed, then the court will consider the easement as reserved though it has not been reserved by express words. Now, an easement, or a right in the character of an easement, may be in the nature of a right to an access of light to a particular window. In a large majority of cases the window which lights a room is necessary to the lighting of that room. Many rooms are lighted by one window. Sometimes we have two or more windows. In the large majority of cases, again, a window is one, on the whole, necessary to the comfortable enjoyment of a room, but no one would suggest that, because it is necessary to the comfortable enjoyment of a room, therefore it is a necessary easement exercisable although not reserved from the purchaser of the adjoining land. You may block it notwithstanding that it is essential and in that sense necessary. Where are you to draw the line, supposing that it is not essential in that sense? Does it largely interfere with the comfort and enjoyment of the room if it is blocked? It seems to me that, if you are entitled to block, you cannot draw a line of that character. The line is one of a different character. As was pointed out by Stirling, L.J. in *Union Lighterage Company Limited v. London Graving Dock Company Limited* (at p. 386 of 87 L. T. Rep.). His Lordship, it seems to me, draws a distinction between an easement of necessity and easements necessary to the reasonable enjoyment of pro-

perty. His Lordship is reported to have said: "The appellants did not dispute that there is no express reservation in the conveyance to the plaintiffs, but contended that the easement claimed by them, the defendants, was an 'easement of necessity' within the recognised exception of the second rule. Now, in the passages cited, the expressions 'ways of necessity' and 'easements of necessity' are used in contrast with the other expressions 'easements which are necessary to the reasonable enjoyment of the property granted' and 'easements . . . necessary to the reasonable enjoyment of the property conveyed'; and the word 'necessity' in the former expressions has plainly a narrower meaning than the word 'necessary' in the latter." And further down he states, after pointing out that certain tie-rods which passed through the plaintiffs' property were in one sense necessary to the enjoyment of the defendants' dock in its present condition, that the dock could not be continued in its present condition without these ties, but that the dock was capable of use without them, and there could not be implied any reservation in respect of them. The dock remained there notwithstanding, and the use of the ties was wrong. He seems to me to draw the distinction between what is absolutely necessary and what is reasonably required for the enjoyment of the land and building as it now exists. It is said here that this is a window, the access of light to which is not expressly reserved, which has it reserved by implication because the light is necessary to the pantry or store. It cannot be that there is any necessity by reason of its being used as a pantry. It cannot be said that a special use of light attaches to it as a pantry, as it can be used for other purposes, and to say, as the defendant does, that the use of the window is reserved to it by necessity, is giving to the word "necessity" a meaning which it does not properly bear in this connection. It seems to have been an afterthought of the pleader which raises the point that in blocking up the window while exercising one right the plaintiff has gone beyond her rights as to another. Now, in the first place, it is said that the plaintiff raised her wall so close to the defendant's wall that the two walls actually touched. It is a very difficult question of evidence; on the balance of evidence my present impression is to hold that it did touch. There are some points of contact. I put that aside. There is another point raised by the defence. In the conveyance to the purchaser there was a covenant. [His Lordship read the covenant in the conveyance of the 18th Oct. 1895.] It is clear that while this obstructing wall is allowed to remain erected it would be impossible for the vendor, though he might have gone on the plaintiff's land, to point or repair the wall, which would not only be obscured but entirely inclosed in this outer casing. Plaintiff's counsel says that a case has not yet arisen for an injunction. It can only arise when defendant wanted to point or repair the wall, and that then he might be entitled to come to the court for an injunction calling on the plaintiff to take down the wall. So far he is perfectly right, and I do not think the court would grant a mandatory injunction ordering the plaintiff to pull down the wall which prevented the defendant from exercising his rights under the covenant. But I

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think the plaintiff has been careless in this respect, and in exercising one right she has transgressed another. Plaintiff's counsel says that the whole contest was about the obstructing of the light. I think the proper order to make will be a declaration that the plaintiff is entitled to build on her hereditaments in such a manner as to darken, injure, and obstruct the light to the two windows, but not so as to trespass on defendant's wall or to prevent the exercise by him, his heirs and assigns, of the rights reserved to him by the conveyance of the 18th Oct. 1895 as to pointing or otherwise repairing the buildings. No order as to costs.

Solicitors for the plaintiff, *Robinson and Bradley*, agents for *Brown, Briggs, and Symonds*, Stockport.

Solicitors for the defendant, *Rowcliffes, Rawle, and Co.*, agents for *Joseph Grundey*, Stockport.

KING'S BENCH DIVISION.

Saturday, March 19.

(Before Lord ALVERSTONE, C.J.)

BAKER AND WIFE v. WICKS AND OTHERS. (a)

Poor law—Overseers—Distress for rates—Illegal distress by assistant overseer—Liability of overseers for illegal acts of assistant overseer.

Overseers are not liable virtute officii for an illegal and excessive distress by an assistant overseer in the execution of a distress warrant for non-payment of rates.

A distress warrant for nonpayment of rates was issued by justices, addressed in the usual statutory form to the overseers and constables, and it was handed by one of the overseers to the assistant overseer of the parish, who had been duly appointed to act as such assistant overseer. The assistant overseer, while purporting to execute the distress warrant, was guilty of an illegal and excessive distress, the overseers having taken no part in the same.

Held, that the overseers were not liable for the illegal acts of the assistant overseer in executing the warrant.

FURTHER CONSIDERATION by Lord Alverstone, C.J. in an action tried before him at the last Lewes Assizes.

The plaintiffs were Daniel Baker, a farmer residing at a farm in the parish of Ringmer, in the county of Sussex, and his wife, who there resided with him. The defendants were Edward Wicks and Walter Wright, overseers of the parish of Ringmer, and John Webster, an auctioneer residing at Belper, in the county of Derby.

The plaintiffs, in their statement of claim, alleged that on the 3rd Sept. 1903 the defendants, by themselves or their servants or agents, entered the dwelling-house of the plaintiffs and unlawfully, wrongfully, and forcibly took possession of certain furniture and effects, the property of the plaintiffs, and removed the furniture and effects from the dwelling-house of the plaintiffs to the premises of an inn in Lewes and detained the whole of the furniture and effects from the plaintiffs for some nineteen days, when they restored a part only of the same.

Alternatively, the plaintiff Daniel Baker said that he had suffered damage by reason of the defendants having wrongfully distrained for 15s. (the balance of a rate due from the plaintiff) goods of the plaintiff of much greater value than the amount of such balance, although part of the goods was then sufficient to have satisfied the balance of 15s., and the defendants thereby made an excessive and unreasonable distress for such balance.

The defendants Wicks and Wright (the overseers of the parish) in their defence said (*inter alia*) that if the acts complained of were done and committed by them as alleged (which was denied), the same were done and committed by them in a lawful and peaceable manner upon the furniture and effects of the plaintiff Daniel Baker only, and under the authority of a justices' distress warrant issued for the nonpayment of rates then due by that plaintiff and the costs incidental thereto, both of which he refused to pay. That the justices' warrant was issued against the male plaintiff on the 7th July 1903 for nonpayment of rates due by him amounting to 7l. 19s. 7½d.; that the plaintiff afterwards paid 7l. 4s. 7½d. thereunder, but refused to pay the balance of 15s., and at the date of the alleged distress the sum of 15s. with costs was still due and owing by the plaintiff under the distress warrant.

They further alleged that if any wrongful acts were committed, the same were not done or committed by them, their agents, or servants, but were committed by one Charles Washer, the assistant overseer of the parish, without their authority or knowledge, for which they were in no way responsible.

The defendant Webster in his defence said (*inter alia*) that if any of the acts complained of were done by him, the same were done in the lawful, peaceable, and proper execution of the warrant against the goods and chattels of the plaintiff Daniel Baker only.

The facts were as follows:—

In June 1903 the plaintiff Daniel Baker, a farmer and ratepayer residing at Ringmer, was served with a demand note for a rate amounting to 7l. 19s. 7½d., under a rate dated the 5th May 1903, but, as he wished to protest against that portion of the rate which was applicable to the support of voluntary or non-provided schools under the Education Act 1902, in June 1903 he told Mr. Charles Washer, who had been appointed in 1892 and then was the assistant overseer of the parish of Ringmer, that he would not pay the rate, and that he was prepared to be summoned for the amount, and he then refused to pay the amount of the rate.

On the 30th June a complaint was made before a justice of the peace by the overseers of the poor of the parish of Ringmer that several persons (including the plaintiff Daniel Baker), whose names were mentioned and set forth in the schedule, being duly rated and assessed to the relief of the poor of the parish in the respective amounts opposite to their names, had not paid the rates or any part thereof, but had refused to do so, and a summons was issued requiring them to appear on the 7th July before justices of the peace to answer the complaint.

On the 7th July 1903 the overseers by Charles Washer, assistant overseer, and some of the ratepayers mentioned appeared before the justices,

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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but the plaintiff Daniel Baker did not appear, and a distress warrant was issued against him by the justices in the statutory form given in the schedule to the Distress for Rates Act 1849 (12 & 13 Vict. c. 14) (forms C 1 and C 2).

The distress warrant was addressed—as in the statutory form—

To the overseers of the poor of the parish of Ringmer, in the county of Sussex, and to the constables of the East Sussex Constabulary, and to all other peace officers in the said county,

and it commanded them forthwith to make distress of the goods and chattels of the several persons, (including the plaintiff Baker) whose names were mentioned and set out in the schedule thereunder written.

At that time one Charles Washer was the assistant overseer of the parish; he had been appointed by the vestry in 1892 and he had been continued in his appointment ever since, and by the terms of his appointment he was empowered to perform all the duties of an overseer.

The distress warrant was handed by the justices to a police constable, but he, apparently under instructions from the chief constable, declined to execute it, and he handed it to the defendant Wicks (one of the overseers), by whom it was handed to the assistant overseer (Washer) for execution, with instructions to do the best he could, to employ a bailiff, and to be careful not to overstep his duty.

Subsequently, on the 16th July, the plaintiff Daniel Baker paid to Washer the amount of the rate due from him, less 15s., which was estimated to be the portion of the rate appropriated to educational purposes, and he continued to refuse to pay the 15s. Certain other rate-payers in the parish, whose names were included in the distress warrant, having also refused to pay the education rate, Washer proceeded to procure a bailiff to execute the warrant, and, not wishing to employ a resident in the neighbourhood for that purpose, he procured the defendant Webster, who was an auctioneer resident at Belper, in Derbyshire, to come to Sussex and effect the distress. The plaintiff heard nothing more of the matter until the 3rd Sept., when a distress was put in. On that day Washer and Webster came to the plaintiff's farm, and there, purporting to act under the warrant of distress, seized and removed from the premises goods and furniture estimated to be of the value of upwards of 100*l.*, to satisfy the claim of 15s., the part of the rate remaining unpaid. They were informed at the time that the whole of the goods, with the exception of about 5*l.* worth, were the property of the female plaintiff, Mrs. Baker, and that the residue only belonged to the husband, and this appeared to be the fact.

The defendants Wicks and Wright (the overseers) were not present when the goods were seized (Wright being abroad at the time), nor did they authorise the seizure of Mrs. Baker's goods; but Washer and Webster were present, and the plaintiff Mr. Baker asked that some goods outside the house and belonging to him should be taken, but this suggestion was not acted on, and the goods inside the house were taken. The goods were taken to an inn in Lewes and were kept there for some three weeks, when the defendant Wicks, having made inquiries in the meantime, caused

them to be handed back to the plaintiffs, with expressions of regret, as he was satisfied that they belonged to Mrs. Baker, and he felt that an error had been committed. The other defendant, Wright, was abroad throughout the whole proceedings.

The present action was then brought by the plaintiffs against the three defendants, the two overseers and the auctioneer Webster. Washer (the assistant overseer) was not made a party to the action, but he was brought in by Webster as a third party to the action, as Webster alleged that he acted under the instructions of Washer and claimed that he was entitled to be indemnified by him.

The principal question was as to the liability of the overseers for the acts of the assistant overseer.

Bozall, K.C. and *E. E. Humphreys* for the plaintiffs.—The plaintiffs are entitled to recover against all three defendants. The defendants Wicks and Wright (the overseers) are liable for the acts of the assistant overseer and of Webster. The distress warrant was addressed to them and the duty was thereby imposed on them to execute the warrant, and it is no defence to them that they did not authorise Washer to commit the illegal acts complained of. A distress for rates is not like a distress for rent; it is in the nature of an execution, being, as Lord Mansfield said in *Hutchins v. Chambers* (1 Burr. 579, at p. 588), much more analogous to the common execution than to the common law distress. By sect. 4 of the Distress for Rates Act 1849 (12 & 13 Vict. c. 14) the distress warrant for rates may be addressed to the overseers, and in the forms in the schedule to that Act it is so addressed. It was so addressed in this case, and it authorises the overseers to levy, so that they are the responsible persons to carry out the levy. In such case the overseers are in the same position as a sheriff who is required to levy an execution under a writ of *fi. fa.*, and, as the sheriff is responsible for any illegal act committed in carrying out the execution by a subordinate officer to whom he has delegated his authority, so the overseers are liable for the illegal acts of subordinates who execute the distress warrant. The reason of the extended liability of the sheriff for the acts of those to whom he delegates his authority is thus stated by Jervis, C.J., in delivering the judgment of the Exchequer Chamber in *Gregory v. Cottrell* (26 L. T. Rep. O.S. 125; 5 E. & B. 571, at p. 585): "He is supposed to be executing his duty in person, as he is bound in the first instance to do. The impossibility of so doing authorises him to delegate that authority to another, and he puts that party in his place; and for whatever that party does, not only when done *virtute mandati*, but *colore mandati*, the sheriff is responsible." That applies equally to the overseers who delegate their authority to an assistant overseer to execute the distress warrant. They have no power to delegate their authority so as to relieve themselves of responsibility for the proper execution of the warrant. With regard to the appointment and duties of an assistant overseer, sect. 7 of the Poor Relief Act 1819 (59 Geo. 3, c. 12) and sect. 61 of the Poor Law Amendment Act 1844 (7 & 8 Vict. c. 101) provide as to the appointment of an assistant overseer by the vestry. The vestry may empower him to execute

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all the duties of the office of overseer, and in fact here they did so empower the assistant overseer, but the warrant in this case was addressed, not to the assistant overseer, but to the overseers themselves, and therefore in the execution of the warrant the assistant overseer must be taken as acting as the servant or bailiff of the overseers. There is another reason for making the overseers liable. By sect. 1 of the Poor Relief Act 1601 (43 Eliz. c. 2) the overseers were to be "substantial householders," but by sect. 7 of the Poor Relief Act 1819 (59 Geo. 3, c. 12) the assistant overseer was only required to be a "discrete person." If the overseers are not liable because the assistant overseer was appointed by statute, still that does not relieve them from liability in respect of Webster, who was not appointed under any statute and by whom the levy was actually made. The defendant Wicks adopted and ratified what was done by Washer, and he is liable on that ground.

Avory, K.C. and Lawless for the defendants Wicks and Wright.—The overseers are not liable for the acts of the assistant overseer. The assistant overseer is in no sense the servant of the overseers; he is appointed by the vestry and not by the overseers, who have nothing whatever to do with his appointment, and his position as assistant overseer is recognised by statute. It may be true that a distress for rates is rather in the nature of an execution than an ordinary distress, but there is this distinction between the case of the liability of a sheriff for the improper acts of his subordinate officer and the liability of overseers for the improper acts of an assistant overseer, that, whereas the officer of the sheriff is directly appointed by the sheriff and has no statutory position apart from the sheriff, the assistant overseer is not directly appointed by the overseers, but is appointed by the vestry (sect. 7 of 59 Geo. 3, c. 12) and has a position recognised by statute wholly independent of the overseers. It was expressed thus by Lord Denman, C.J. in delivering the considered judgment of the court in *Reg. v. Watts* (7 A. & E. 461, at p. 469): "The assistant overseer is not the servant of the churchwardens and overseers of the parish, but of the vestry, from whom he directly receives his authority"; and Coltman, J. in delivering the considered judgment of the court in *Points v. Attwood* (6 C. B. 38, at p. 49), after citing the above passage from Lord Denman's judgment, said: "The acts done by him are not, therefore, to be considered as done by him as the agent of the other overseers, but as done by virtue of his own authority derived from the appointment of the vestry." He is, by sect. 7 of 59 Geo. 3, c. 12, to be elected by the vestry, who are to specify the duties to be performed by him and to fix the salary which he is to receive, and such salary is to be paid out of the rates, and he is by that section authorised and empowered to perform all such of the duties of the office of the overseer as shall in the warrant for his appointment be expressed, and he may be required to give security; so that he is a responsible officer, having rights and duties altogether apart from the overseers. It has been argued that the warrant is addressed to the overseers, and that that renders them liable for the acts done; but if the overseers are to be held liable merely because the warrant was addressed to them, then on the same principle the constables of the East

Sussex Constabulary would also be liable, as the warrant is addressed to them as well as to the overseers. It was, in fact, to one of the constables that the warrant was first handed. The warrant, having been addressed to the overseers, must be taken as including the assistant overseer, who would be equally empowered to perform all the duties required of the overseers. The defendant Wright, being abroad all the time, cannot be held liable except from his position of overseer, and the above considerations show that Wicks and Wright are not liable merely by the fact of their being overseers. Wicks did not make himself liable merely by handing the warrant to Washer for execution; he did not thereby make Washer his agent for that purpose, or render himself liable for the illegal acts of Washer. If a judgment creditor hands a writ of *fi. fa.* to a sheriff for execution, without giving any special direction, he is not liable if the sheriff seizes the goods of a wrong person:

Smith v. Keal, 47 L. T. Rep. 142; 9 Q. B. Div. 340;

Morris v. Salberg, 61 L. T. Rep. 283; 22 Q. B. Div. 614.

It is said that Wicks ratified what had been done by Washer. There are two answers to that: first, there was no evidence of any ratification in fact; and, secondly, even if there were, it would not avail, as, if the wrongful act were done without authority, a subsequent ratification of it has no effect:

Woollen v. Wright, 7 L. T. Rep. 73; 1 H. & C. 554.

Lailey for the defendant Webster.

Boxall, K.C. in reply.

Lord ALVERSTONE, C.J.—I cannot give my decision without expressing my regret that the plaintiff, Mr. Baker, was not better advised in this case, which strongly brings out the absurdity of raising in this way his objection to paying this rate for educational purposes. He might have taken his objection with equal dignity by simply paying under protest the amount he objected to. It is also much to be regretted that the police should have refused to execute the warrant. It was their duty to have executed it, and if they had done so, this trouble would not have arisen. However, the matter has now to be dealt with as a question of law. The action was brought against the two overseers and the auctioneer, who has brought in Washer, the assistant overseer, as a third party. At the time in question the overseers of the parish were the defendants Wicks and Wright; and there was also an assistant overseer named Washer, who, in 1892, was appointed to perform all the duties of an overseer of the poor, and at the time now in question he was acting under that appointment. A distress warrant had been issued, addressed to the overseers of the poor in respect of the rates owing by the plaintiff, Daniel Baker; but the distress warrant, the execution of which formed the subject of the present action, was at the time of the execution an effective warrant for the sum of 15s. and no more, the rest of the rate having been paid. If the overseers are in the position of sheriffs, the plaintiffs would be entitled to a judgment as against the defendant Wicks; but as to the defendant Wright it has been shown that he had nothing to do with the matter. Wicks appears to have given the assistant overseer Washer, in whose hands the matter was placed,

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proper advice, but he made no attempt to take the matter out of Washer's hands. Overseers may legally employ a qualified broker to levy the execution, and may obtain an auctioneer to sell the goods. If the auctioneer in this case (Webster) only took an inventory of the goods under the direction of the assistant overseer, then he would not be liable for illegal distress; but the facts proved in evidence show that he did much more than take an inventory of the value of the goods under the directions of Washer. He was a principal in levying the distress, and it was improper conduct on his part; it was a wrongful act and an excessive distress. It was contended that Wicks is responsible for these unlawful acts. That raises the question whether overseers are responsible for the conduct of assistant overseers, and whether the same principle ought to be applied in the case of overseers which is applied in the case of sheriffs, who are responsible for everything done in carrying out the execution. That seems to have been held in the case of *Gregory v. Cotterell* (*ubi sup.*), and if that case governs the present case, then the plaintiffs would be entitled to succeed against the overseers. A sheriff is responsible for the acts of his subordinates. Overseers, however, are not in the position of sheriffs, and the principle, therefore, which applies to sheriffs does not apply to the case of an assistant overseer, who is by statute appointed to perform all the duties of an overseer. The assistant overseer is appointed by the vestry, and is the servant of the vestry and not of the overseer; and the overseer is not liable for any act done by the assistant overseer which he has not in any way authorised, and to which he is no party. The assistant overseer acts by virtue of his own authority, and there is a statutory recognition of his office and of the duties he has to perform; and therefore the law with regard to the responsibility of sheriffs for the acts of their subordinates does not apply. The cases of *Reg. v. Watts* (*ubi sup.*) and *Points v. Attwood* (*ubi sup.*), which have been cited, altogether exclude the view that I ought to apply to overseers the same principle as is applied in the case of sheriffs. Those cases show clearly that the assistant overseer is not the servant of the overseers, but is the servant of the vestry; and, although, perhaps, they are not direct decisions to that effect, but may be said to be dicta only, yet they do lay down that principle in the clearest and strongest way. Moreover, the statutes which have been cited show that there is a statutory recognition that assistant overseers can perform all the duties of overseers, so that apart from authority which is binding on me, the Legislature has recognised that in the case of overseers there may be a statutory officer who has power to do all the acts which the overseers themselves can do. There was no act on the part of the defendants Wicks or Wright which made them responsible for the taking of Mrs. Baker's goods, and judgment must be given for them with costs. As to the defendant Webster, I find that he did levy the distress, and that he took part in an illegal act; and I also find that he had no remedy over as against Washer, so that the third party notice fails against him.

Judgment for the plaintiffs against Webster for 50l., with costs; judgment for the defendants Wicks and Wright with costs.

Solicitor for the plaintiffs, *Samuel Lithgow*, for *D. Albert Davies*, Hove.

Solicitors for the defendants *Wicks and Wright*, *Beal and Payne*, for *E. Bedford*, Newhaven.

Solicitors for the defendant *Webster*, *Needham*, *Tyer*, and *Barrow*, for *E. G. and F. J. Jackson*, Belper.

Monday, April 18.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

FRASER v. FRASER. (a)

Practice—*Appeal*—*Specially indorsed writ*—*Action by consent referred to master*—*Decision of master*—*Right to appeal to Divisional Court from decision of master*—*Order XIV., r. 7.*

An appeal does not lie to the Divisional Court from the decision of a master in an action which has been referred to him by consent of the parties under Order XIV., r. 7, which provides that, upon the hearing of an application for leave to enter final judgment, "with the consent of the parties, an order may be made referring the action to a master."

APPLICATION by the defendant for an order that the finding and certificate given and the report or award made and judgment directed on the trial or reference of the action under Order XIV., r. 7, before Master Lord Dunboyne on the 26th May 1903, be set aside or varied and that judgment be entered for the defendant on the claim and for 1009l. on the counter-claim, or alternatively that a new trial or reference may be had or that the action be remitted to the master for reconsideration.

The action was brought to recover from the defendant a large sum of money as commission upon the sale of shares by the plaintiff for the defendant.

The writ was specially indorsed, and the plaintiff applied for leave to sign final judgment under Order XIV. The defendant did not make any affidavit in opposition, and the master made an order giving the plaintiff leave to sign final judgment.

The defendant appealed, and made an affidavit stating his grounds of defence, and setting up a counter-claim.

Thereupon Phillimore, J. at chambers made the following order:

"That the order of Master Lord Dunboyne giving the plaintiff leave to sign final judgment be discharged, and that the defendant be at liberty to defend this action. And it is by consent under Order XIV., r. 7, further ordered that the action be referred to be decided by a master without pleadings."

The matter was heard before the master, and on the 26th May 1903 he gave his certificate as follows: "In pursuance of the order of the Honourable Mr. Justice Phillimore, dated the 5th day of May 1903, I do find and certify that, after allowing the defendant the sum of 234l. 0s. 3d., in respect of his set-off and counter-claim, the plaintiff is entitled to recover the sum of 925l. 1s. 4d. in this action. I direct the defendant to pay the plaintiff his costs of the action and of the reference to be taxed. And

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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I direct that judgment may be entered in accordance with this my certificate."

On the 27th May 1903 the judgment was drawn up as follows: "The action having by an order of Phillimore, J., dated the 5th May 1903, been referred for trial to Lord Dunboyne, one of the masters of the Supreme Court, and the said master having tried the said action and by his certificate dated the 26th May 1903 found that, after allowing the defendant the sum of 234l. 0s. 3d. in respect of his set-off and counter-claim, the plaintiff is entitled to recover the sum of 925l. 1s. 4d. in this action, and having directed the defendant to pay the plaintiff his costs of the action and of the reference to be taxed, and having directed judgment to be entered accordingly, it is this day adjudged that the plaintiff recover from the defendant the sum of 925l. 1s. 4d. and the costs of both the reference and the action to be taxed."

From this judgment of the master the defendant appealed to the Court of Appeal asking for judgment or a new trial, the master having given leave to appeal.

On the hearing of the appeal the preliminary objection was taken for the plaintiff that there was no right of appeal at all from the decision of the master when the action was referred to him by consent under Order XIV., r. 7; but that if there was any right of appeal, the appeal did not lie to the Court of Appeal, but to the Divisional Court.

The Court of Appeal (Collins, M.R., Mathew and Cozens-Hardy, L.J.J.) held that no appeal lay in such a case to the Court of Appeal, leaving the question open as to whether or not there was any right of appeal to the Divisional Court. See *Fraser v. Fraser* (89 L. T. Rep. 491; (1904) 1 K. B. 56).

The defendant then appealed to the Divisional Court.

Order XIV., r. 7—introduced in July 1902—provides:

Upon the hearing of the application [that is, an application for leave to enter final judgment under rule 1 of the order] with the consent of the parties, an order may be made referring the action to a master, or the action may be finally disposed of without appeal in a summary manner.

Trevor F. Lloyd for the plaintiff.—There is a preliminary objection to the hearing of this appeal. No appeal lies to the Divisional Court from the decision of the master in this case. The appeal was first taken to the Court of Appeal, but that court held that no appeal lay to them (*Fraser v. Fraser*, 89 L. T. Rep. 491; (1904) 1 K. B. 56), and, although they did not decide the question, they seemed to think that no appeal lay to any court. The whole reasoning of the judgments in that case, especially of the judgment of Mathew, L.J., tends to the view that there is no right of appeal to any court. An action can only be referred to a master under Order XIV., r. 7, by consent of the parties, and when an action is referred to a master by consent, the master is in the same position as an arbitrator to whom an action has been referred by consent. If the matter had been referred to an arbitrator by consent, there would have been no appeal from the arbitrator's decision; there would only have been a right to impeach his award on the usual and

well recognised grounds. So, in this case there is no appeal from the judgment of the master. By Order XXXV., r. 9, a person may appeal from an order or decision of a district registrar to the judge, and the rule expressly provides that such appeal may be made notwithstanding that the order or decision was in respect of a matter as to which the district registrar had jurisdiction only by consent. That shows that it was clear to the framers of the rule that where the matter is sent for decision by consent there would be no appeal except the appeal is given in express terms, and therefore that provision was put in to show that in that case there was an appeal. [Lord ALVERSTONE, C.J.: At present it seems to me that where an action is referred to a master by consent of the parties there is no appeal].

Hume-Williams, K.C. (J. W. McCarthy with him), for the defendants, in support of the appeal.—An appeal lies in this case to the Divisional Court. The master to whom this action was referred was not in the position of an arbitrator and did not act as an arbitrator; he was in the position of a referee, and from the decision of a referee there is an appeal to this court. Order XL., r. 6, provides that where at a trial by a referee he has directed any judgment to be entered, any party may move to set aside such judgment and to enter any other judgment, on the ground that upon the finding the judgment so directed is wrong; and in the King's Bench Division such motion must be made to the Divisional Court. Rule 2 of the same order provides that every referee to whom a cause is referred for trial shall direct how judgment is to be entered, and such judgment is to be entered accordingly, and rule 6 gives a right of appeal from such judgment. Then by rule (6a): "Rules 2 and 6 of Order XL. shall apply to a reference to any officer of the court or special referee or arbitrator under an order of the court." A master is an officer of the court, and therefore, by rule (6a), a reference to him is a reference to a referee to which rule 6 applies, and if rule 6 applies there would be an appeal from his decision expressly given to the Divisional Court, as in the case of an appeal from the judgment of a referee. Sect. 14 of the Arbitration Act 1889 (Annual Practice, vol. 2, p. 567) deals with references under that Act, and it says that in any cause or matter, if all the parties consent, the court or a judge may order the whole cause or matter to be tried before a special referee or arbitrator agreed on by the parties, or before an official referee or officer of the court. That reference is by consent of the parties; almost the same words are used as in Order XIV., r. 7, and the procedure is the same. There is an appeal to the Divisional Court from the decision of the referee after trial under sect. 14 of the Arbitration Act, notwithstanding that the reference of the whole action is by consent of the parties; and then come in rules 6 and 6 (a) of Order XL., which apply the same rule to any reference to any officer of the court under an order of the court. It would be a strange result if, when an action is by consent of the parties referred by an order of a judge, under sect. 14 of the Arbitration Act 1889, to a referee, there should be a right of appeal, and yet that there should be no right of appeal when an action is by consent of the parties and by order of a judge referred to a master under Order XIV.,

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r. 7. The reference is in either case made by consent of the parties and by order of a judge, and there is no more reason why there should be an appeal in the one case than in the other. What Order XIV., r. 7, contemplates is that the action should be sent to a master under the same conditions as to an official referee under the Arbitration Act; and the moment you refer an action and take an order of the court for that purpose, then the case is under the Arbitration Act. If that rule were to deprive a person of his right to appeal to this court, it would take away the usefulness of the rule. An examination of the rule itself shows that it was not intended to take away the right of appeal. The first clause of the rule says that with the consent of the parties an order may be made referring the action to a master; the second part of the rule says, "or the action may be finally disposed of without appeal in a summary manner." In the latter part of the rule it was intended that there should be no appeal, and the words "without appeal" are expressly inserted. If it had been intended that in the reference to a master in the first part of the rule there should be no appeal, we should also have expected to find the words "without appeal," but those words are confined to the second part of the rule; thereby showing that there is no such limitation in the case of a reference to a master. [Lord ALVERSTONE, C.J.—My present view is that if the parties consent to refer to a master under Order XIV., r. 7, then it is the same as in the former practice before the Judicature Act—namely, that there is no appeal, as the master would be acting as an arbitrator.] In *Darlington Waggon and Engineering Company v. Harding and Trouville Pier and Steamboat Company* (64 L. T. Rep. 409; (1891) 1 Q. B. 245) an order was made by consent to refer all matters in difference to arbitration, and it was held that the award of the arbitrator was final and could not be reviewed by the court; but the reason there given was that the order of reference, as it included matters other than the action, was not one that could be made under sect. 57 of the Judicature Act 1873, or the Arbitration Act 1889, but owed its validity to the consent of the parties only, and that therefore the award was final. The judgment of Lord Esher, M.R. would seem to show that if the reference had been of the action simply, the result would have been different; and there is a difference between that case and the present, where the order was that "the action" should be referred. If in the Chancery Division the whole action is referred to an official referee for trial, and judgment has been entered by his direction, that judgment is not final, and an application to set it aside may be made to a judge of that division:

Wynne-Finch v. Chaytor, 89 L. T. Rep. 123; (1903) 2 Ch. 475.

There can be no possible distinction between the two cases of the parties consenting to the matter going to an arbitrator under sect. 14 of the Arbitration Act, and the parties consenting to the action being referred to a master under Order XIV., r. 7. [He also referred to Order LVII., rr. 7 and 11, as to judgments in interpleader proceedings.]

Trevor F. Lloyd in reply.—Here the parties deliberately by consent referred the action to a

master. If the parties want to preserve their right of appeal, they need not consent to the reference. There can be no hardship and no difficulty at all, as all the parties have to do is to refuse to give their consent.

Lord ALVERSTONE, C.J.—This case undoubtedly raises a point of very great importance, and, if I had any real doubt in the matter, I should have taken time to consider it. That, however, is not necessary, more especially as the case is one in which our decision can be reviewed. The point is whether under Order XIV., r. 7, where an action has been referred to a master by consent of the parties, the master is a referee or special referee for the purposes of the trial, under sect. 14 of the Arbitration Act 1889, or is a person selected by the parties to whom the action is referred. What presses on my mind is that there had been for years a well-known practice of referring actions to the master. In old days, for many years, it was a common thing to refer a case to the Queen's Bench masters, and, when cases were so referred to the master on questions of fact, he was an arbitrator, and there was no review. A master would have the power of stating special cases and doing certain things; but the point we are considering to-day is whether or not, when a motion has been brought to set aside his finding on the questions referred to him, there is an appeal of any kind. I cannot believe that under such words as are in the rule it was intended to destroy the old practice. I think the rule, when it says "Upon the hearing of the application with the consent of the parties, an order may be made referring the action to a master," means that the master becomes an arbitrator. Counsel for the defendant pressed us with reference to the words "may be finally disposed of without appeal in a summary manner," but I think there is a fallacy in his argument, if I may say so. It is not that there is no appeal at all from the reference to the master. A question might arise if the master had exceeded his jurisdiction and dealt with something outside the action; but, with reference to the questions referred to him, I see no express or implied intention that the master should be put, for the purposes of that reference, into the position of an official referee. I think the subsequent orders somewhat strengthen the view I am taking. I need not refer in detail to the code of rules, or do more perhaps than refer to sect. 14 of the Arbitration Act, which provided for a different state of things, and provided for a compulsory reference. It says: "The court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court." Those cases we know well. The referee makes a report. On that report you may move for judgment. Sometimes the judgment may be entered automatically, or may be entered upon the report where the parties are left to move for judgment. The official referee or the special referee is the person who is created by the rules for the purpose of determining certain questions, and certain rights are given to the parties. The only rules to which I need refer, beyond those to which I have referred in general terms, are those relied upon by the defendant's counsel. If we look at Order XL.,

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r. 6 (a), which applies, as the defendant's counsel rightly says, to rules of the same order, it says rules 2 and 6 of Order XL shall apply to a reference to any officer of the court, or special referee, or arbitrator under an order of the court. Rule 2 is: "Every referee to whom a cause or matter shall be referred for trial shall direct how judgment shall be entered, and such judgment shall be entered accordingly by a master or registrar, as the case may be," and rule 6 is, to put it shortly, that the judgment, if not entered in accordance with the finding, may be set aside. Neither of those rules directly imply, if I am right in the view that the master is intended to be an arbitrator, that there would be any appeal from his decision on a question of fact. Then turning to Order XXXVI., r. 55 (c), to which reference was also made, that states that "The provisions of rules 48 to 55 of Order XXXVI. and of rule 55 (b) shall apply, where any cause or matter . . . is referred to an officer of the court, or to a special referee or arbitrator." If we look through the rules we find that they are really rules of procedure, and have nothing to do with the question of appeal, or the question of setting aside the decision of a master in a case referred to him. If any argument is to be founded on those rules, it would go against the contention of the defendant's counsel, because it shows that it was thought necessary to apply these special provisions, and that the trial was not intended to be subject to all the provisions which apply in the case of a trial by a special referee. Then the defendant's counsel says that it is a strange thing that an appeal should be taken away. It is for that reason that I venture to refer to the old and still existing practice. I think the master was intended to be an arbitrator. Without saying that the decision of the Court of Appeal in this case of *Fraser v. Fraser* (*ubi sup.*) is an authority upon this point, because obviously they meant to leave this point open, I think the reasoning of the Master of the Rolls, and certainly the opinion of Cozens-Hardy, L.J., is applicable. Cozens-Hardy, L.J. says in terms that the words used clearly indicated a reference to a person who was to be an arbitrator, or in the nature of an arbitrator. While I do not agree with the view that the words "without appeal" in the second limb of the rule really show that the language of the rule meant to exclude appeal, I think it did refer to another mode of trial in which there was no appeal. In my opinion the language of the rule intended the action to be referred by consent of the parties to the master, who was to hear the facts as an arbitrator, and that there was to be no appeal against his decision. I assume, of course, that that is the basis of the motion which is made before the court. In my opinion there is no appeal.

WILLS, J.—I am of the same opinion. Order XIV., r. 7, upon which the question turns, is not, as has been remarked in the Court of Appeal, very happily worded. Inasmuch as no order can be made under that rule except by consent, there is really no *a priori* argument that can be urged why there should or should not be an appeal, because whatever is done has to be done with the consent of the parties. It seems to me that to say there is some reason to suppose that the parties consented to forego some appeal is quite beside the mark. That is unreasonable when

people agree to things with their eyes open. It may be that a person who did not understand the rules may have agreed to something which he did not intend to agree to; but that is a case which is common where there is an obscurity of expression in the rules. Then, again, an argument may be founded on what the position or contrast may be between the two parts of the sentence in rule 7, which are joined by the word "or," as between appeal and no appeal, or between a reference to the master and a case where the master hears the case himself and decides in a summary way. There is nothing in the rule which would make the one construction more easy than the other. Under these circumstances the only thing to do, as it seems to me, is to look at the words of the rule and see what is the natural meaning to be put upon them. The phrase "that the action be referred" is a very old one. I have, when at the Bar, decided very many actions upon phraseology identical with that. Cases are referred to an arbitrator constantly, and it means, generally speaking, unless there is something special in the words which accompany it, a referring of the case in the ordinary sense to an arbitrator. Why that should not be the case here I really do not know. The fact that that is merely recurring to an old practice which existed many years ago, long before the Judicature Act was passed, to which my Lord has referred, is an argument for saying that reference means an ordinary reference constituting the referee an arbitrator. It seems to me that the words are more consistent with that view than with any other. If that be so, the rules of the Arbitration Act, which apply to an ordinary arbitration, apply here, and not those which apply to special references which are made to official or special referees, whose jurisdiction is confined to reporting, as to whom special rights of appeal or for reviewing their decisions, have given rise to rules which relate to them. This, in my opinion, must be an ordinary reference. Certainly the view of Cozens-Hardy, L.J. in *Fraser v. Fraser* (*ubi sup.*) was in the same direction, and so, apparently, was the view of the Master of the Rolls. I quite agree with my Lord in thinking that the words "without appeal" do not govern the whole of the rule. For the reasons which I have given, it seems to me that these words were wanted in the second limb, because the words of the first member of the rule do not apply to the case in which the master takes the reference then and there himself. If he does take the reference then and there then he has to dispose of it without appeal. In the other case, if that is not convenient, and he makes an order sending it to another master, because the case would take a long time or for some such reason, then it must be on the footing of an ordinary reference. In either case, as far as an appeal on the facts is concerned, there is none.

KENNEDY, J.—I am of the same opinion. The phrase "An order may be made referring the action to a master" had a well understood meaning at the time of the passing of the enactment and the framing of the rules under the Judicature Act. I cannot, for my own part, see any difficulty or inconsistency in holding that "referring the action to a master" means other than referring the action to a master as the understood meaning of the phrase had been for a long time, and

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existing at the time of the rule itself. Referring the action to the master treats the master as an ordinary arbitrator, with the consequence that in the strict sense of the term there would be no appeal from his decision, subject to this—that during the course of the arbitration points may be raised and submitted to the court above for his guidance or his correction. It is strongly argued by the defendant's counsel that that ought not to be the meaning which we are to put on the rule, on the ground that the words "without appeal" in the following limb of the sentence "or the action may be finally disposed of without appeal in a summary manner," would apply to that part of the sentence and not apply to the earlier part of the sentence. To my mind there are two sufficient answers to that. In the first place, the words "without appeal" are needed in the second limb of the rule if there had been no limb preceding that. For instance, supposing the rule had run: "Upon the hearing of the application with the consent of the parties the action may be finally disposed of in a summary manner," to reject the words "without appeal," otherwise than with regard to the summary jurisdiction of the master on the hearing of the summons, clearly would involve a right of appeal on the reference as from the master to the judge. I do not think there can be any argument on the question of the words "without appeal" in the second limb, or that the absence of the words in the first limb of the rule means that the action shall be referred to the master subject to the provisions of the Arbitration Act, sects. 14 and 15. Then I think there was this further reason that I do not suppose, if our view is right, that anybody would consider it was necessary to put the words "without appeal" in the first limb, because referring the action to a master was in itself an understood and complete expression, and to add to that the words "without appeal" would have been, to my mind, to have indicated a kind of reference such as nobody had heard of before—the reference of an action to an arbitrator without appeal. It would have been an unknown and difficult phrase, and people would have had to find some justification for it, because it would be inserting the words "without appeal" when it was only a reference to a master of an arbitration which did not carry any appeal strictly so called. Further, in my opinion, it is a strong thing to read the special provisions of the Arbitration Act into this enactment of Order XIV., r. 7, because one would have expected, if it was so intended—the rule being dated 1902—that the words would have been the same as they are in the Arbitration Act: "That an order may be made referring the trial of the action to the master." If it is to be said that it cannot have been intended to keep alive the old practice of reference to masters, a well-understood term, and that we ought to read in the provisions of the Arbitration Act, which is earlier in date—namely, 1889—then one would have expected that a special provision would have been inserted in Order XIV., r. 7, so as to make it clear that the reference which was to take place was a reference of the whole cause and matter to be tried before the special referee as arbitrator. Further than that, I think myself, although it is quite clear that the Court of Appeal reserved this point, as every member of the court who gave judgment

said, and did not decide it, yet the language of Mathew, L.J. implies that that was the view with which he, at any rate, was impressed, because (at p. 60 of (1904) 1 K. B.) he is reported as giving judgment in these terms: "It was urged for the plaintiff that, under this rule, the master is merely in the position of an arbitrator at common law, and his decision is therefore final, except in cases where the decision of such an arbitrator could be questioned. I hesitate to decide that, because it is not, I think, really necessary in this case; but I have been impressed by the argument in favour of that construction of the rule." The phraseology of Cozens-Hardy, L.J. has been already referred to. Then Collins, M.R. leaves the point open. He says at the conclusion of his judgment: "As I have already said, I think the words of the rule plainly import that the action is to be 'referred,' and by that, in my opinion, must be meant either a reference at common law or a reference within the statutory provisions which I have mentioned." I therefore, as far as we can, prefer to take the view which seems, at any rate, as regards two members of the Court of Appeal, to have impressed them favourably, although it was not necessary for them to decide the point. I think, both on reason and on convenience, and on the true construction of the rule, that the view we have taken is right.

Appeal dismissed. Leave to appeal.

Solicitors for the plaintiff, *Harratt and Pollock.*

Solicitors for the defendant, *Williams and Neville.*

RAILWAY AND CANAL COMMISSION COURT.

July 22, 23, Dec. 9 and 10, 1903.

(Before WRIGHT, J., Sir FREDERICK PEEL, and Viscount COBHAM.)

SPILLERS AND BAKERS LIMITED v. TAFF VALE RAILWAY COMPANY. (a)

Railway—Rates—Undue preference—Shipment rate and works rate—Works rate for same services higher than shipment rate—Right of trader to apply for reduction of works rate—Right to make application where trader does not directly pay rate—Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), s. 2—Railway and Canal Traffic Act 1883 (51 & 52 Vict. c. 25), s. 27.

The mere fact that a railway company charge a higher rate for carriage of coal over the same length of line to traders' works—all traders being charged an equal rate—than they do for coal for shipment, is not of itself sufficient to give a trader a right to apply to the court for reduction of the works rate, and such difference between the works rate and the shipment rate does not necessarily show an undue preference or an undue prejudice within the meaning of the Railway and Canal Traffic Acts.

A railway company carried from certain collieries to C. large quantities of coal, the greater proportion of which was for shipment from that port to places abroad and to ports in England, and the remaining part was for works in C., including the works of the applicants, who were large flour

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

millers in C., and for home consumption. They carried the shipment coal at a low shipment rate, but all other coal, whether for works (including the applicants' works) or for home consumption, was charged a higher or works rate, the works rate being some 50 per cent. higher than the shipment rate, and being the same for all traders in C. It was proved that the low shipment rate was justified by necessity, and that owing to competition with other ports and to other causes it was practically impossible in the interests of the public for the company to raise the shipment rate; and further, that the works rate was a reasonable rate, and was in fact so low that it could not reasonably be made lower without reducing it to a non-paying rate, and though there was some slight competition, no real or substantial competition was proved between the two classes of coal.

Upon a complaint by the applicants that the higher works rate charged for the carriage of their coal as compared with the low shipment rate was an undue preference and an undue prejudice within the meaning of the Railway and Canal Traffic Acts:

Held, that the mere difference in the two rates was not in itself sufficient to prove an undue preference or an undue prejudice, or to give the applicants a right to come to the court for relief; that, under the circumstances, within the meaning of sub-sect. 2 of sect. 27 of the Railway and Canal Traffic Act 1888, not only was the lower charge for the shipment traffic "necessary for securing in the interests of the public the traffic in respect of which it is made," but also "the inequality could not be removed without unduly reducing the rates charged to the complainant," and that therefore the applicants were not entitled to a reduction in the works rate charged to them.

Seemle, in such case, the fact that the rates are charged by the railway company to and paid by the colliery company, and not directly charged to or paid by a trader himself in the first instance, does not prevent the trader from applying to the court under the Railway and Canal Traffic Acts, if in substance the charge is made so as to affect the traders' interest.

APPLICATION to the Railway and Canal Commission Court.

1. The applicants, Messrs. Spillers and Bakers Limited, were millers and corn merchants carrying on business at (amongst other places) Cardiff.

2. They purchased large quantities of coal from collieries situated on the defendants' railway, and such coal was conveyed from the collieries by the defendants in owners' waggons to one or other of the following points—namely, either: (a) to a junction of the defendants' railway with the Cardiff Railway called the East Dock Junction, Cardiff; or (b) to a point of exchange with the Cardiff Railway in the vicinity of the East Dock Junction known as Maloney's Sidings; or (c) to the Roath Dock Junction; or (d) to a point of exchange with the Cardiff Railway Company in the vicinity of the Roath Dock Junction, being the sidings situate on the south side of Roath Dock Coal Tips; or (e) to the defendants' Cardiff terminus. From the said point or points the coal was conveyed by the Cardiff Railway Company to the applicants' mills at a uniform charge of 2s. per waggon.

3. The defendants also conveyed coal from the same collieries *via* the East Dock Junction and the Roath Dock Junction respectively to the coal tips in the vicinity of the points of exchange (b and d), referred to in clause 2, with a view to its shipment from the Bute Docks, Cardiff.

4. Notwithstanding that the coal for the applicants was conveyed in the same manner and passed only over the same portion of the defendants' railway as the coal for shipment, the defendants charged higher rates for the conveyance of the applicants' coal than for coal for shipment as set forth in the next paragraph, and thereby they subjected the applicants and traffic in coal for consumption in Cardiff to an undue and unreasonable prejudice and disadvantage.

5. Rates for coal to the points above referred to:

From the following Sidings.	Rate for Coal for shipment per ton.	Rate for Coal of applicants.
Hills Plymouth Company, Merthyr	s. d. 1 0 683/800	1 7 9 16
Cambrian Colliery Company, Clydach Vale	1 0 27/40	1 6 1/2
D. Davis and Sons Limited Boedryngallt	11 31/50	1 5 19/32
Ocean Colliery Company, Maundy	11 793/800	1 6 1/2
Abergorchel Colliery	1 0 15/16	1 7 11/16
South Cambrian Colliery	6 9/10	10 1/2
Werfa Colliery	1 1 13/160	1 7 29/32
Powell Duffryn Colliery, Aberdare	1 0 7/32	1 6 19/32
Nixons Navigation Colliery	9 147/160	1 3 3/32
Locketta Merthyr Colliery	1 1 161/800	1 8 3/32
Gelli Collieries	11 103/160	1 5 23/32
Naval Colliery, Pandy Pla	10 212/800	1 8 17/32

6. By reason of the undue preference and inequality of charge the applicants had suffered damage and paid overcharges to the defendants since the 1st Jan. 1896; and they applied to the Court of the Railway and Canal Commission under the Railway and Canal Traffic Acts 1854 to 1888 and the Railway Clauses Consolidation Act 1845, for the following relief, that is to say: (1) An order enjoining the defendants to desist from subjecting the coal traffic of the applicants to the undue prejudice above referred to. (2) (Alternatively) An order enjoining the defendants at all times to charge to the applicants the same rates for the carriage of their coal as the defendants charged for coal for shipment from the said collieries respectively. (3) 1852l. 15s. 8d. as damages in respect of the overcharges.

The answer of the defendants was as follows:—

The defendants did not admit that coal destined for the applicants' premises was conveyed by the defendants from the collieries referred to in par. 2 of the application to the points mentioned in that paragraph, nor that coal for shipment was conveyed by them in the manner alleged in par. 3 of the application.

The coal for the applicants was not conveyed in the same manner and did not pass only over the same portion of the defendants' railway as the coal for shipment, nor did the defendants subject the applicants and traffic in coal for consumption in Cardiff to an undue and unreasonable prejudice and disadvantage.

There was no competition in interest between the applicants and the persons for whom the shipment coal was carried. The cost of conveyance of the applicants' coal was greater than that of

shipment coal, and lower rates for shipment coal were necessary for the purpose of securing in the interest of the public the shipment traffic.

The applicants had not suffered damage or paid overcharges. The defendants did not carry the coal destined for the applicants' mills, nor had the charges made by the defendants for the carriage thereof been paid by the applicants.

No complaint was made to the commissioners within one year from the discovery by the applicants of the matter complained of.

The charges made by the defendants had been paid voluntarily and with a full knowledge of the facts. The rates complained of had, for the period during which such rates had been in operation, been duly published in the rate-books of the defendants at their stations in accordance with sect. 14 of the Regulation of Railways Act 1873, as amended by the Railway and Canal Traffic Act 1888.

So much of the applicants' claim as related to damages alleged to have been sustained before the 23rd Dec. 1896 was barred by the Statute of Limitations.

It was assented to by both parties that the charges and the difference in the charges set out in par. 5 of the case were correct; and, further, that the charges were not paid by the applicants to the railway company, but were paid, at all events in the first instance, by the colliery-owners to the railway company.

It was also admitted in the evidence and was common ground that the rates charged by the defendant railway company for carrying the coal from the respective collieries to the sidings at Cardiff were, in the case of coal carried for the applicants' works in Cardiff and other works in Cardiff 75d. per ton per mile, which was the statutory maximum the railway company were entitled to charge, and in the case of coal for shipment from Cardiff 575d. per ton per mile; so that the two rates of which complaint was made by the applicants as founding an undue preference or an undue prejudice against them were the shipment rate of 575d. per ton per mile and the works rate of 75d. per ton per mile. The difference between the two rates (the shipment rate and the works rate) came to about 6d. per ton—that is, that the shipment rate was less than the works rate by some 30 per cent., or the works or home rate charged to the applicants and others in Cardiff for the home coal consumed at the works around the Cardiff Docks was some 50 or 52 per cent. more than the rate charged for shipment coal. There was a very large export of coal from the port of Cardiff (including Barry), estimated at some 20,000,000 tons yearly, of which some 12,000,000 tons were shipped from Cardiff (including Penarth). Of this quantity the Taff Vale Railway Company conveyed 9,000,000 tons for shipment (5,000,000 tons to Cardiff and 4,000,000 tons to Penarth), 1,000,000 tons for works over their whole system, and 400,000 tons to works at Cardiff; so that the proportion carried by the defendants for shipment and for home consumption at Cardiff was about 9,000,000 tons to 400,000 tons. The shipment rate was the same whether the coal was shipped to foreign ports or coastwise, and the same works rate was charged for all coal to be used in Cardiff.

Evidence was given on behalf of the applicants to the effect that they used about 12,000 tons

of coal yearly for their mills at Cardiff, and that they purchased their coal from the colliery companies set out in the application, but that the greater part of it (being more than one-half of the whole) they purchased from the Ocean Colliery Company, who were very large colliery proprietors and shippers of coal. The applicants generally paid to the colliery company the same rate as for shipment coal on the f.o.b. basis, in accordance with their contract, and then afterwards they paid the extra charge for the home or works coal over and above the shipment rate. The coal coming from the Ocean Company (whether intended for the applicants or for shipment) was brought down from the collieries intermixed together, and whatever their destination might be—whether for shipment or for home consumption—they were brought down together by the colliery company to the sidings at Cardiff in the same train loads and under the same conditions; and it was not until the coal got to these sidings that the colliery company said whether the coal was for shipment or for the works, and they then gave orders that some of the waggons should be sent to the applicants' mills, and the coal was then separated, and the applicants' coal went partly over the sidings and partly over the Cardiff Company's line to the applicants' works, for which the Cardiff Company were paid 2s. per waggon. The whole of the coal from the Ocean Colliery came down ostensibly for shipment; if it was intended for shipment it went over the staiths to the Roath Dock and the Roath Basin; but if it was intended for the applicants' works it was handed over at the sidings and then taken to the applicants' works. The coal in each case was precisely the same kind of coal—namely, steam coal that would be used for industrial purposes—and the applicants alleged that so far as they were concerned for precisely the same services in carrying coal of the same kind and quality, and carrying it under precisely the same conditions, they were charged by the railway company some 50 per cent. more when the coal was coming to their mills than when it was going for export, although there were no extra services of any kind performed by the company. As regards the payment of the rate, the usual course according to the contract was for the applicants to pay the colliery company the f.o.b. price, and then when the railway company made the further charge on the colliery company for the extra 6d. per ton, the colliery company paid it to the railway company, and then sent in another invoice to the applicants for that 6d. per ton, so that the applicants themselves did not pay the rate to the railway company directly, but the rate having been paid in the first instance by the colliery company, the applicants repaid the colliery company. Sometimes the coal was conveyed from the other collieries direct to the applicants' works, but in such cases it was carried under the same conditions as the shipment coal, and sometimes it was conveyed in pick-up trains.

For the purpose of showing competition in interest, evidence was given to the effect that coal was brought from the same collieries and districts at the shipment rate to Cardiff, and was thence carried by sea to Gloucester, London, Portsmouth, and to Ireland, and was supplied to flour millers in those places (four firms in and around London, one firm in Newport, and one in Cork), and that this

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coal would be used for milling purposes by the firms to whom it was supplied, and that these firms were more or less competitors with the applicants in their business in certain markets and particularly in London, so creating an unfair competition with the applicants, which considerably affected their business in London, Southampton, Portsmouth, Newport, and elsewhere.

Evidence was given on behalf of the railway company that originally there was no distinction on their line between the shipment rate and the works rate; that that identity of rate lasted from the opening of the railway in or about 1840 down to about the year 1860; that the first difference between the two rates was made about 1860 by reducing the terminal on shipment coal, and in 1867 that terminal was abolished. Then that having lasted for some years, the rate, which up to that time had been 875d. per ton per mile was, by successive steps from 1876 to 1889, reduced for shipment to 74d. per ton per mile. Then in 1889 the Barry Docks were opened and a new competition sprang up, and the Barry Company announced publicly that their shipment rate would not exceed 1d. per ton per mile, and in order to meet that the defendants brought down their shipment rate to the present figure of 575d., which was practically equivalent to the 1d. of the Barry Company, making allowance for the difference in distance, and that even before the opening of the Barry Docks great pressure was put upon the defendants by persons engaged in the shipping trade to lower their shipment rate, and that it was probably owing to that pressure that the very low Barry rate was fixed on, as the Barry Dock was built at the instance of coal traders. If coal were going from any given colliery to Cardiff by the Taff Vale Railway, or to Barry by that railway and the Barry Railway combined, the shipment rate and the works rate would be the same whether it were going to Cardiff or to Barry. If coal were going to Barry from these collieries it would pass over a part of the Taff Vale Railway, and thence by the Barry Railway to Barry, and in such case, if it were consigned for shipment, it would, when passing over the defendants' line, be charged the same low or shipment rate as if it were going to Cardiff; but if consigned for works in Barry it would be charged the high or works rate (875d.).

For the purpose of showing that the rate charged to the applicants was a fair rate, evidence was given to show that the rates actually charged for works at Cardiff (including the applicants' works) were the rates allowed under the defendants' Rates and Charges Order 1892, which was simply a re-enactment of their previous powers, and that this rate (875d. per ton per mile for coal), although a maximum, was a very low maximum—in fact, the lowest in the kingdom, although the distance was not great—and that in most of the other railway companies the maximum charge was 1½d. or over, as in the case of the Great Western, where the maximum went as high as 2d. per ton; and that therefore the applicants, in being charged that rate, were enjoying a low rate, which could not be lowered without reducing it to a non-paying rate.

Evidence was also given to show that the shipment rate could not be raised; that the low shipment rate had been brought about chiefly by the commercial pressure of Cardiff, and

had very largely increased the home and export trade of Cardiff, and that if there were a raising of the shipment rate the trade would leave Cardiff and go to other ports, such as Barry, Newport, and other places; that, in fact, it could not be raised, owing to the considerable and increasing competition with other foreign sources of coal supply, and that there was one special reason why it was impossible to raise it—namely, that the Barry Railway Company had bound themselves by agreement with their freighters, as one of the conditions on which they constructed their dock, that they would not charge more than 1d. per ton per mile for the conveyance of shipment coal over their railway, and that if the Taff Vale Railway charged a higher shipment rate than was charged by the Barry Railway, the coal would leave the defendants' railway and go to the Barry Railway, and that bargain between the Barry Company and the freighters ruled the defendants' shipment rate, and prevented them from raising it. The existence of the low shipment rate had been of great benefit to the public, and the fact that the defendants treated coastwise traffic exactly the same (as to shipment rate) as foreign traffic had developed considerable competition by sea to the advantage of the public; that by the low shipment rate the coal which formerly went by rail was attracted to Cardiff and was conveyed by sea to Southampton, London, and other places, and that if the shipment rate were raised this competition by sea would be materially affected, to the prejudice of the public.

For the purpose of showing the extra cost of carriage of works coal as compared with shipment coal, evidence was given that the shipment coal was brought down from the collieries to Cardiff in full train loads (of about 450 tons as an average), but that coal for the works, including the applicants' coal, was generally brought down in pick-up or mixed trains (of about 100 tons), which stopped several times on the journey for the purpose of picking up other goods, and that the extra cost of working these pick-up trains and delivering the coal by them at the various works was estimated by the defendant company from about 3½d. as a minimum to about 5½d. or 6d. per ton as a maximum, according to circumstances. The pick-up train consisted very largely of empty waggons returning to Cardiff after taking up goods traffic, a few trucks of light goods, chiefly empties—such as crates, boxes, and so forth—returning home, and a few trucks of coal; they were mixed trains, dealing with other goods as well as coal, and making stoppages all along the journey to pick up goods, thereby increasing the cost of carriage.

Sect. 2 of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) provides:

Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or

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any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company, and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.

The Railway and Canal Traffic Act 1888 (51 & 52 Vict. c. 25) provides:

Sect. 27 (1). Whenever it is shown that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services, than they charge to other traders, or classes of traders, or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company. (2) In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the court having jurisdiction in the matter, or the commissioners, as the case may be, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: Provided that no railway company shall make, nor shall the court, or the commissioners, sanction, any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services. (3) The court or the commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway.

Balfour Browne, K.C. (C. A. Russell, K.C. and W. J. Noble with him) for the railway company.—The two rates which are complained of as founding an undue preference are the shipment rate of 575d., and the works rate of 875d. It is important to point out that the applicants have really no contract at all with the railway company, and they do not pay the railway company for the carriage of their coal. They make their contracts with the colliery proprietors, and the colliery proprietors, and not the applicants, pay the railway company for the carriage. The charges complained of are charges to the colliery proprietors, so that the applicants are really not known to the railway company at all in this transaction. The applicants' complaint is based on the fact that the railway company do charge a different and a lower rate for coal for shipment than they do for coal for the [applicants'] works. That practice,

whether right or wrong exists at almost all ports. First, as to sect. 90 of the Railways Clauses Act 1845, there is no preference at all, as all coal going to works in Cardiff or for consumption in Cardiff is carried at exactly the same rate, and every person there is treated in the same way if he is going to consume in Cardiff. [*Cripps, K.C.*—The applicants are not here upon sect. 90 of the Act of 1845, nor do I think it would apply, though the case is as near to it as possible. *WRIGHT, J.*—If you are both agreed as to that, we need not consider that section.] If the complaint is under the Traffic Acts, then under sect. 2 of the Traffic Act of 1854, there must not only be a preference, but that preference must be shown to be undue. There was here no undue preference and no preference at all, because there was no competition in interest between the two sets of coal—the coal for shipment and the coal for the works, and coal for works in Cardiff was all carried at the same rate. It is said that the difference in the rates is illegal, and the argument is based, not so much on the Act of 1888, as upon sect. 2 of the Act of 1854, the words relied on being “no company shall make or give any undue or unreasonable preference . . . to or in favour of any particular person, or any particular description of traffic.” It is said that the company are preferring a traffic, and that therefore there is an undue preference. But there can be no preference of an article unless that results in the preference of an individual; it does not matter that an article is preferred. It is the trader that the Legislature want to protect as against the action of the railway company in relation to other traders; and when we refer to sect. 27 of the Act of 1888 it is seen that the word “traffic” is left out altogether. The words there are: “Whenever it is shown that any railway company charge one trader or class of traders” lower tolls, then the court has jurisdiction; so that the idea that you can have a preference unless there is a preference or prejudice to some individual is new and cannot be made out from the true construction either of sect. 2 of the Act of 1854 or sect. 27 of the Act of 1888. In various cases the question of traffic without a preference or a prejudice to an individual has been considered. It was considered with regard to passenger traffic by the Court of Session in *Hoxier v. Caledonian Railway Company* (17 Sc. Sess. Cas. 2nd series, 302, 1 N. & Mac. 27), and the distinction is founded on sect. 2 of the Act of 1854. That case shows that you cannot look at the traffic as such, but that there must be an individual who is aggrieved by the particular thing. That was followed in 1887 by this court in *Skinningrove Iron Company v. North-Eastern Railway Company* (5 Ry. & Can. Tr. Cas. 244). That position has not been altered by sect. 27 of the Act of 1888. Under that section if lower charges are made to one class of traders than to another, then the onus of showing that that is not an undue preference is put on the railway company, and in sub-sect. 2 the court, in dealing with the question of undue preference, are, in addition to other circumstances, to take into account two things—whether the lower charge is necessary for the purpose of securing the traffic in the interests of the public, and whether the inequality could not be removed without unduly reducing the rates charged to the complainant. Those are the tests

to apply to this case in ascertaining whether there has been an undue preference or not. First, with regard to the lower shipment rate, that lower rate is necessary for securing the traffic in the interests of the public. The home rate from the collieries to Cardiff and to Barry is practically the same. If the railway company raised the shipment rate to anything like the rate charged to the traders, then the company would get none of that traffic at all, and no coal for shipment would come over their railway at all; it would all go to Barry, Newport, and elsewhere, and into other hands; and in addition to the competition by sea there is also the competition by other railways and routes, and the competition is an element which this court ought to consider, according to Lord Herschell in *Pickering-Phipps v. London and North-Western Railway Company* (66 L. T. Rep. 721; (1892) 2 Q. B. 229). The whole district would suffer by raising the shipment rate. Then, with regard to lowering the traders' rate, the evidence shows that that rate is already very low, and that, if it were reduced at all, it would be to a non-paying rate. There is also another reason for the difference in the rates. The coal for shipment comes down in full train loads, whereas the applicants' coal is brought down in pick-up trains and in loads which are picked up at various places, and the cost to the company is thereby increased. That might not justify the whole difference, though it would account for a part of it; but the company do not rely upon the extra cost of carriage, as they wish to establish their right to make this difference, as comparing these two articles and their destination. Lastly, there is no competition in interest between the people complaining and the people who get this supposed undue preference, and all the cases show that there must be such competition of interest.

Cripps, K.C. (*Rowland Whitehead* with him) for the applicants.—The case raises a most important question of principle under the Traffic Acts, and the applicants are not here to seek to diminish by a penny or so the difference between the two charges, though, as traders, they would be glad to get any reduction. Our contention goes far beyond that to the general principle that the same stuff carried under the same conditions, so far as the traders are concerned, whether for export or for the applicants' works, ought to be charged at the same rate. The applicants' coal comes from the same collieries; it is the same kind of coal (steam coal) as the shipment coal, and it is extremely important in this case that as regards the conditions of carriage there is absolutely no distinction between whether the coal is going for shipment or for home consumption, and the applicants want to have their coal treated in the same way as to charges as the shipment coal. Traffic connected with the home industries should have the same advantage as the shipment rate. There is no question here of putting up the shipment rate; the railway company say that it is impossible; but the rate to the traders ought to be lowered to the shipment rate, as there is no reason why the home industries should not have the benefit of the competition which they ought naturally to get from the great shipping traffic at Cardiff. Then it is said that there is no element of competition, which is necessary in cases of undue preference. We have the very same pro-

ducts, the same steam coal in both cases—and steam coal is about the most competitive raw material possible under modern conditions of business—therefore we have both competition with, and disadvantage to, the applicants. Industries abroad competing with industries at home get the commodity of raw coal with an undue advantage. Coal going from Cardiff docks to be used in industries abroad must come into competition with home industries, and further, in the case of Messrs. Spillers, a large quantity of the shipment coal goes round to the Thames, where there are millers competing with them in their own trade. It has never been suggested in this court that where you have the same raw material, and are giving better terms for shipment than for home traffic, there is no competition. The home industries should not be put to this disadvantage of 6d. per ton. There is, therefore, competition. Then, apart from special injury to a particular trader, the Traffic Act of 1854, as explained in this respect by the Act of 1888, did provide against what is called undue preference as regards traffic *quâ* traffic, quite apart from trader. If there are traffics which in themselves are different—as, for instance, if it were a case of coal for gas purposes and coal for manufacturing purposes, then there is not the same traffic and there is not the traffic competition; but where the traffics are exactly the same or similar, then there is no case in which it has been held that a preference of this kind does not come within the undue preference clause. It is an extremely important principle that traffic for traffic, traffics are to be treated equally, as well as traders. The distinction is clearly brought out between the two things in sect. 2 of the Act of 1854. It says that the company are not to give any undue preference “to or in favour of any particular person.” That is one point, and that refers to the trader *qui* trader. Then the section goes on: “or any particular description of traffic.” That refers to traffic *quâ* traffic, and means (as was interpreted by the House of Lords under sect. 90 of the Act of 1845) that if you have traffic which, so far as the railway company are concerned, is similar in all respects and have the same stuff carried and carried under the same conditions, then the case comes within the very terms of sect. 2, and the company cannot charge more to one trader than to the other. There is the same idea in sect. 27 of the Act of 1888, which is merely in addition to the general principle of sect. 2 of the Act of 1854. We have the whole traders (as this is admitted to be the general system) who use this class of coal for their works at Cardiff, placed at an undue disadvantage in reference to rates and unduly prejudiced as compared with all other traders who use the same coal either in other parts of this country or abroad, and who get the lower price by means of export coal, some of which is exported to places in this country and thereby comes into competition with the applicants. So that there is not only an undue preference given to the one class of traders, but there is an undue prejudice or disadvantage to the other class, and traffic *quâ* traffic, quite apart from trader, comes within sect. 2. The only case that tends in favour of the company's contention is *Skinningrove Iron Company v. North-Eastern Railway Company* (*ubi sup.*). That case was decided in the year 1897, and therefore before the Act of 1888 was passed, and it is

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submitted that the law, as stated by Sir F. Peel (at p. 249), can hardly be considered the law now. There there was not a case of direct competition, one of the parties not being able to show that their trade was immediately affected. That is not the principle which is now adopted in this court. No one would suggest that an applicant would now have to show that he had lost orders in the market and that test would not now be applied in the sense of non-suiting anyone who brought an application for undue preference, merely because he could not show actual loss of market or actual injury, so long as there is competitive interest, as there was there and as there is here. But even taking that case as it is, we can show that we are aggrieved in having a higher rate charged, and in the sense that our actual competitors in trade get the advantage of the lower shipment rate. [WRIGHT, J.—I am not at all sure that sect. 27 of the Act of 1888 was not passed for the purpose of dealing with the *Skinningrove* case.] It certainly would deal with that: at all events, it is now sufficient for an applicant to prove a higher rate in respect of a similar transit to entitle him to launch his case. [He also referred to the judgment of Lord Herschell in *Pickering-Phipps v. London and North-Western Railway Company* (ubi sup.) and to *Great Western Railway Company v. Sutton* (22 L. T. Rep. 43; L. Rep. 4 H. L. 226.)]

C. A. Russell, K.C., for the railway company in reply, referred to sect. 41 of the Bute Docks Act 1882 (45 & 46 Vict. c. cxxii.), and to clause 7 of the Agreement in the schedule to the Taff Vale Railway Act 1884 (47 & 48 Vict. c. cxi.), as showing an important statutory distinction between coal which was destined for shipment and coal which was destined for other purposes, and as showing that Parliament imposed upon the company an obligation in respect of coal which was destined for shipment which they did not impose in respect of coal destined for other purposes, in that it obliged the company, when the coal was for shipment, to perform certain services, such as the removing and conveying of empty waggons free of any charge, which they would not have been bound to perform without payment, and that therefore, although there was not the statutory recognition of the difference between the shipment coal and land sale coal taking the form of a difference of maximum, there was the statutory recognition of the difference taking the form of obligations placed on the company in respect of shipment coal which were not put upon them in respect of land sale or works coal. In the first place, the applicants have failed to establish that there is any competitive interest; they have entirely failed to show that any person has been unduly preferred. Secondly, even if there was the least evidence as to that calling on the company for a justification, there is ample evidence of justification—namely, there is the statutory recognition of difference between shipment and land sales coal; the two trades are entirely different and distinct, and the one has necessities which do not exist in the other; in the case of shipment coal the company are subjected to the competition of other docks and railways, and there is nothing of the kind with regard to land sales coal; and there is also justification, because the cost of dealing

with the two classes of tariff is not the same, being higher in the case of land sales coal. On all these grounds the application fails.

WRIGHT, J.—We should not have thought of disposing of this case without further consideration if we had not already had a considerable opportunity of discussing it, and if we had not had the advantage of the very full arguments which we have heard. There is one point I wish to deal with before going to the merits of the case, and that is with regard to the construction of sect. 27 of the Railway and Canal Traffic Act 1888. I confess I have felt some difficulty throughout the case as regards the question whether these applicants have at present any *locus standi* to make this application, inasmuch as the rates for the railway carriage are, in the first instance at any rate, charged to, and paid by, the colliery company, and it is a matter of some difficulty to determine whether the payment by the colliery company is or is not a payment by them as colliery owners, or in some way as agents for persons to whom the coal is going. I do not think it is very material to discuss that question in the present case, for this one reason, amongst others, that in my opinion sect. 27 is rather framed with a view to giving the go-by, as far as possible, to technicalities of that kind. Sect. 27, sub-sect. 1, provides: "Whenever it is shown that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services, than they charge to other traders, or classes of traders, or to the traders in another district, or make any difference in treatment in respect of any such trader, or traders," and so on. It is not necessary, in our judgment, to decide it in this case; but I desire simply to point out that, to my mind, if in substance the charge is made so as to affect the interest of the trader, it may be that it is not essential legally that there should be any direct charge made to the trader. I say no more than that at present, and I say it only to pass it by. I now come to the case itself, which is one of very great importance. Messrs. Spillers and Bakers, the applicants, have mills and biscuit works at Cardiff, with an out-turn of something like 530,000L. per annum. For the purpose of those works they consume about 12,000 tons of coal per annum. For the carriage of that coal they pay, or there is paid in respect of the carriage of that coal—I will not say which it is at present—2s. per truck to the Dock Company, and 1s. 6d. per ton in respect of the transit over the Taff Vale Railway Company's (the defendants') line. The Taff Vale Railway Company's charge for similar coals carried by them over the same portion of line for shipment may be taken at 1s. The applicants, Messrs. Spillers and Bakers, complain that to the extent of this difference, which may be taken as 6d. per ton, there is an undue preference in favour of the shipment traffic and an undue prejudice or disadvantage to the applicants' traffic within the meaning of sect. 2 of the Railway and Canal Traffic Act of 1854; and inasmuch as for the transit over the same portion of the Taff Vale Railway Company's line of the same traffic there is a difference in the charge of 50 per cent., the applicants being charged some 50 per cent. more

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than the shipment rate, I suppose no one can deny that, *prima facie*, there is a case for investigation. It is possible, and I should myself say probable, that the difference of 6d. per ton in the 1s. 6d. might have to be reduced by something in respect of an actually greater running cost of the pick-up trains, in which the applicants' traffic is conveyed, as compared with the cost of the working of the trains with full train loads, in which the shipment coal is conveyed. That difference is put by the defendants at somewhere between 3d. and 6d., but I do not think it is possible to suppose that the real difference is as great as that. Most of it is due to the trucks carrying other goods, and, speaking for myself, I should say that the very outside allowance to make to the railway company for any difference in running cost in respect of the coal trucks would be 2d. per ton. But even that would leave a difference of some 33 per cent., and it is clear that the railway company, under sect. 27 of the Railway and Canal Traffic Act of 1888, have to justify that. Now, the Taff Vale Railway Company say that they cannot possibly raise their shipment rates. The shipment coal is about nine million tons, or nine-tenths of their entire coal traffic in the district, and, in my judgment, they have proved that they cannot practically raise the shipment rates, partly by reason of the agreements by which they are bound, partly by reason of the competition with Barry, and partly by reason of the circumstances of the traffic itself in the coal, which will not stand increased rates. Further, the Taff Vale Railway Company say that the 1s. 6d. is a reasonable charge to make for the works coal which the applicants consume; and I think that there is an entire absence of any evidence to show that that charge is, taken by itself, anything but a very low charge; at any rate, it is a reasonable charge. Are those two answers sufficient? Another answer is suggested—namely, that sect. 27 of the Traffic Act of 1888 does not apply at all, and that the old Traffic Act of 1854 does not apply at all, except where the applicants' traffic is shown to suffer in competition with other traffic. I do not say how far there may not be something in that argument. The existence of competition is, I think, proved in this case, but I think there is no sufficient proof that the competition is at all substantial at the present time, or is affected in any way by the rate which is charged to the applicants for their coal. I doubt myself very much whether, under sect. 27 of the Act of 1888, the element of prejudice in competition is in any way an essential part of the cause of action. I think that question may some day have to be argued carefully. But here in substance, there being no real case of competition, the applicants' case is really founded on the mere difference of the rates charged for the transit of the same thing over the same line. The ground upon which we have come to the conclusion that the applicants' case fails is extremely short and simple. We think that the rates charged for the works coal are not shown to be too high, but are, upon the face of them, and upon the evidence before us, quite reasonable rates, except so far as they are more than the shipment rates; and they are rates which are charged, not to the applicants alone, but to all the traders within the district—traders who consume between them in the more restricted district of

Cardiff alone 400,000 tons of coal for works and domestic consumption, and in the larger district which this railway supplies 1,000,000 tons of coal. That is a large area, and a large class of traders are affected, and when the whole of those traders are charged the same rate we cannot consider that the applicants have any special claims different from the other traders, and if the rate which is charged to all those traders is satisfactory to them, which, so far as the evidence goes, it appears to be, that is an additional argument for saying that the rate as charged to the applicants is one which ought not to be reduced unless by reason of the mere fact of the lower shipment rate. Therefore this case really comes down to a question whether the reduction of the shipment rate is of itself enough to give the applicants a right to relief. Upon that, it seems to me, the evidence is plain that the low shipment rate is justified here by necessity, and that practically it is impossible for the defendants to raise that rate. It is necessary to maintain the low shipment rates in order to secure the enormous traffic of 2,000,000 tons, in their own interest and in the public interest; and they are hindered by agreements, some of them statutory, and by the competition of Barry, from raising that rate at all. Then the case comes back to this, and this is the whole point of it; in sub-sect. 2 of sect. 27 of the Act of 1888 it is directed that we shall take into consideration, so far as we think reasonable, "in addition to any other considerations affecting the case, whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made." We have already answered that question in the affirmative. Then, secondly, "whether the inequality cannot be removed without unduly reducing the rates charged to the complainant." In our view, inasmuch as the shipment rates cannot practically be raised, and the only alternative is to lower the works rate, we cannot grant the relief asked, because it appears to us that the works rate is already as low as it can reasonably be made. Apparently it is quite as low as any rate in the United Kingdom for similar distances; and we do not see our way to reducing those rates further, because we think it would not be fair to the railway company to oblige them to charge the applicants less. We should add, although this forms no part of the grounds of our decision, that the loss to the applicants by reason of their being charged the works rate instead of the shipment rate, is not of a serious kind. Assuming that 2d. ought to be taken off the 6d. in respect of the difference of running costs between the two kinds of traffic, 4d. on 12,000 tons would be an annual loss of 200l. That on an out-turn of 530,000l. is about 9d. in 100l. At any rate, it is something very small, and it can hardly appreciably affect the applicants' traffic. For these reasons we think that the application must be dismissed.

Sir FREDERICK PEEL and Viscount COBHAM concurred.

Application dismissed.

Solicitors for the applicants, *Riddell and Co.*, for *Vachell and Co.*, Cardiff.

Solicitors for the respondents, *Williamson, Hill, and Co.*, for *Ingledeu and Sons*, Cardiff.

House of Lords.

Feb. 8, 9, and May 10.

(Before the LORD CHANCELLOR (Halsbury),
Lords MACNAGHTEN and LINDLEY.) (a)
WINANS AND ANOTHER v. ATTORNEY-
GENERAL. (b)

ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

*Domicil—Renunciation of domicil of origin—
Evidence—Burden of proof.*

*The onus of proving that a domicil has been chosen
in substitution for the domicil of origin lies
upon the party asserting that the domicil of
origin has been lost.*

*W., whose domicil of origin was in America, left
America in 1850 and resided in Russia, for
business purposes, for twenty years, visiting
England in the winter to avoid the Russian
climate. In 1870 he came to reside in England,
but up to 1883 visited Russia yearly for business
purposes. From 1883 up to his death in 1897
he resided in England. He retained a large
interest in property in America, and always
described himself as an American citizen, and
spoke frequently of his intention of returning
to America to develop his property in that
country. While in England he lived in various
houses taken on short leases. His will was
proved in England, and the Crown claimed
legacy duty on his estate, which was very large.*

*Held (reversing the judgment of the court below),
Lord Lindley dissenting, that the Crown had
failed to discharge the onus, which was upon
them, of proving that W. had a fixed and settled
purpose of renouncing his domicil of origin,
and that the claim for legacy duty failed.*

APPEAL from a judgment of the Court of Appeal
(Collins, M.R., Stirling and Mathew, L.JJ.),
reported 85 L. T. Rep. 508, who had affirmed a
judgment of the Queen's Bench Division
(Kennedy and Phillimore, JJ.), reported 83 L. T.
Rep. 634, upon an information by the Attorney-
General on behalf of the Crown to recover
legacy duty payable in respect of the estate of
William Louis Winans, who died on the 22nd
June 1897. The question was whether or not
he was domiciled in this country.

The action was commenced by information by
the Attorney-General, on behalf of the Crown,
claiming legacy duty at 10 per cent. on an
annuity of 2000*l.* bequeathed by the testator to
his sister-in-law, Ellen de la Rue, or her assigns
during her life for her separate use.

The courts below decided in favour of the
Crown.

The main facts admitted or proved were as
follows: W. L. Winans was born in 1823 in the
State of New Jersey, in America, where his
father, Ross Winans, was then domiciled. When
he was about three years old his father left New
Jersey with his family and settled at Baltimore,
in the State of Maryland, carrying on busi-
ness as a contractor; and he became a partner
with his father, and lived in his father's house
until he went to Russia in 1850. He went to

Russia to carry out Government contracts for the
making of railways there, and resided in Russia
for about twenty years, during part of the time
being United States Consul at St. Petersburg.

In 1851 he married, at St. Petersburg, the
daughter of a native of Guernsey, by whom he
had two sons, the appellants, both born at St.
Petersburg.

In 1859 a large property at Ferry Bar, Balti-
more, consisting of about 141 acres, was bought
by Thomas Winans, a brother of the testator,
for the Winans family, two-fifths of the purchase
money being contributed by W. L. Winans.

In 1859 W. L. Winans had suffered from
inflammation of the lungs, and he was advised that
he would die if he remained in Russia during the
winter and that he had better winter at Brighton,
in England. Accordingly he came to England;
and, finding that the climate of Brighton suited
him, he went there for the winter on account of
his health, but, except during the winter, he con-
tinued to live in Russia until the year 1870. He
brought his family with him in the winter because
he wished to have them with him, and also that
they might avoid the climate of Russia.

In 1860 he took a furnished house, No. 2,
Chichester-terrace, Brighton, for five years,
terminable at the end of any year of the term;
and in or about the same year he took the adjoining
house, No. 1, Chichester-terrace, for twenty-
one years, determinable at the fifth, seventh, or
fourteenth years of the term, as he was unable to
get it for a shorter period. He used these houses
for the winter.

On the 4th May 1860 two-fifths of the Ferry
Bar property were conveyed to the testator by
Thomas Winans.

In 1865 Mr. Winans renewed his agreement for
No. 2, Chichester-terrace for ten years, deter-
minable at the end of any year.

In or about 1870 many of the contracts
with the Russian Government were completed;
and after that year until the year 1883 the
testator lived in Russia for about two months in
the summer, at Kissingen for two or three months,
and in Scotland, London, and Brighton for the
rest of the year.

In 1870 he took the lease of a mixed shooting
in Scotland for the purposes of sport for himself,
the appellants (his sons), and his friends. He
afterwards took leases of deer forests in Scotland
for short terms, but did not himself shoot.

In or about 1886 the appellants gave up shooting
in Scotland, and in 1893 Mr. W. L. Winans ter-
minated the leases of the greater part of his
shootings in Scotland, and in 1896 sublet and
assigned the remainder of them.

In 1875 he continued to occupy No. 2, Chi-
chester-terrace as tenant from year to year, and
did so till his death.

In 1877 Ross Winans, his father, died; and
thereupon the Baltimore business, in which he had
retained an interest, was wound-up. In 1877 Mr.
Winans purchased the lease of No. 15, Ken-
sington Palace-gardens, which had an unexpired
term of sixty-five years.

Before buying the lease he made special in-
quiries whether he could dispose of it at any time
without difficulty, and ascertained that he could
do so.

In 1892 he ceased to reside there, and expressed
a desire to get rid of it.

(a) Lord Shand was present during the argument,
but died before their Lordships gave judgment.

(b) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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In 1881 he took a renewed lease of No. 1, Chichester-terrace for twenty-one years, determinable at the fifth, seventh, or fourteenth years.

In 1883 he ceased to visit Russia; and until 1890 he spent two or three months at Kissingen, in Germany, and the remainder of the year in Scotland, Brighton, and London.

In 1885 he bought a further two-fifths of the Ferry Bar property at Baltimore, leaving one-fifth outstanding in other members of the family.

Up to the year 1888 he suffered from consumption, but in that year this disease was arrested, although the lung mischief remained.

In 1888 he suffered from an internal affection, which recurred at intervals, and gradually broke down his health.

In 1893 Mr. Winans ceased to visit Kissingen; and from that time until his death he lived in London, Brighton, or in the country in England. He had for many years been interested in improvements in spindle-shaped or cigar-shaped ocean steamers, the object being to invent a steamer of such a shape that she would be very much steadier in going through the water than steamers of the usual shape.

Patents in connection with these vessels were first taken out in America in 1858.

Experiments were carried out by the testator in conjunction with his father and his brother, Thomas Winans; and in about the year 1877 he was left the sole active person, his father having died and his brother having retired. He had an office in London, where he had a staff of draftsmen engaged in making plans and designs of cigar ships, and in 1893 he applied in America for a prolongation of these patents.

In the affidavit made on the application for the prolongation of these patents he described himself as a citizen of the United States and a native of the city of Baltimore, and he pointed out the advantages which would accrue to the Government and people of the United States at large in peace and war from the construction of a fleet of ocean-going vessels for Transatlantic passenger traffic to sail under the flag of the United States, and he prayed that, in the interests of justice to an American citizen, Congress would not refuse to pass the Act prayed for.

Mr. Winans expressed the intention of running a line of cigar ships from England to America, building wharves on his Ferry Bar property for them to come to, and of going to America by the first cigar ship which crossed the Atlantic, building a house on the property at Ferry Bar, and living there as his home and developing the property. His state of health would have made it dangerous for him to go back in an ordinary vessel.

Mr. W. L. Winans had from time to time acquired the greater part of the shares in the property at Ferry Bar, Baltimore. He always called Baltimore his home, and in 1878 or 1880 he had plans prepared of a large house to be built for himself to live in on the property. He also had plans prepared for developing the property, and informed his solicitor that the property, if developed, would be worth 1,000,000*l.* He often expressed his intention of living there and developing it as soon as he could cross the Atlantic.

In Feb. 1897 he made his will, which was effective as a testamentary disposition both in the United States of America and in England, and he described himself as a citizen of the United States of America, residing at Nos. 1 and 2, Chichester-terrace, Brighton, in the county of Sussex.

Shortly before his death he had entered into an agreement to buy the remaining one-tenth share in the property at Ferry Bar, Baltimore, which was the only outstanding share in it. His political sympathies were always strongly American, and in many documents he described himself as a citizen of the United States or a native of Baltimore, but now sojourning in the City of London or in England, as the case might be.

Asquith, K.C., R. M. Bray, K.C., Willoughby Williams, and Kenrick appeared for the appellants.

The *Attorney-General* (Sir R. Finlay, K.C.), the *Solicitor-General* (Sir E. Carson, K.C.), and *Vaughan Hawkins* for the respondent.

In addition to the authorities cited in the judgments the following were also referred to in the course of the argument :

Hodgson v. De Beauchamps, 12 Moo. P. C. 285 ;

King v. Foxwell, 3 Ch. Div. 518 ;

Attorney-General v. Kent, 31 L. J. 391 Ex. ;

Hoskins v. Matthews, 8 De G. M. & G. 13.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 10.—Their Lordships gave judgment as follows:—

THE LORD CHANCELLOR (Halsbury).—My Lords: The short question here is whether Mr. Winans was at the time of his death domiciled in this country. So far as it is a question of law it is simple enough to state; but when the law has been stated a difficult and complex question of fact arises, which it is almost always very hard to solve. Now, the law is plain that where a domicile of origin is proved it lies upon the person who asserts a change of domicile to establish it, and it is necessary to prove that the person who is alleged to have changed his domicile has fixed and determined purpose to make the place of his new domicile his permanent home. Although many varieties of expression have been used, believe that the idea of domicile may be quite adequately expressed by the phrase, Was the place intended to be the permanent home? Now, Mr. Winans was an American citizen; he resided in Russia for some time; he had various residences in England and great sporting leases in Scotland. He married in St. Petersburg a Guernsey lady. He had property in the United States, and he originally came to England upon the recommendation of his medical man. He lived a very long time in England; and if I were satisfied that he intended to make England his permanent home, I do not think that it would make any difference that he had arrived at the determination to make it so by reason of the state of his health, as to which he was very solicitous. It would be enough that for obvious reasons he had determined to make England his permanent home; but was that his determination? I confess that I am not able very confidently to answer that question either way. I have been in considerable doubt when I view his whole career

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whether he ever intended finally to remain here. He had invented cigar-shaped boats, in which he took a deep interest as inventor, and also as one who meant to travel back to his own country when his boats succeeded. It may be that your Lordships do not think that he was likely to succeed; but it may be confidently asserted that the inventor thoroughly believed that he would succeed. It is true that great reliance might be placed upon his great acquisition of sporting areas in Scotland, but, on the other hand, they were acquired by him rather as profit-making investments than because he himself was devoted to sport; but even in this, as in some other parts of his conduct, it is difficult to say that a certain inference could be deduced from what he did. Being a man of enormous wealth, he never made a home for himself or his family such as one would have expected if he had really meant to remain permanently in England. Like all questions of fact dependent upon a variety of smaller facts, it is possible to treat this or that piece of evidence as conclusive, and different minds will attribute different degrees of importance to the same facts. I must admit that I have regarded the whole history of Mr. Winans' life differently at different stages of the argument, and the conclusion to which I have come is that I cannot say that I can come to a satisfactory conclusion either way; but then the law relieves me from the embarrassment which would otherwise condemn me to the solution of an insoluble problem, because it directs me in my present state of mind to consider upon whom is the burden of proof. Undoubtedly it is upon the Crown; and, as I have said that, I cannot bring myself to a conclusion either way whether Mr. Winans did or did not intend to change his domicile, his domicile of origin must remain, and I therefore am of opinion that the judgment of the Court of Appeal ought to be reversed.

LORD MACNAGHTEN.—My Lords: There is, I think, hardly any branch of law which has been more frequently or more fully discussed in this House in comparatively modern times than the law of domicile. Difficulties have arisen, and difficulties must arise now and then, in coming to a conclusion upon the facts of a particular case. But those difficulties, as Lord Cottenham said, are "much diminished by keeping steadily in view the principle which ought to guide the decision as to the application of the facts." Domicile of origin, or, as it is sometimes called, perhaps less accurately, domicile of birth, differs from domicile of choice mainly in this: that its character is more enduring, its hold stronger and less easily shaken off. In *Munro v. Munro* (1 Rob. H. of L. 492; 7 Cl. & F. 842) Lord Cottenham observed that it was one of the principles adopted not only by the laws of England, but generally by the laws of other countries, "that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile. . . . Residence alone," he adds, "has no effect *per se*, though, it may be most important as a ground from which to infer intention." "The law," said Lord Cairns, L.C., in *Bell v. Kennedy* (L. Rep. 1 H. L. Sc. 307), "is beyond all doubt clear with regard to the domicile of birth that the personal status

indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicile is acquired." The onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost. "Residence and domicile," as Lord Westbury points out, "are two perfectly distinct things. . . . Although residence may be some small *prima facie* proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find that the party had any other residence in existence or in contemplation." Lord Chelmsford's opinion was that "in a competition between a domicile of origin and an alleged subsequently-acquired domicile there may be circumstances to show that, however long a residence may have continued, no intention of acquiring a domicile may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not whether there is evidence of an intention to retain the domicile of origin, but whether it is proved that there was an intention to acquire another domicile." Such an intention, I think, is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years, least of all from the absence of any manifestation of intention one way or the other. It must be, to quote Lord Westbury again, a "fixed and settled purpose." "And," says his Lordship, "unless you are able to show that with perfect clearness and satisfaction to yourselves, it follows that a domicile of origin continues." So heavy is the burden cast upon those who seek to show that the domicile of origin has been superseded by a domicile of choice. And rightly, I think. A change of domicile is a serious matter—serious enough when the competition is between two domiciles both within the ambit of one and the same kingdom or country, more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicile. To the same effect was the inquiry which Lord Cairns proposed for the consideration of the House in *Bell v. Kennedy*. It was this—whether the person whose domicile was in question had "determined" to make, and had in fact made, the alleged domicile of choice "his home with the intention of establishing himself and his family there and ending his days in that country." In a later case (*Douglas v. Douglas*, 25 L. T. Rep. 530; L. Rep. 12 Eq. 617) which came before Wickens, V.C., who was an excellent lawyer, and, owing to the official position which he long held, peculiarly conversant with cases of this sort, all the authorities were reviewed. The competition there was between a Scotch domicile of origin and an alleged English domicile of choice. The learned Vice-Chancellor thought the case "a peculiar and difficult one." He put the question in this way: "What . . . has to be here considered," he said, "is whether the testator . . . ever actually declared a final and deliberate intention of settling in England or whether his conduct and declarations lead to the belief that he would have declared such an intention if the necessity of making the election between the countries had arisen." If the authorities which

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I have cited are still law, the question which your Lordships have to consider must, I think, be this—Has it been proved “with perfect clearness and satisfaction to yourselves” that Mr. Winans had at the time of his death formed a “fixed and settled purpose”—a “determination,” “a final and deliberate intention”—to abandon his American domicile and settle in England? Considering the amount of Mr. Winans’ fortune, which was between two and three millions in marketable securities, and the length of his residence in this country, it is somewhat singular that the evidence offered on the question before your Lordships should be so meagre. There is not a single letter written by or to him, or a memorandum or note of any sort made by him, which bears directly on the point. There is nothing but long-continued residence in England on the one hand and some oral declarations and some words in some legal documents on the other. There is nothing else except such inference as may be drawn from a consideration of Mr. Winans’ character and disposition, the life he led here, and the objects which he seems to have had most at heart. The principal events in Mr. Winans’ life may be stated briefly. He was born in the United States in 1823. He lived there till 1850, residing at Baltimore with his father, a railway contractor, and employed in his father’s business. Mr. Winans’ eldest son, Walter, who was examined in this case, says that when he spoke of Baltimore he always called it “home.” In 1850 Mr. Winans went to Russia. He was employed by the Russian Government, as his father had been, in equipping railways there on the American system. During the Crimean War he rendered assistance to the Russian Government in the construction and equipment of gunboats to be used against the enemy—England and England’s ally. In Russia he married a Guernsey lady, the daughter of a gentleman also employed by the Russian Government. He had two sons by her. In 1859 his health broke down. There were symptoms of consumption, and he was warned by his doctor that another winter in Russia would probably be fatal. He was advised to winter in Brighton in England. Very reluctantly, under medical orders, he left St. Petersburg and spent the winter in an hotel at Brighton, returning to Russia when the winter was over. In 1860 he took a furnished house in Brighton, No. 2, Chichester-terrace, for a term of five years, determinable at the end of any year. He also took the next house, No. 1, for a term of twenty-one years, determinable at the fifth, seventh, or fourteenth year. He connected the two houses structurally. He held both these houses at the time of his death—the furnished house, No. 2, as tenant from year to year, and No. 1 on a tenancy similar to that on which it was originally taken. From 1860 down to 1870 or 1871 he used to spend the winter at Brighton and about eight months of the year in Russia. In 1870 he gave up his house in St. Petersburg, and took a lease of some shooting in Scotland, apparently for the sake of his sons, for he shot very little himself. From 1871 to 1883 he spent about two months in Russia, two or three months in Kissingen, in Germany, and the rest of the year in Brighton, Scotland, or London. In 1883 he ceased to visit Russia, thenceforward dividing his time between Kissingen, Brighton, London, and Scotland. This mode of life continued until 1893. After that date

he spent the whole year in England—in London, Brighton, and the country. He never bought an estate in England for himself or for either of his sons. As far as he was concerned “he preferred living in furnished houses or hotels,” so his son says. Two events in his life referred to in the argument have, I think, no bearing on the question before your Lordships. In 1877, to please his wife, he bought the Crown lease of a house in Palace-gardens. But he never lived there until after 1892. It was shut up, and he tried to dispose of it. When he bought the lease he seems to have made particular inquiries in order to ascertain whether there was anything in the conditions of the lease which might prevent his parting with it at any time he pleased. He never liked to “hamper” himself. Any prudent person would probably have done the same. Then there was his unfortunate experiment in the management and improvement of deer forests in Scotland. He took vast tracts of forest, not, perhaps, altogether for sporting purposes, as sport is understood in this country. After a time he inclosed the ground with miles of fencing to prevent the deer from straying. He had a notion that the value of the forest for letting purposes would be much increased by stopping shooting for some years and allowing the stage a longer term of undisturbed life. However, he got into trouble with the crofters and with his lessors, and he became rather unpopular, both with those by whom deer-stalking is highly esteemed and those to whom deer forests are an abomination. He thought, too, that he had rather wasted money on the shootings—so he gave up his experiment, and he seems to have got rid of all the Scotch shootings before his death. In the dearth of evidence by written or oral declaration as to Mr. Winans’ intentions, it seems to me to be important to consider what manner of man he was, what were the main objects of his existence and what sort of life he lived in this country. I think that there is a good deal of force in some observations that were made both by Lord Cranworth and Lord Wensleydale in the case of *Whicker v. Hume* (7 H. L. C. 124) to the effect that in these days, when the tendency of the educated and leisured classes is to become cosmopolitan—if I may use the word—you must look very narrowly into the nature of a residence suggested as a domicile of choice before you deprive a man of his native domicile. Mr. Winans was a person of considerable ability and of singular tenacity of purpose, self-centred and strangely uncommunicative. He was not interested in many things, but whatever he did he did, as his son says, thoroughly. He became completely absorbed in a scheme when he took it up. At the same time he lived a very retired—almost a secluded—life. He took no part in general or municipal politics. He rarely went into society. He had no intimate friends, if, indeed, he had any friends at all, in this country. There is no evidence that he was interested in any charity or charitable or philanthropic institution in England. Although he was on affectionate terms with his two sons he never let them into his secrets. “He always worked his business himself,” his son says, “and never brought us into the business affairs in any way.” And although at odd times he mentioned his property in America, he never allowed even his eldest son “to

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understand much about it." Mr. Winans had three objects in life. His first object was his health. He nursed and tended it with wonderful devotion. He took his temperature several times a day. He had regular times for taking his temperature and regular times for taking his various waters and medicines. Besides the care of his health there were two other objects which engrossed his thoughts. The first was the construction of spindle-shaped vessels commonly called cigar ships. This form of vessel was, as Mr. Winans asserted, an invention of the Winans family. Many patents were taken out for it both in England and in America. It was asserted that vessels of this type would be able to cross the Atlantic without pitching or rolling. In an application to Congress in the year 1892 Mr. Winans represented himself as attached heart and soul to his country and asked for protection for a long term of years in consideration of the great expenditure which he and his family had incurred in perfecting the invention, and the vast benefits that would result from it to the people of the United States. Mr. Winans declared his confident expectation that a fleet of spindle-shaped vessels subsidised by Congress would restore to America the carrying trade which had fallen into the hands of England and other foreign nations, secure to America the command of the sea, and make it impossible for Great Britain to maintain war against the United States. Such a fleet as he described in his application could, he said, "meet war vessels in open sea near the European side and destroy one vessel after another, so that none of them would be able to reach our shores." In the development of his invention Mr. Winans stated that he had incurred an expense equal to nearly 4,000,000 dollars. Mr. Winans's confidence in this project remained unshaken to the end of his life, and he kept an office in Beaufort-gardens where a staff of engineers and draftsmen were engaged in working out the problem. There was another scheme which Mr. Winans hoped to develop and work in connection with his fleet of spindle-shaped vessels. In 1859 a property in Baltimore, about 200 acres in extent, called Ferry Bar, was purchased on behalf of the Winans family originally for the purpose of being used, as Mr. Winans states in a letter of the 31st Jan. 1882, "for the service of the sea-going steamers of the spindle-shaped form." The scheme was that the water frontage should be used for wharves and docks, while a portion of the property should be laid out for the building of first-class houses as a sort of Belgravia. There Mr. Winans intended to build a big house for himself and control the undertaking, which would make the property, he thought, when developed, worth one million sterling. Nothing practical came of this scheme because the family could not agree among themselves as to how the property was to be developed. So Mr. Winans determined to wait until he could get the whole into his own hands. Then he would develop the property himself in his own way and according to his own ideas. He did not succeed in acquiring the entire interest until just before his death. At the date of his death, his son says, "he was working night and day on it." I find that in the conveyances of the last portion of the Ferry Bar property, which were prepared just before his death, and are dated the 16th June 1897, Mr.

Winans is described as "of city of Baltimore, but now sojourning in the City of London, England." Of course, to us these schemes of Mr. Winans' appear wild, visionary, and chimerical. But I have no doubt that to a man like Mr. Winans, wholly wrapt up in himself, they were very real. They were the dream of his life. For forty years he kept them steadily in view. And one was anti-English and the other wholly American. It was in connection with these schemes that the latest and clearest declaration of intention was made by Mr. Winans. Mr. H. Montague Williams, who was his solicitor at Brighton, says that about two years before his death, a time which in cross-examination he fixed in the winter of 1895 or beginning of 1896, Mr. Winans entered into rather a lengthy disquisition about the Ferry Bar property. Mr. Winans told him that he was making arrangements for buying the remaining shares in it—that a good deal of it belonged to him, and that he intended when he had done that to go out to America and live in Baltimore and develop the estate there himself. Mr. Williams says he remembers Mr. Winans particularly saying, "If I do that it will be worth a million pounds," and he adds "the decided way in which he said 'I shall go out to Baltimore' (or words to that effect) struck me at the time." The only other circumstance to be mentioned is that in his will, dated the 4th Feb. 1897, Mr. Winans describes himself as a "citizen of the United States of America." It was argued on behalf of the Crown that although Mr. Winans may have been prevented by the state of his health from returning to America when he left Russia, and although he could not have safely attempted the voyage in the latter years of his life, yet there was a time in which he might have ventured to cross the Atlantic in an ordinary liner. The obvious answer is that at that time, when divided counsels and family disagreements prevented the development of the Ferry Bar property, he had no object in going to Baltimore. Then it was said that the length of time during which Mr. Winans resided in this country leads to the inference that he must have become content to make this country his home. Length of time, is, of course, a very important element in questions of domicile. An unconscious change may come over a man's mind. If the man goes about and mixes in society that is not an improbable result. But in the case of a person like Mr. Winans, who kept himself to himself and had little or no intercourse with his fellow men, it seems to me that at the end of any space of time, however long, his mind would probably be in the state in which it was at the beginning. When he came to this country he was a sojourner and a stranger, and he was, I think, a sojourner and a stranger in it when he died. On the whole, I am unable to come to the conclusion that Mr. Winans ever formed a fixed and settled purpose of abandoning his American domicile and settling finally in England. I think that up to the very last he had an expectation or hope of returning to America and seeing his grand schemes inaugurated. To take the test proposed by Wickens, V.C., "if the question had arisen in a form requiring a deliberate or solemn determination," I have no doubt that Mr. Winans, who was, as his son says, "entirely American in all his ideas and sympathies," would have answered

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it in favour of America. I am, therefore, of opinion that the Crown has not discharged the onus cast upon it, and I think that the order appealed from ought to be reversed.

LORD LINDLEY (after going through the facts as set out above, his Lordship continued as follows:—My Lords: I take it to be clearly settled, by the *Lauderdale Peerage* case (10 App. Cas. 692), *Udny v. Udny* (L. Rep. 1 H. L. Sc. 441), and *Bell v. Kennedy* (Ib. 307) that the burden of proof in all inquiries of this nature lies upon those who assert that a domicile of origin has been lost, and that some other domicile has been acquired. Further, I take it to be clearly settled that no person who is *sui juris* can change his domicile without a physical change of place coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression may be preferred. If a change of residence is proved, the intention necessary to establish a change of domicile is an intention to adopt the second residence as home, or, in other words, an intention to remain without any intention of further change except possibly for some temporary purpose: (see *Story's Conflict of Laws*, s. 43, and *Re Craignish*, 67 L. T. Rep. 689; (1892) 3 Ch. 180; *Attorney-General v. Pottinger*, 4 L. T. Rep. 368; 6 H. & N. 733; and *Douglas v. Douglas* (25 L. T. Rep. 530; L. Rep. 12 Eq. 617). The change of residence here is plain enough, and need not be enlarged upon. The difficulty is about the intention of Mr. Winans with reference to the change. The exact time when he made up his mind to settle here cannot be ascertained. There is no document or conversation which enables any one to fix the date. But it by no means follows that when he died it cannot be inferred that he must have abandoned all thoughts of going back to America and settling there, and have gradually become content to make his home in this country without contemplating any further change. If this can be established, a change of domicile will be the legal result: (*Haldane v. Eckford*, 21 L. T. Rep. 87; L. Rep. 8 Eq. 631; *Douglas v. Douglas*, *ubi sup.*). An intention to change nationality, to cease to be an American and to become an Englishman, was said to be necessary in *Moorhouse v. Lord* (8 L. T. Rep. 212; 10 H. L. C. 272); but that view was decided to be incorrect in *Udny v. Udny* (L. Rep. 1 H. L. Sc. 441). Intention may be inferred from conduct, and there are cases in which domicile has been changed, notwithstanding a clear statement that no change of domicile was intended: (see *Re Steer*, 3 H. & N. 594; and per Wickens, V.C. in *Douglas v. Douglas*, *ubi sup.*). An expressed intention to return for a temporary purpose, or in some possible event which never happens, will not prevail over a clear inference from other circumstances of an intention to remain: (see *Attorney-General v. Pottinger*, *ubi sup.*, per Bramwell, B.; *Doucet v. Geoghegan*, 9 Ch. Div. 441). I do not propose to refer at length to the details of Mr. Winans' life. They were elaborately brought to your Lordships' attention by counsel. There is no real controversy about the facts. The question is what inference ought to be drawn from them. Here I have the misfortune to differ from my noble and learned friends who have just addressed the House. I have arrived at the same conclusion as that arrived at by Kennedy and Phillimore, JJ. and by the Court of Appeal. I cannot myself draw any

other inference. Where was his home, his settled permanent home? He had one and only one, and that one was in this country; and long before he died I am satisfied that he had given up all serious idea of returning to his native country. He was an American citizen permanently settled in this country. But although so settled he was proud of his nationality and had no intention of changing it. He may at one time have looked back on Baltimore as his possible ultimate home, but he had ceased to do so long before he died. In 1880 he proposed to build a house for himself in Baltimore, but this came to nothing; and none of his later schemes for developing his property there were carried out in his lifetime, nor did they involve any change of residence on his part. A dim hope and expectation of being at some time able to return to America when he had succeeded in constructing a ship to his liking, which he never did, is spoken to by his son; but when last does not appear. I can find nothing to displace the only inference which I can draw from Mr. Winans' conduct for the last twenty or twenty-five years of his life. In my opinion the appeal should be dismissed, with costs.

Order appealed from reversed. Respondent to pay to the appellants their costs here and in the courts below.

Solicitor for the appellants, E. H. Quicke, for H. Montague Williams, Brighton.

Solicitor for the respondent, Sir F. C. Gore, Solicitor of Inland Revenue.

Friday, May 13.

(Before the LORD CHANCELLOR (Halsbury), Lords DAVEY, JAMES OF HEREFORD, and ROBERTSON.)

ATTORNEY-GENERAL v. LORD MONTAGU. (a)
ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Revenue—Estate duty—Mortgage by tenant for life and remainderman—Indemnity to tenant for life—Property passing on death of tenant for life—Finance Act 1894 (57 & 58 Vict. c. 30), ss. 1, 2, 7.

The tenant for life of settled lands joined with the remainderman in creating a mortgage on the lands.

The loan secured by the mortgage was entirely for the benefit of the remainderman, and the tenant for life did not covenant to pay either the mortgage debt or the interest on it.

By an indenture of even date with the mortgage, and made between the remainderman and the tenant for life, the former covenanted to indemnify the latter against any loss of profits of the settled lands, and against any expenses or charges in respect of the mortgage, and assigned certain securities and charges on other lands as security for the performance of such covenants. The tenant for life was in fact kept wholly indemnified during her life.

Held (reversing the judgment of the court below), that on the death of the tenant for life the estate duty should be assessed upon the whole value of the settled lands, and not upon the value after deducting the amount of the mortgage debt.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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APPEAL from a judgment of the Court of Appeal (Williams, Stirling, and Mathew, L.JJ.), reported 88 L. T. Rep. 120; (1903) 1 K. B. 483, who had reversed a judgment of Phillimore, J., reported 86 L. T. Rep. 57; (1902) 1 K. B. 429, by which it was declared that on the death of Charlotte Anne Dowager Duchess of Buccleuch (which happened on the 28th March 1895) estate duty became payable under the provisions of the Finance Act 1894 upon the principal value of the Ditton estate devised by the will of Walter Francis, Duke of Buccleuch, without deduction of a certain mortgage debt of 27,000*l.*

By the will, dated the 8th Aug. 1883, of the Duke of Buccleuch and Queensberry (who died on the 16th April 1884) the testator's Ditton estate in the counties of Bucks and Middlesex was settled to the use of the testator's wife for life without impeachment of waste (as a residence for her and in addition to all other provisions), and from and after her decease to the use of the testator's second son, the respondent, then Lord Henry John Montagu Douglas Scott, for life, without impeachment of waste, with remainder to the use of his first and other sons successively in tail male, with divers remainders over.

By an indenture dated the 28th May 1888 the Ditton estate was disentailed, with the consent of the duchess as protector of the settlement, and a joint power of appointment over it given to Lord Montagu and his eldest son, John Walter Edward Douglas Scott Montagu.

By an indenture dated the 29th May 1888 and made between the duchess dowager of the first part, the respondent Lord Montagu of the second part, the said J. W. E. Douglas Scott Montagu of the third part, and Gerald Henry Brabazon Ponsonby, John Poyntz, Earl Spencer, and Frederick William John, Marquis of Bristol (thereinafter called the mortgagees), of the fourth part, Lord Montagu and his son, in consideration of 27,000*l.* lent to them by the mortgagees, jointly and severally covenanted with the mortgagees to pay to them on the 29th Nov. then next the sum of 27,000*l.* with interest at the rate of 4*l.* per cent. per annum; and the duchess dowager, as tenant for life in possession under the will of the late duke, granted, and the respondent Lord Montagu and the said J. W. E. Douglas Scott Montagu, in exercise of the joint power of appointment given to them over the fee simple in remainder expectant on the decease of the duchess dowager by the indenture of the 28th May 1888 appointed, the Ditton estate to the use of the mortgagees in fee simple, subject to a proviso for redemption by the respondent Lord Montagu and his son, on payment of the moneys due thereunder, and Lord Montagu and his son covenanted for the keeping in repair and due insurance of buildings during the continuance of the security.

By another indenture, also dated the 29th May 1888, and made between Lord Montagu of the first part, J. W. E. Douglas Scott Montagu of the second part, the duchess dowager of the third part, and William Henry Walter, Duke of Buccleuch, and Charles Alexander, Earl of Home (trustees), of the fourth part, an estate called the Clitheroe estate, in the county of Lancaster, was charged with a yearly rentcharge of 1500*l.* in favour of the duchess dowager to keep down the interest on the mortgage debt of 27,000*l.*, or on so much thereof as should from time to time be

owing on the mortgage, to the intent that the life interest of the duchess dowager in the Ditton estate might be wholly exonerated therefrom.

The mortgage for 27,000*l.* was created wholly for the benefit of the respondent Lord Montagu and his son, and the dowager duchess, who joined in the mortgage only as a surety, was, and the Ditton estate during her life was, exonerated and kept wholly indemnified by them against the mortgage and all claims in respect thereof.

The interest on the mortgage debt was throughout paid by the respondent Lord Montagu.

The dowager duchess died on the 28th March 1895.

The Crown claimed duty on the whole value of the Ditton estate free from the mortgage debt, but the respondent contended that duty could only be claimed on the equity of redemption after deduction of the moneys due on the mortgage.

Phillimore, J. decided in favour of the Crown, but his decision was reversed by the Court of Appeal.

The *Attorney-General* (Sir R. Finlay, K.C.), the *Solicitor-General* (Sir E. Carson, K.C.), and *Vaughan Hawkins* appeared for the appellant, and argued that in estimating the duty payable the mortgage should not be deducted from the value of the estate, for, as between the tenant for life and the remainderman the estate must be considered as unincumbered as she enjoyed the whole of the life estate in consequence of the indemnity. The court below decided the case of the authority of *Lord Cowley v. Commissioners of Inland Revenue* (80 L. T. Rep. 361; (1899) A. C. 198), but they misapprehended the effect of that decision. There is a distinction between a sale of a portion of the property and the creation of a charge. This is a cesser of interest within sect. 2, sub-sect. 1 (b) of the Act, and the value is to be ascertained under sect. 7, sub-sect. 7 (b). The point did not arise in *Lord Cowley's* case. If the tenant for life had parted with her life interest the purchaser would have been entitled to the benefit of the indemnity.

Danckwerts, K.C. and *Austen-Cartmell*, for the respondent, contended that nothing passed on the death of the tenant for life but the equity of redemption. The object of the indemnity was to provide against the case of the mortgagees enforcing their security by foreclosure. The tenant for life was mortgagor in possession, and the remainderman got nothing but the property subject to the mortgage.

The *Attorney-General* in reply.—This arrangement for an indemnity was not intended as compensation for the loss of any part of the life interest, but to prevent it from being in any way affected.

At the conclusion of the arguments their Lordships gave judgment as follows:

The LORD CHANCELLOR (Halsbury).—My Lords: In this case, with the greatest respect for the learned judges in the Court of Appeal, I think that they have allowed validity to be given to what is mere form and not substance, and with that I cannot concur. If one looks at the whole arrangement, it seems to me that the substance of the matter was this; not that there should be a mere contractual relation between the remainderman and the lady who was entitled to this pro-

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erty, but that the property should remain hers as between those two persons, and that she should never have one farthing less than she was entitled to, being secured by the property to which she was entitled, and all the analogies which Mr. Danckwerts has endeavoured to put before your Lordships seem to me to beside the question. It may be that the same deed may have a legal operation as between one set of persons, and yet, as between other parties to it, the real substance of the transaction may be such that it cannot be treated as if it had its full legal operation. That, I think, is the case here. As between the duchess and Lord Montagu there never was the relation which is insisted upon by Mr. Danckwerts. It seems to me that Lord Montagu, wanting to borrow money, gets the security of this lady's estate which enabled him to borrow the money; but the parties to the instrument which they executed point out very distinctly that the effect of it, as between those two persons, is to be that the duchess is to be entitled for the rest of her life to retain and keep that which she then had—namely, a right to the property and to the results of the property. And she did so; she paid nothing in the way of interest on the mortgage, and she received the rents and profits. As between those two persons, looking at that instrument, I think that it effected nothing, although it afforded security to the persons who lent the money. But the notion that there was no liability to estate duty when that transaction came to an end, and when the whole of what she had goes to Lord Montagu, seems to me to be a very forced construction of these legal instruments, which were effective for the object which they were designed to effect, but were never intended to pass the estate itself out of the dowager duchess. Under those circumstances, with great respect for the Court of Appeal, I am of opinion that the true question was that which was put by Phillimore, J. He said that what she gave up, what she relinquished by her death, was the thing that she enjoyed during her lifetime. That being so, it seems to me that the Crown is perfectly right in the contention which has been set up. I therefore move your Lordships that the judgment be reversed.

LORD DAVEY.—My Lords: I am of the same opinion. I adhere to everything which I am reported to have said in the case of *Lord Cowley v. Commissioners of Inland Revenue* (*ubi sup.*), and in particular to the passage from my judgment on which the Court of Appeal founded the decision which they have given. If this were a simple case of mortgage by a tenant for life and a remainderman, or by successive tenants for life and the ultimate remaindermen, I think that the property would be taken out of the settlement as from the date of the mortgage, and, on the death of the first tenant for life, the estate duty could only be claimed on the equity of redemption. But there appear to be circumstances in the present case which take it out of that rule. I am not prepared to say, and it is not necessary to express an opinion, whether, if there had been a mere indemnity, such, indeed, as the law would imply from the fact of the mortgage being for the benefit of the remainderman, if there were a mere personal covenant of indemnity to the duchess (to take this concrete case), by Lord Montagu and his son, I am not prepared to say

whether that would be sufficient or not; I do not say that it would not be, and I do not say that it would be. But in this case it appears to me that we have far more than that. We have what in my opinion amounts to an express contract by Lord Montagu and Mr. Montagu with the duchess that under no circumstances, although she had at their request joined in the mortgage in order to effect a mortgage of the fee, should she be called upon to pay anything out of the income of her Ditton property; and provision was made that, in case any such claim were made upon her, she might have recourse to another fund. Another fund was provided out of which the interest should be obtained. The arrangement between the parties was, in fact and in truth, that the duchess should continue to enjoy the whole income of the Ditton estate discharged, as between them, from any liability by reason of her having joined in the mortgage. What, then, was the property which passed on the death of the duchess? First, I will take it under sect. 1. It is admitted that the equity of redemption at any rate passed—that is to say, the property subject to the mortgage. But did the residue of the property pass on the death of the duchess? Now, if the true transaction between the parties was that as between themselves the mortgage should not effectually attach to the estate until the death of the duchess, then I think it may fairly be said that the whole property passed under sect. 1. But supposing that not to be so, and I quite admit that there is a little technical difficulty about it, I am quite satisfied that the property passed under the combined operation of sect. 1 and sect. 2. As regards sect. 1, the equity of redemption—that is, the property subject to the incumbrance—passed undoubtedly under sect. 1; but as regards sect. 2 it appears to me that so much of the income of the Ditton estate as represented or was equal to the interest on the mortgage comes exactly within sect. 2, sub-sect. 1 (b). If I am right in the view which I have expressed as to the effect of the arrangement between the parties, the duchess had a beneficial interest, notwithstanding the mortgage, in the whole of the income, including the 1080*l.* a year, which was equivalent to the interest on the mortgage. She had, as between her and Lord Montagu, an undoubted beneficial interest to receive and to retain, without incumbrance or charge upon it, that portion of the income. Sect. 2, sub-sect. 1 (b), is this: "Property in which the deceased or any other person had an interest ceasing on the death of the deceased." Now, I think that the portion of the rents which was equal to 1080*l.* a year was property in which the duchess had an undoubted beneficial interest ceasing on her death. Then the sub-section says that the property is to be deemed to pass, to what extent? "to the extent to which a benefit accrues or arises by the cesser of such interest." Lord Montagu thereupon acquired the benefit of receiving that sum of 1080*l.* a year for the purpose of discharging his mortgage interest. He was under liability for the interest on the mortgage during the duchess's lifetime but he had no fund out of which to pay it. He now receives a fund out of which he will be enabled to discharge the interest of the mortgage. In my opinion that is "a benefit which accrues or arises" to him. The property represented by that 1080*l.* a year, if it did not pass under sect. 1,

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is to be deemed to pass under sect. 2. To complete the case I may as well point out that to determine the value which is to be deemed to pass sect. 7, sub-sect. 7 (b), provides that "if the interest extended to less than the whole income of the property," the value of the benefit accruing shall be "the principal value of an addition to the property equal to the income to which the interest extended." So that *quacunque via* I am of opinion that, whatever technical difficulties there may be, and whatever was the form of the conveyance which the parties employed for the purpose of carrying out the transaction, the Crown is entitled to say that the whole value of the Ditton estate either passed under sect. 1, or should be deemed to have passed under sect. 2. I confess that if there were any difficulty in this view, which I do not think there is, I should have thought it quite open to your Lordships to say that if the 1080*l.* a year is to be a charge upon the Clitheroe annuity, then the case is as broad as it is long, because if Lord Montagu is relieved from the payment of estate duty on the ground that the estate, to the extent of the mortgage, did not pass by the duchess's death, he would still remain liable to pay an equivalent amount of duty in respect of the cesser of the annuity created out of the Clitheroe money for the duchess's indemnity. I am therefore of opinion that the appeal should succeed, and that the judgment below should be reversed.

Lord JAMES OF HEREFORD.—My Lords: I concur in the result which has been arrived at by my noble and learned friends. No doubt there was in form a mortgage—a mortgage that was good as between the mortgagor and mortgagee—and I accept the submission of the respondent's counsel that beside that mortgage there was only a contractual obligation; but I differ from his submission that this contractual obligation cannot affect the estate passing on the death of the tenant for life. It seems to me that the contractual obligation did affect the estate, because it relieved the tenant for life from bearing any of the burden of the mortgage. The result is that in substance there was, as between the tenant for life and the remainderman, no mortgage, and that by the death of the Dowager Duchess of Buccleuch, the tenant for life, Lord Montagu, obtained the estate without the mortgage affecting him, or at all events obtained the benefit of it to a greater degree than during her life. He had then to bear the burden of the mortgage. By the death of the tenant for life he has become seised of the estate, and receives the benefit of it which he did not receive before. Therefore I concur in thinking that the judgment appealed from ought to be reversed.

Lord ROBERTSON.—My Lords: I entirely concur.

Judgment appealed from reversed. Judgment of Phillimore, J. restored. Respondent to pay the costs both here and below.

Solicitor for the appellant, Sir F. C. Gore, Solicitor of Inland Revenue.

Solicitors for the respondent, Nicholl, Manisty, and Co.

Feb. 23, 25, and May 17.

(Before the LORD CHANCELLOR (Halbury),
Lords MACNAGHTEN and LINDLEY.)

STEEL, YOUNG, AND CO. v. GRAND CANARY
COALING COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

Ship—Charter-party—Construction—Time for loading—Stoppage by strike—"Stoppage for six days from time of vessel being ready to coal"—Right to cancel charter.

By a charter-party it was agreed that a ship of the appellants should load a cargo of coal for the charterers "to be loaded in 140 running hours, commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds, and ready to load." The charter-party also provided that in the event of a stoppage caused by a strike "continuing for a period of six running days from the time of the vessel being ready to load, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage."

Due notice was given that the ship was ready to load, and, after the expiration of the time allowed for loading, a stoppage caused by a strike commenced, and continued for six days. No cargo had been shipped, and the charterers gave notice that the charter-party was cancelled. Held, that the charter-party contemplated a stoppage in existence at the beginning of the loading time, and that the charterers were not entitled to cancel the charter on the occurrence of a stoppage at a later period.

Judgment of the Court of Appeal reversed.

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), reported 87 L. T. Rep. 321; 7 Com. Cas. 213, who had reversed a judgment of Phillimore, J., reported 6 Com. Cas. 240, in favour of the appellants, the plaintiffs below.

The action was brought by the appellants, as owners of the steamship *Nith*, against the respondents for breach of a charter-party. The facts of the case and the material clauses of the charter-party appear from the headnote above, and from the judgments of their Lordships.

The ship was ready to load on the 8th Aug. 1900, and due notice was given to the respondents. The loading time expired on the 15th Aug., but no cargo had been loaded.

On the 20th Aug. a colliery strike caused a stoppage of the coal intended for the ship, and this stoppage continued for more than six days.

On the 28th Aug. the respondents gave notice that the charter was cancelled.

The ship could not obtain another charter till the 3rd Sept., and then at a lower rate of freight. The plaintiffs claimed damages for the delay from the 8th Aug. to the 3rd Sept. and also for the difference in freight. The defendants paid into court a sum for demurrage at the rate fixed by the charter-party from the 8th Aug. to the 26th Aug.

Carver, K.C. and L. Noad appeared for the appellants.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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J. A. Hamilton, K.C. and Montague Lush, K.C. for the respondents.

Carver, K.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 17.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case the whole question seems to turn upon a very narrow point—namely, the true construction of the charter-party. I have tried to see whether the language literally construed according to the ordinary plain meaning of words and sentences is susceptible of any other meaning than that which the plaintiffs attribute to it. I am unable to come to the conclusion that it is. Although I am not insensible to some of the inconvenience which may result from a literal interpretation of the words, I cannot say that any alternative interpretation that I can suggest is fit for your Lordship's adoption. No other construction can be placed upon the words than that contended for by the plaintiffs; to my mind they are not susceptible of any other meaning. The parties have placed their own interpretation upon them, and it appears to me impossible to contend under those circumstances that there is any other construction to be given to the charter-party than that for which the plaintiffs contend. If that is the true view of the charter-party, the facts raise no question which can be debated, when once you give that interpretation to the charter-party. I can give no other construction to it than the literal meaning which the words convey, and, therefore, I move that the judgment of the Court of Appeal be reversed.

Lord MACNAUGHTEN.—My Lords: The question in this case depends on the true construction of one clause in a charter-party, under which a screw steamer called the *Nith* was engaged to carry a cargo of coal from Newport in Monmouthshire to Santa Cruz or Las Palmas. The charter makes provision for the avoidance of the contract in the event of a stoppage occasioned by a strike or any cause beyond the control of the charterers continuing for six running days from the time of the vessel being ready to load, subject, however, to this proviso—that no cargo had been shipped on board. The point to be decided is whether the stoppage to be effective for the purpose of avoiding the contract must be in existence at the beginning of the loading time or whether it may commence at any time within a reasonable limit after notice given of the vessel being ready to load. The former construction was adopted by Phillimore, J. The Court of Appeal has taken the other view. The clause in question, so far as material, is in the following words: "3. The cargo to be loaded in 140 running hours . . . commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load. . . . Any time lost through riots, strikes, lock-outs . . . or by reason of . . . any cause beyond the control of the charterers not to be computed as part of the loading time unless any cargo be actually loaded during such time." I pause for a moment to point out that here the charter itself contemplates the possibility of cargo being loaded during a stoppage—a thing

which might very well occur, even though it were intended that the cargo should consist of nothing but coal. The clause proceeds as follows: "In the event of any stoppage or stoppages arising from any of these causes continuing for six running days from the time of the vessel being ready to load, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages." Of course, if a charter were to be annulled after cargo had been shipped on board difficulties must arise, and it would be by no means easy to provide for the rights of the parties. It is, therefore, only reasonable and, indeed, necessary, that any provision annulling a charter should not apply when once cargo is shipped. It can make no difference whether cargo actually on board has been shipped before the commencement of the stoppage or during the stoppage. The expression "such stoppage" must mean a stoppage continued for the full period of six running days. These considerations seem to make it plain that the words "previous to such stoppage or stoppages" mean previous to the completion, not previous to the commencement, of the period which may give occasion for the avoidance of the charter. It cannot, I think, be disputed that if the language of clause 3 is to be taken in its natural and ordinary signification a stoppage to be effective must be one reckoned from the commencement of the loading time. On any other view the words "from the time of the vessel being ready to load" would be wholly idle and superfluous. So much out of place would they be that I cannot imagine any draftsman, however careless, inserting them or allowing them if inserted to remain uncanceled. The argument on the other side is that the literal construction is to be rejected and a less accurate meaning given to the word "from," because the proviso at the end of the clause shows as it is contended, that the parties must have contemplated that there would occur between the commencement of the loading time and the six days' stoppage an interval of time during which cargo might or might not be put on board. It seems to me, however, that there is not much force in this argument, if you bear in mind that the parties contemplated the possibility of cargo being put on board during a stoppage. And the force of the argument is, I think, altogether destroyed when you find that by a note in the margin of the charter, which seems to be part of the printed form—for it also occurs in the substituted charter of the 3rd Sept.—the charterers are at liberty to put on board twenty tons of general cargo. The loading of general cargo would not necessarily, or even probably, be prevented by a strike, lock-out, or accident which might interfere with loading coal. It appears to me, therefore, that, even without resorting to a suggestion which is rejected by the Court of Appeal as a vain imagination of counsel, ingenious, but wholly unfounded, there is nothing to justify a departure from the natural and ordinary meaning of the language employed to define the commencement of a stoppage which may operate to put an end to the contract. The result is not unreasonable. There are two provisions relating to stoppages occasioned by a cause beyond the control of the charterers—a general provision and a special provision. In all cases of stoppages, partial or otherwise, the charterer may

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exclude from the loading time the time during which no loading takes place. In the special case of the charterer being met by a stoppage in existence at the commencement of the loading time, which is just as likely to happen as the occurrence of a stoppage afterwards during the loading time, the contract may be annulled. Looking at the matter from a charterer's point of view, that, I think, is all that can be required. From a shipowner's point of view the other construction would seem, occasionally at any rate, to offer a premium on dilatory tactics. As regards the measure of damages, it seems to me that Phillimore, J. was right. There was, in my opinion, a repudiation of the contract on the one side and an acceptance of that repudiation on the other. I am, therefore, of opinion that the appeal should be allowed with the usual consequences.

LORD LINDLEY.—My Lords: The expression "loading time," which occurs in this charter, means the 140 running hours within which the ship is to be loaded; and these 140 hours begin to run after written notice that the ship is ready to load. Any time lost in loading through strikes, &c., is not to be computed as part of the loading time, unless some cargo is actually loaded during such time. So far the charter-party seems clear enough. Then if any strike, &c., continues for six days "from the time of the vessel being ready to load" the charter is to become null and void, unless any cargo shall have been shipped prior to the stoppage. The expression "six days from the time of the vessel being ready to load" points to the earliest time when she is ready, and not to any time after she is ready. I quite see the inconveniences which may arise in other cases from adhering closely to the words of the clause on which the controversy between the parties turns. But I see no absurdity or injustice in construing the clause in its most obvious and natural sense in this particular case. The case is peculiar and unusual. The ship was ready to load and her time for loading had expired before there was any strike, and the strike had lasted six days before the charterer began to load, and he then insisted that the charter had become null and void. That is the case with which your Lordships have to deal. This case does fall within the clause if construed according to its most obvious meaning. I leave other cases to be dealt with when they arise. The appellants have the advantage of being able to rely on the words as they stand, and I see no sufficient reason for extending them. As regards the damages, the correspondence shows a refusal by the charterer to load on the 28th Aug., persisted in from that time onwards, and I see no reason for holding that the damages have been improperly assessed. In my opinion, therefore, the appeal should be allowed, with costs here and below, and the judgment of Phillimore, J. should be restored.

Judgment appealed from reversed. Judgment of Phillimore, J. restored. Respondents to pay to the appellants the costs here and below.

Solicitors for the appellants, W. A. Crump and Son.

Solicitors for the respondents, Botterell and Roche, for F. Vaughan, Cardiff.

Feb. 16 and May 16.

(Before the LORD CHANCELLOR (Halsbury),
Lords MACNAGHTEN and LINDLEY.)

SAMUEL v. JARRAH TIMBER AND WOOD
PAVING CORPORATION LIMITED. (a)

ON APPEAL FROM THE COURT OF APPEAL
IN ENGLAND.

Mortgage—Debenture stock of company—Collateral agreement for purchase—Clog on equity of redemption.

The appellant agreed to make an advance to the respondent company upon the security of first mortgage debenture stock of the company with an option of purchasing the whole or any part of the stock so pledged at an agreed price at any time within twelve months. The company were desirous of paying off the loan before the expiration of the twelve months, and the respondent gave notice that he intended to exercise his option of purchasing. The company thereupon brought an action claiming a declaration that the agreement was not binding on them, and for consequential relief, and the appellant counter-claimed for specific performance or damages.

Held (affirming the judgment of the court below), that the case came within the rule that a mortgage is not allowed at the time of making the loan to enter into a contract for the purchase of the mortgaged property, and that the option of purchasing could not be enforced.

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Romer and Cozens-Hardy, L.J.J.) reported 88 L. T. Rep. 106; (1903) 2 Ch. 1 who had affirmed a judgment of Kekewich, J. reported 87 L. T. Rep. 44; (1902) 2 Ch. 479 in favour of the respondents in an action brought by them against the appellant under circumstances which appear from the headnote above, and from the judgments of their Lordships.

P. O. Lawrence, K.C. and Manning appeared for the appellants.

T. R. Warrington, K.C. and Martelli for the respondents.

In addition to the cases cited in the judgments *South African Territories Limited v. Wallington* (78 L. T. Rep. 426; (1898) A. C. 309) was referred to.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 16.—Their Lordships gave judgment as follows:—

THE LORD CHANCELLOR.—My Lords: I regret that in this case the state of the authorities leaves me no alternative than to affirm the judgments of Kekewich, J. and of the Court of Appeal. A perfectly fair bargain made between two parties to it, each of whom was quite sensible of what they were doing, is not to be performed because at the same time a mortgage arrangement was made between them. If a day had intervened between the two parts of the arrangement the bargain which the appellant claims a right to have performed would have been perfectly good and capable of being enforced; but a line of authorities going back for more than a century has decided that such an arrangement as that which was here arrived at is contrary to a principle of equity, the sense or reason of which

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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I am not able to appreciate, and very reluctantly I am compelled to acquiesce in the judgments appealed from.

LORD MACNAGHTEN.—My Lords: By letter dated the 11th June 1901 the appellant, Henry Samuel, offered to advance to the respondent company 5000*l.* at 6 per cent., upon the security of 30,000*l.* first mortgage debenture stock of the company, subject to his having "the option of purchasing the whole or any part of such stock at 40 per cent. at any time within twelve months." Other conditions were attached to the offer, but they are not material for the purpose of the present question. Then followed this provision: "The advance to become due and payable with interest at thirty days' notice on either side." The offer was accepted by the company. The stock was duly created and registered in Mr. Samuel's name. Within the period of twelve months, and before the company gave notice of their intention to repay the advance, Mr. Samuel claimed a right to purchase the whole of the mortgaged stock at the agreed price. Thereupon the company brought this action, asking for a redemption and a declaration that the option was illegal and void. Both Kekewich, J. and the Court of Appeal decided in favour of the company. Having regard to the state of the authorities binding on the Court of Appeal if not on this House, it seems to me that they could not have come to any other conclusion, although the transaction was a fair bargain between men of business without any trace or suspicion of oppression, surprise, or circumvention. It is, I think, unnecessary to consider what the true construction of the agreement between Mr. Samuel and the company may be. The result would have been precisely the same if the agreement had in terms declared that the option was not to continue after repayment. The law undoubtedly is that a condition such as that in question, if legal and binding at all, must come to an end on repayment of the loan. In the Court of Appeal the question was treated as governed by the principle, of which *Noakes v. Rice* (86 L. T. Rep. 62; (1902) A. C. 24) is a recent example, that on redemption the mortgagor is entitled to have the thing mortgaged restored to him unaffected by any condition or stipulation which formed part of the mortgage transaction. That principle, I think, is perfectly sound. But in my opinion the question here depends rather upon the rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property. This latter rule, I think, is founded on sentiment rather than on principle. It seems to have had its origin in the desire of the Court of Chancery to protect embarrassed landowners from imposition and oppression. And it was invented, I should suppose, in order to obviate the necessity of inquiry and investigation in cases where suspicion may be probable and proof difficult. I gather from some general observations made by Lord Hardwicke in *Mellor v. Lees* (2 Atk. 494), that he would have been disposed to confine the rule to cases in which the court finds or suspects "a design to wrest the estate fraudulently out of the hands of the mortgagor," and to cases of "common mortgage" that is, as I understand it, mortgage of land by deed. It will be observed that in the latter case of *Toomes v. Conset* (3

Atk. 261), which is often referred to for a statement of the rule, his Lordship speaks only of "a deed of mortgage"—an instrument which perhaps rather lends itself to imposition; for no one, I am sure, by the light of nature ever understood an English mortgage of real estate. In *Vernon v. Bethell*, however (2 Eden, 113), Northampton, L.C., then Lord Henley, laid down the law broadly in the following terms: "This court, as a court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And, therefore, I take it to be an established rule that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not truly speaking free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them." This doctrine, described by Lord Henley as an established rule nearly 150 years ago, has never, so far as I can discover, been departed from since or questioned in any reported case. It is, I believe, universally accepted by text writers of authority. Speaking for myself, I should not be sorry if your Lordships could see your way to modify it so as to prevent its being used as a means of evading a fair bargain come to between persons dealing at arm's length and negotiating on equal terms. The directors of a trading company in search of financial assistance are certainly in a different position from that of an impecunious landowner in the toils of a crafty moneylender. At the same time, I quite feel the difficulty of interfering with any rule that has prevailed so long, and I am not prepared to differ from the conclusion at which the Court of Appeal has arrived. I am, therefore, of opinion that the appeal must be dismissed with costs.

LORD LINDLEY.—My Lords: The letter of the 11th June 1901, written by the defendant to the plaintiff company, contained an offer of a loan of 5000*l.* to the company upon certain terms, and this offer and the terms proposed were accepted by the company by their letter in answer, dated the 14th June 1901. These two letters constituted an agreement between the parties. The main provisions are as follows—viz.: (1) That the defendant should forthwith lend the company 5000*l.* at 6 per cent., redeemable on thirty days' notice by either party; (2) that the defendant should have as security 30,000*l.* of the company's first mortgage debenture stock transferred to him; (3) that the directors of the company should elect a nominee of his on their board; (4) that the defendant should have the option of purchasing the whole or any part of such stock at 40 per cent. at any time within twelve months; (5) that he should have a further option—viz., in the event of the company at any time raising further capital or selling its undertaking for shares or stock of another company, the defendant should have the option of underwriting the taking up of such new capital, or shares, or stocks at a commission of 10 per cent. The first question is, What is the true nature of the agreement? Is it a mortgage with an option of purchase, or is it a conditional sale? Or is it an agreement giving Samuel an option of holding the debenture stock as a mortgage or a purchase? It appears to me to be

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clearly a mortgage with a option of purchase. A loan of 5000*l.* on security was what the company wanted, and what Samuel agreed to let the company have on terms. They were not bargaining for anything else. As soon as the 5000*l.* was advanced and the debenture stock was placed at Samuel's disposal he was in the position of mortgagee of that stock. He had the rights of a mortgagee and the company had the rights of a mortgagor. There was that reciprocity and mutuality of remedies which distinguishes a mortgage transaction from a conditional sale, and from other transactions more or less resembling a mortgage, but not really constituting a mortgage. The transaction was, in my opinion, a mortgage plus, amongst other things, an option of purchase, which, if exercised by the mortgagee, would put an end to the mortgagor's right to redeem—i.e., would prevent him from getting back his mortgaged property. This was the view taken by Kekewich, J. and by all the members of the Court of Appeal, and I am unable myself to view the transaction differently. In *Lisle v. Reeve* (83 L. T. Rep. 731; (1902) 1 Ch. 53), Buckley, J. suggested some instances in which he considered that a mortgagee might validly stipulate for an option to buy the equity of redemption; but although his decision was affirmed first by the Court of Appeal (85 L. T. Rep. 464; (1902) 1 Ch. 53) and afterwards by this House (*Reeve v. Lisle*, 87 L. T. Rep. 308; (1902) A. C. 461), the affirmation proceeded entirely on the fact that the agreement to buy the equity of redemption was no part of the original mortgage transaction, but was entered into subsequently, and was an entirely separate transaction to which no objection could be taken. It is plain that the decision would not have been affirmed if the agreement to buy the equity of redemption had been one of the terms of the original mortgage. The Irish case *Re Edward's Estate* (11 Ir. Ch. Rep. 367) is to the same effect. I cannot help thinking that both parties intended that the two options of purchasing the 30,000*l.* debenture stock and of underwriting further capital or debenture stock, if issued, were to be exercisable, even after payment off of the 5000*l.* But the decisions of this House in *Noakes v. Rice* (*ubi sup.*) and *Bradley v. Carritt* (88 L. T. Rep. 633; (1903) A. C. 253) conclusively show that, whatever might have been intended, Samuel could not have been entitled to exercise either option after repayment of his loan. But these decisions and the previous decision of *Salt v. Northampton* (65 L. T. Rep. 765; (1892) A. C. 1) emphatically recognise the old doctrine once a mortgage always a mortgage, which is too well settled to be open to controversy. Lord Harkwicke said in *Toomes v. Consett* (3 Atk. 261): "This court will not suffer in a deed of mortgage any agreement in it to prevail that the estate become an absolute purchase in the mortgagee upon any event whatsoever." But the doctrine is not confined to deeds creating legal mortgages. It applies to all mortgage transactions. The doctrine once a mortgage always a mortgage means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that

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effect is invalid, and is inconsistent with the transaction being a mortgage. This principle is fatal to the appellant's contention if the transaction under consideration is a mortgage transaction, as I am of opinion it clearly is. Then it was contended that, as the property mortgaged was debenture stock issued by a limited company, the case did not fall within the principle to which I have been referring. I confess my inability to follow the argument on this point. Debenture stock is usually a sum of money charged on the assets of the company issuing it. It may be redeemable or irredeemable, in which case it is not a mortgage at all. But whether redeemable or irredeemable it is capable of being made a security for money lent upon it. It can be mortgaged as well by the company which issues it as by an ordinary holder. I can discover no reason for treating a mortgage of debenture stock as something so different from other mortgages as to render the principle once a mortgage always a mortgage inapplicable to it. In my opinion the appeal ought to be dismissed with costs.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Dale, Newman, and Hood.*

Solicitor for the respondents, *H. P. Becher.*

April 28, 29, and May 19.

(Before Lords MACNAGHTEN, DAVEY, JAMES OF HEREFORD, and ROBERTSON.)

CHEMISCHE FABRIK VORMALS SANDOZ v.
BADISCHE ANILIN UND SODA FABRIKS. (a)
ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

Practice—Service of writ out of the jurisdiction—Order XI., rr. 1, 4—Prima facie evidence of breach within jurisdiction.

Where application is made for leave to serve a writ out of the jurisdiction, or to discharge an order for such service, the court is not called upon to try the merits of the action, but the affidavits should show a prima facie cause of action within the jurisdiction, and disclose a substantial question which the plaintiff bona fide desires to try. Sufficient information should be given to make clear the ground on which the court is asked to proceed.

Judgment of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal (Collins, M.R., Romer, and Cozens-Hardy, L.JJ.), reported 88 L. T. Rep. 490; 20 Pat. Cas. 413, who had affirmed an order of Joyce, J. refusing a motion on behalf of the appellants to discharge an order giving the respondents leave to issue a writ in the action, and to serve the appellants with notice of it out of the jurisdiction.

The respondents were the owners of letters patent in this country for an invention for "the manufacture and production of new basic dye-stuffs."

The appellants carried on business at Basle, in Switzerland, as manufacturers of various chemical substances, including, as the respondents alleged,

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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among others, dyes made according to the patented invention of the respondents.

The respondents commenced the present action to restrain the appellants from infringing their letters patent, and an affidavit was filed by the solicitor for the respondents setting out the grounds on which it was alleged and believed that the appellants were infringing the letters patent.

On reading this affidavit Joyce, J. gave leave to the respondents to serve notice of the writ on the appellants outside the jurisdiction, and service was accordingly made on the appellants at their place of business in Basle.

On the 3rd Feb. 1903 the appellants caused a conditional appearance to be entered for them, but subsequently moved to set aside the writ and service.

It was from the dismissal of this motion that the present appeal was brought.

Order XI., r. 4, is in the following terms:

Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made, and no such leave shall be granted unless it shall be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this order.

It was alleged by the respondents that the appellants had, by their travellers and agents, obtained orders in this country for a dye which infringed the respondents' patent.

The appellants contended that they had not done any act which constituted an infringement of the letters patent of the respondents or brought them within the jurisdiction of the court.

Asquith, K.C., Upjohn, K.C., and Colefax appeared for the appellants.

Moulton, K.C., Cripps, K.C., and J. C. Graham for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 19.—Their Lordships gave judgment as follows:

LORD MACNAGHTEN.—My Lords: As your Lordships, after a full discussion, have come to the conclusion that the appellants have not made out a case for disturbing the order under appeal, it seems to me that the less said about the matter the better. The learned counsel for the appellants admitted that the evidence on their side did not completely displace all the grounds upon which permission to serve the writ abroad was sought. Now, if the case be reduced to a consideration of the effect of the way in which the appellants' samples and pattern cards have been used in this country there would still remain a nice and difficult question of law, and one which it is conceded has never yet been brought forward for decision. Whether the appellants can do without the use of these samples and pattern cards—which hitherto they have used largely—whether the question is of as little importance to their trade as they represent it to be, or whether it is really of vital importance, as alleged on the other side—that is a matter which it is impos-

sible to determine on the materials now before the House. It is at least conceivable that it may be of great importance. I think that the respondents are entitled to have this question tried, and tried in the usual manner. And on that ground, even if it stood alone, I think that they would be entitled to maintain the order of which they are in possession. Of course, the court is bound to be careful in allowing a step to be taken which will expose foreigners to the inconvenience and annoyance of litigation in this country. But, after all, the foreigners are not so much to be pitied in the present case. They have invaded this country, and it is on account of what they are alleged to have done in England that they are impleaded. Having said so much I should say no more, but that I think that the evidence adduced calls for some observation. Speaking for myself, I must say that I do not think the affidavits on either side altogether satisfactory. One cannot help being struck by the silence of the four agents who manage the appellants' business in England, on whose conduct the case will probably turn. Their silence is all the more remarkable since it appears that one of the appellants' travellers and their general manager abroad came over to London to make their affidavits. It is to be presumed that they must have had some consultation with the agents in this country. And it certainly would be more satisfactory to know what the agents themselves say about their mode of conducting the business than to have their action described second-hand by foreign witnesses. The evidence on the part of the respondents is, I think, open to still greater objection. Assuming that Mr. Johnson's affidavit was sufficient in the first instance (as I think it was), and assuming that he was a proper person to make the affidavit required by rule 4 (as I think he was) a more definite answer ought (as it seems to me) to have been given to the appellants' counter affidavits. The respondents' case, was that their letters patent had been infringed by the appellants in no fewer than six instances, and on a large scale, and that they had at last obtained definite proof of infringement, and yet they do not give the court a single instance in proof of their assertion. I think, that under the circumstances sufficient information ought to have been given to make it clear that the court was asked to proceed on sure ground. This unwillingness on the part of the respondents to show their hand has led to a great deal of unnecessary expense and delay. On the whole, however, I do not think that it would be right to interfere with the order of the Court of Appeal. It is a matter of discretion, and the court appears to have exercised its discretion with great care and consideration. The learned judges of the Court of Appeal made their order with some hesitation and reluctance, and, with some reluctance, I move your Lordships that the order appealed from be affirmed, and the appeal dismissed with costs.

LORD DAVEY.—My Lords: The jurisdiction which has been exercised by the High Court in the present case is always one of some delicacy and difficulty, and the conditions prescribed by the orders of the court do not diminish the difficulty. Rule 1 of Order XI. enumerates the cases in which the court may give leave to serve a writ out of the jurisdiction. The present case is alleged to come under the head lettered (f)

H. OF L.]

MCDONALD v. BELCHER AND OTHERS.

[PRIV. CO.]

An injunction is sought to restrain the defendants from doing some act within the jurisdiction. Rule 4 of the same order prescribes that the application is to be supported by evidence stating that in the belief of the deponent the plaintiff has a good cause of action, and no such leave is to be granted unless it be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this order. This does not, of course, mean that a mere statement by any deponent who is put forward to make the affidavit that he believes that there is a good cause of action is sufficient. On the other hand, the court is not, on an application for leave to serve out of the jurisdiction, or on a motion made to discharge an order for such service, called upon to try the action or express a premature opinion on its merits, and where there are conflicting statements as to material facts, any such opinion must necessarily be based on insufficient materials. But I think that the application should be supported by an affidavit stating facts which, if proved, would be a sufficient foundation for the alleged cause of action, and, as a rule, the affidavit should be by some person acquainted with the facts, or, at any rate, should specify the sources or persons from whom the deponent derives his information. A more difficult question is where it is in dispute whether the alleged or admitted facts will, as a matter of law, entitle the plaintiff to the relief which he seeks. If the court is judicially satisfied that the alleged facts, if proved, will not support the action, I think the court ought to say so, and dismiss the application or discharge the order. But where there is a substantial legal question arising on the facts disclosed by the affidavits which the plaintiff *bona fide* desires to try, I think that the court should, as a rule, allow the service of the writ. The words at the end of the order do not, I think, mean more than that the court is to be satisfied that the case comes within the class of cases in which service abroad may be made under the first rule of the order. In the present case, if I had been in Joyce, J.'s place, I am not sure that I should have granted the leave for service abroad on Mr. Johnson's affidavit alone, but on the affidavits filed by the present appellants I think that there was enough to justify the learned judge in refusing to discharge the order. I designedly say nothing as to either the facts or the law, lest I should be misunderstood or supposed to express a premature opinion on the merits. I am therefore of opinion that the appeal should be dismissed.

Lord JAMES OF HEREFORD.—My Lords: It is impossible to lay down any general rule as to the measure of proof required by Order XI., r. 4, to justify the summoning of a person resident abroad to come within the jurisdiction and here answer to process. In my view that power ought not to be lightly exercised. To bring those who may be foreigners from far away—without knowledge of our language or procedure—without possible means of proof at hand, imposes a burden and difficulty which ought not to be lightly inflicted. But this power does exist, and the conditions under which it is to be exercised are to be found in Order XI., rr. 1 and 4, as mentioned at the Bar. I quite agree that the court to which the application is made for service abroad has not to try the question whether a suit can in the

result be successfully maintained. Such a determination might involve a consideration of complicated facts, of credibility of witnesses, or of the application of legal principles. But, on the other hand, the court ought, I think, to be convinced by the proof brought before it that the applicant is in a position to present to the tribunals of the country a substantial case for their determination. I think, also, that before granting the application the court should afford the proposed defendant an opportunity of denying categorically the statements relied upon by the applicant. [His Lordship discussed the evidence, and continued as follows:] Without expressing any opinion as to what my judgment would have been if I had had to determine this case in the court of first instance, I have, after great doubt, come to the conclusion that the appellant has not sufficiently established that the discretion of that court, and of the Court of Appeal, has in either instance been so erroneously exercised as to justify your Lordships in reversing those judgments. I, therefore, concur in the view that this appeal should be dismissed.

Lord ROBERTSON.—My Lords: The question before your Lordships is whether the decision of the Court of Appeal should stand. That decision was pronounced on different materials from those which were before Joyce, J., and I think that the decision can be supported. My view is that the net result of the affidavits on both sides is to disclose, *prima facie*, a question or questions to be tried about the samples and the specimen cards. This conclusion is derived from the special circumstances of the case. From the tone of the Lords Justices' judgments, I infer that there is no danger of the courts encouraging vagueness and laxity in the statements upon which they will proceed to exercise this exceptional jurisdiction against foreigners. The reserve which is appropriate enough in the early stages of a suit brought by right must be abandoned when the plaintiff is asking the court for leave to serve a foreigner. And I agree in the view indicated in the Court of Appeal that mere generalities given from second-hand knowledge ought not to be considered adequate to satisfy the court.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellants, George B. Ellis.

Solicitors for the respondents, J. H. and J. Y. Johnson.

Judicial Committee of the Privy Council.

April 27 and 28.

(Present: The Right. Hons. the LORD CHANCELLOR (Halsbury), Lords LINDLEY and KINROSS, and Sir ARTHUR WILSON.)

MCDONALD v. BELCHER AND OTHERS. (a)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Yukon Territory—Practice—Right of appeal—Judgment whether final or interlocutory—Jurisdiction—Promissory note—Yukon Territory Act 1899.

In an action upon a document alleged by the

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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plaintiffs to be a promissory note the judge at the trial ordered that, "as to the alleged note or paper writing mentioned in par. 2 of the plaintiffs' statement of claim," the plaintiffs' action be dismissed.

Held, that this was a final judgment that the sum of money represented by the alleged note was not due, and, notice of appeal not having been given within the time limited by the Yukon Territory Act 1899, no appeal lay to the Supreme Court of British Columbia, and consequently a further appeal from that court to the Supreme Court of Canada was incompetent.

Judgment of the court below reversed.

APPEAL by special leave from a judgment of the Supreme Court of Canada (Taschereau, C.J., Sedgewick, Davies, Mills, and Armour, JJ.), who had reversed a judgment of the Supreme Court of British Columbia (Hunter, C.J., Drake and Martin, JJ.), who had affirmed a judgment of Dugas, J. at the trial in favour of the appellant, the defendant below.

The action was brought in the Territorial Court of the Yukon District by the respondents as executors of the late Alexander Calder against the appellant, Alexander McDonald, for an account in connection with various mining transactions in the Yukon District in which Calder and McDonald had been jointly interested, and for payment of (1) a sum of 50,000 dollars with interest due on a note or document of the appellant, and (2) a sum of 8798 dollars, being an unpaid balance of an amount alleged to be due by him to Calder in respect of the "clean-up" for 1899 of a mining claim known as "No. 27 Eldorado." The appellant contended that the document had been given under special circumstances, and with regard to the contingency of his death, on the occasion of his departure for England, and with a view to effecting a sale of mining properties, including those in which he and Calder were interested, some of which had remained and others had been placed in the appellant's name. He alleged that the promise in the paper was in lieu of Calder's interest in such properties and of any money balance, if any, which might exist against him on their transactions. He contended further that after his return to the district (the properties remaining unsold, but in process of being worked out) the paper stood as a security for his return of Calder's subsisting interest in respect of the properties, and that Calder, having realised a large part of that interest, had acknowledged satisfaction of 50,000 dollars in respect thereof; and that the appellant had subsequently made good to Calder, and after his death to the plaintiffs, all the remaining interest, and had satisfied and discharged all his obligations. The claim for the 50,000 dollars was disposed of by Dugas, J. adversely to the respondents, and the appellant contended that that decision had become absolutely final and conclusive and had ceased to be subject to appeal. As to the remaining items of claim, an official inquiry showed that there was, after ascertaining the payments and sets off, nothing due to the respondents from the appellant, but, on the contrary, a balance due to the latter. The Supreme Court of British Columbia, sitting in appeal, affirmed the decision of Dugas, J.; but the Supreme Court of Canada, on further appeal, reversed both judgments and

ordered a new trial, with leave to the parties to amend their pleadings as they might be advised. From this last-mentioned judgment special leave to appeal to the Judicial Committee was granted.

The relevant legislation upon appeals from the Territorial Court is to be found in sects. 7, 8, and 13 of cap. 11 of the Statutes of Canada for 1899, and is as follows:

7. The Supreme Court of British Columbia is hereby constituted a Court of Appeal for the territory. (2) An appeal shall lie from any final judgment of the Territorial Court to the judges of the said Supreme Court sitting together as a full court where the matter in controversy amounts to the sum or value of five hundred dollars or upwards, or where the title to real estate or some interest therein is in question, or the validity of a patent is affected, or the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a public or general nature affecting future rights, or in cases of proceedings for or upon *mandamus*, prohibition, or injunction. (3) The said Supreme Court and the judges thereof shall have the same powers, jurisdiction, and authority with reference to any such appeal and the proceedings thereon as if it were an appeal duly authorised from a like judgment, order, or decree made by the said Supreme Court or a judge thereof in the exercise of its ordinary jurisdiction.

8. Notice of any such appeal shall be given within twenty days from the day upon which the judgment appealed from is pronounced or given, or within such further time as the Territorial Court or a judge thereof may allow.

13. An appeal shall lie to the Supreme Court of Canada from the judgment upon any appeal authorised by this Act of the Supreme Court of British Columbia, wherever such an appeal to the Supreme Court of Canada would have been authorised had the judgment appealed from been delivered by the Supreme Court of British Columbia in a like case in the exercise of its ordinary jurisdiction upon appeal in respect of cases originating in the courts of the said province. (2) An appeal shall also lie to the Supreme Court of Canada direct from any final judgment of the Territorial Court from which it is herein provided that an appeal may be taken to the Supreme Court of British Columbia, and the provisions of sects. 8, 9, and 11 of this Act shall apply, *mutatis mutandis*, to such appeal.

Blake, K.C. and Auguste Noël (both of the Canadian Bar) appeared for the appellant.

Sir C. Tupper, K.C. (of the Canadian Bar) and the Hon. Frank Russell, for the respondents, took the preliminary objection that no leave to appeal should have been given, as there was no question of general interest involved, the statute in question having been repealed before the application for leave to appeal was made. They cited

Lyall v. Jardine, 22 L. T. Rep. 882; L. Rep. 3 P. C. 318;

Wilson v. Callender, 9 Moo. P. C. 100;

Sibnarain Ghose v. Hulodhur Doss, 9 Moo. P. C. 354.

Blake, K.C. was heard *contra* on this point.

Their Lordships pointed out that the proper course for the respondents to have taken would have been to apply to rescind the leave to appeal, and decided to hear the appeal on the merits.

Blake, K.C. and Auguste Noël, for the appellant, argued that there was no appeal in this case. It was a final judgment, and, notice of appeal not having been given within the time prescribed by statute, there was no appeal, and neither the Supreme Court of British Columbia nor the

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Supreme Court of Canada had jurisdiction to entertain it. If it was an interlocutory judgment, no appeal lay at all. They cited

Ex parte Moore, 52 L. T. Rep. 376; 14 Q. B. Div. 627;
Re Alexander, 66 L. T. Rep. 133; (1892) 1 Q. B. 216;
International Financial Society v. Moscow Gas Company, 37 L. T. Rep. 736; 7 Ch. Div. 241;
Lowe v. Lowe, 40 L. T. Rep. 236; 10 Ch. Div. 432;
Shelfer v. City of London Electric Light Company, 72 L. T. Rep. 34; (1895) 1 Ch. 287;
Brenhilda v. British Indian Steam Navigation Company, 8 Ind. App. 159;
Standard Discount Company v. La Grange, 37 L. T. Rep. 372; 3 C. P. Div. 67;
Shubbrook v. Tufnell, 46 L. T. Rep. 749; 9 Q. B. Div. 621;
Collins v. Vestry of Paddington, 42 L. T. Rep. 573; 5 Q. B. Div. 368;
Blakey v. Latham, 43 Ch. Div. 23;
Bozson v. Altrincham Urban District Council, (1903) 1 K. B. 547.

If your Lordships are with the appellant on this point, it is not necessary to go into the merits, and the dealings between the parties.

Sir C. Tupper, K.C. and the Hon. F. Russell, for the respondents, contended that the appeal to the Supreme Court of British Columbia was brought within the prescribed time, and in any case the ruling of the judge at the trial was not a final judgment on the point, but only an expression of opinion that the document in question was not a promissory note, and could not be sued on in that character. Leave to amend should have been given. They cited

Cremetti v. Crom, 4 Q. B. Div. 225;
Bozson v. Altrincham Urban District Council (ubi sup.);
Krehl v. Burrell, 39 L. T. Rep. 461; 10 Ch. Div. 420;
Pheysey v. Pheysey, 41 L. T. Rep. 607; 12 Ch. Div. 305;
Boston v. Lelièvre, 22 L. T. Rep. 733; L. Rep. 3 P. C. 163;
Laird v. Briggs, 43 L. T. Rep. 632; 16 Ch. Div. 440; on appeal, 45 L. T. Rep. 238; 19 Ch. Div. 22;
Re Abrahams, 2 Moo. P. C. N. S. 241.

Blake, K.C. was heard in reply.

At the conclusion of the arguments their Lordships' judgment was delivered by

The LORD CHANCELLOR (Halsbury).—Notwithstanding the time occupied by this case in argument, the questions for decision are very narrow indeed. The action, which was commenced in the Territorial Court of the Yukon Territory, was brought under circumstances similar to those which would arise in this country if a plaintiff were to bring a number of actions comprehended in one writ. During the argument a great many observations were made which some half-century ago would have been very appropriate, and probably conclusive, but they are wholly inapplicable to the system of jurisprudence which has been established since that period. Formerly there were forms of action outside which the plaintiff could not go. One record was one history of a particular litigation. Indeed, in earlier times, only one plea was admitted; and until the Statute of Anne (the Law Amendment Act 1705) a person was

compelled to base his whole defence on one plea, and could not raise more than one. In like manner he had either to plead or to demur, and the judgment upon the plea, if issue was taken upon it, was conclusive against the person who was found to be in the wrong; and the judgment upon demurrer was conclusive, and would, in the strictest and most appropriate sense, be described as a final judgment. The so-called declaration, to which a person was confined, had to set out the cause of action, appropriately describe it, and, within very narrow limits indeed, bring it under a particular head of right. All that is changed. It is clear that all those rules are now inappropriate, and that the learning and phraseology applicable to them have passed away. Rightly or wrongly, the Legislature has enacted—and the law in force in the Yukon Territory follows in terms the procedure of this country—that the statement of claim shall be a simple narrative of the facts upon which the plaintiff relies, and it is for the judge to direct the jury, if there be a jury, or to decide himself, if there be none, as to the nature of the legal liability which is disclosed, not upon appropriate legal averment, but upon the facts described in the statement of claim. It is necessary to bear these matters in mind in deciding the present case, because many of the observations made and some of the authorities quoted by counsel appear to rest upon the idea that, notwithstanding the fundamental changes made by the Legislature, the old legal procedure is still preserved. In this case the respondents, the executors of one Calder, brought an action against the appellant claiming certain sums of money as due from him to Calder's estate. There were several matters in dispute, and the statement of claim describes the mode in which they arose. The particular matter, however, upon which the case now before their Lordships depends (and it has been frankly admitted that, if that one particular matter is decided against the respondents, the appeal must succeed and that the other matters may be disregarded) is whether the question of an indebtedness by the defendant (the appellant) to the extent of 50,000 dollars was, or was not, finally disposed of by the trial which took place before the Territorial judge; that is to say, whether the language used by the learned judge in disposing of the matter constituted a final judgment of the court. If the judgment was interlocutory, no appeal lay. If it was final, an appeal could only be brought within twenty days, whereas, in fact, no appeal was entered, or notice given, until a period of twenty-one days. The question, therefore, is reduced to this: Was there, or was there not, a final judgment? The learned judge ordered, on the 23rd May 1901, that, "as to the alleged note or paper writing mentioned in par. 2 of plaintiffs' statement of claim," the plaintiffs' action be dismissed. On the language used by the learned judge some criticism might be passed as to whether, in giving a decision on one item of an account, it is appropriate to say that "the action thereupon is dismissed." The respondents contend that the language used might have misled them as to the amount of time in which they could appeal, because they did not understand that language to constitute a final judgment. The point in dispute is whether the judgment of the learned judge, who, by the request of the respon-

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dents themselves, took out one of the items of account and adjudicated upon that item, was a mere adjudication that an action on a promissory note would not lie, or was really a decision that the sum of money represented by that note was one which, according to his view of the evidence, was not due. Their Lordships desire, in the first place, to observe that, if the decision were simply that the instrument relied on was sued on in its character as a promissory note, no other evidence than the document itself was required to enable the learned judge to give such a decision. But so far from confining himself to the document itself, the learned judge heard the evidence. Apart altogether from what he said afterwards, in Sept. 1901, it is impossible, if one looks at what was done and said at the time of the trial, to suppose but that the learned judge entered into the merits, and came to the conclusion that the 50,000 dollars were not due. If confirmation of that view were wanted, it is only necessary to look at what occurred when the rest of the items in the account were referred to the clerk of the court, to determine, whether or not, any money was due from the defendant to the plaintiffs. In making his report, dated the 10th Sept. 1901, the referee says: "The claim for 50,000 dollars having been dismissed, I take this as a starting point, and the only starting point that I can take from the evidence." The referee, therefore, understood what the learned judge had said; and if it was intended to contest his construction of the judgment of the 23rd May 1901, one would have expected the plaintiffs to make an application to the court, and to urge that the referee had not understood the judgment, and that the learned judge only intended to say that an action would not lie on a promissory note, whereas the referee to whom the rest of the account had been remitted had actually refused to enter into the question of the 50,000 dollars, on the ground that this money had been adjudicated upon, and that he had no right to enter into that part of the account. If that is what the plaintiffs thought at the time, and if they did not themselves understand the meaning of the learned judge, what would have been simpler than for them to apply to the court, and to have the matter put right? They could have urged that all the learned judge meant was that an action would not lie upon this as a promissory note, because it was for gold dust, and not for money. But instead of doing this, they allowed the account to be taken, to the exclusion of the claim for 50,000 dollars. The referee does not use the phrase "promissory note." He speaks of "the claim for 50,000 dollars." He says in effect: "The claim for 50,000 dollars having been decided against you, it is hardly necessary to proceed further to show what everybody understood at the time to be that which the learned judge subsequently explained"; and their Lordships cannot admit that there was anything to prevent the learned judge from explaining what he had intended to decide, if there was any ambiguity in his language. However, the question whether there should be an appeal was, as Mr. Blake has pointed out on behalf of the appellant, decided by the parties themselves, and the notion of their having been misled, and having delayed this notice of appeal through a misunderstanding of the learned judge's judgment, is illusory, because they had actually

decided to appeal and an interlocutory order would have been unappealable. The account given of why they did not appeal in time—viz., that they could not give notice of appeal in twenty days—is a somewhat singular one, which is treated with great propriety by the Supreme Court of British Columbia. In the result, their Lordships are of opinion that there was a final judgment in the Territorial Court as to the claim for 50,000 dollars, whether the costs were given at the time, or followed in due course of law. If there was a final judgment the present appeal does not lie; for it is impossible to get out of the express language of the Canadian statute (the Yukon Territory Act 1899, s. 8). This is a most important matter for one of the litigants, at any rate. For the moment the time for appealing has passed, the litigation is at an end, and it would be very disastrous if, under such circumstances, it could be extended contrary to statute. As pointed out in a case cited before their Lordships (*International Financial Society v. City of Moscow Gas Company*, 37 L. T. Rep. 736; 7 Ch. Div. 241), the law in such cases confers a most important right on one of the litigants by ordering that there shall be an end, finally, of the litigation between the parties. The result is, that an appeal did not lie to the British Columbian Court from the judgment of the Territorial Court of the 23rd May 1901, as regarded the claim for 50,000 dollars, and the appeal to the Supreme Court of Canada was incompetent. In these circumstances it is not necessary, and, indeed, it would not be proper, to discuss the merits of the question which have been decided by the only tribunal competent to decide them from whose decision there is now no appeal. Their Lordships will therefore humbly advise His Majesty to allow the appeal, to reverse the judgment of the Supreme Court of Canada with costs, and to restore the judgment of the Supreme Court of British Columbia of the 19th Nov. 1902, with a declaration that the judgment of the Territorial Court of the 23rd May 1901 was final so far as it "ordered and adjudged as to the alleged note or paper writing mentioned in par. 2 of plaintiffs' statement of claim that the plaintiffs' action thereupon be and the same is hereby dismissed." A preliminary objection was taken by the respondents that the particular statute in question, the construction of which was stated to be a matter of general public importance justifying an application to His Majesty in Council for special leave to appeal, had, at the time of such application, been repealed, and that the appellant ought to have brought that fact before their Lordships at the time when his application was made. It has not been suggested, and very properly not suggested, that there was any lack of *bona fides* on the part of the appellant. At the same time, the fact ought to have been mentioned. Their Lordships do not, however, consider the point to be such as to affect the question of costs in this case, inasmuch as the real question raised on this appeal—viz., whether or not an order made under the circumstances stated was a final judgment within the meaning of the statute—is as important now as it was then. Their Lordships have already expressed their opinion that it was a final judgment; and it is only necessary to add that some of the confusion and difficulties that have been raised are due to the acts of the respondents themselves. If the causes of action

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had been allowed to take their ordinary course, and the whole matter had been disposed of by the learned judge in the Territorial Court, no question could possibly have been raised, and the learned judge would probably have disposed of the costs, and have used language not open to ambiguity in disposing of the whole litigation. But at the express desire of the respondents themselves he took out of the account the particular item of the claim for 50,000 dollars, and gave judgment upon that particular item. The compliance with this request of the respondents has probably given rise to all this trouble. But the question whether the order under consideration was, or was not, a final judgment, is as important to-day as it was before the statute referred to was repealed. The result is that their Lordships find no sufficient reason to deprive the appellant of his ordinary right to the costs of the appeal.

Solicitors for the appellant, *Blake and Redden*.
Solicitors for the respondents, *Charles Russell and Co.*

April 20 and May 6.

(Present: The Right Hons. Lords MACNAGHTEN, DAVEY, and LINDLEY, and Sir ARTHUR WILSON.)

CITIZENS' LIFE ASSURANCE COMPANY LIMITED
v. BROWN. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW
SOUTH WALES.

Libel—Libel by officer of corporation—Liability of corporation—Scope of duty of agent—Malice.

A limited company is liable for a libel published by one of its officers acting within the scope and in the course of his employment, on the ordinary principles of agency; and, if there is evidence that it was within the scope of the agent's authority and employment to write the letter which contained the libel complained of, the fact that he went further than the facts warranted, and made charges which he knew to be false, will not relieve the company from liability.

Judgment of the court below affirmed.

APPEAL from a judgment of the Supreme Court of New South Wales (Stephen, Acting C.J., G. B. Simpson and Pring, JJ.) refusing a rule nisi to set aside the verdict found for the respondent, the plaintiff below, and to enter a nonsuit, or a verdict for the defendants, or for a new trial.

The action was brought by the respondent against the appellants to recover damages for a libel published by one Fitzpatrick, an agent of the appellant company, under circumstances which appear in the judgment of their Lordships.

The case was first tried in April 1901 before Owen, J. and a jury, when the jury returned a verdict for the plaintiff with damages.

This verdict was set aside and the case was tried again in Oct. 1901 before Cohen, J. and a jury, when the plaintiff again obtained a verdict with damages.

This verdict was also set aside, and in Oct. 1902 the case was tried for the third time before Simpson, J. and a jury, when the plaintiff again obtained a verdict with 650*l.* damages.

Asquith, K.C. and the Hon. *F. Russell* appeared for the appellants, and contended that the verdict was wrong in finding that Fitzpatrick was acting within the scope of his employment in publishing the libel. A communication to a policy-holder in answer to an inquiry was privileged so long as he was acting in the interests of the company; and if he used his position to gratify personal malice, he was acting outside the scope of his duty. In any case the malice with which he acted cannot be imputed to the corporation. They cited

Nevill v. General and Fine Arts Insurance Company, 72 L. T. Rep. 525; (1895) 2 Q. B. 156; on appeal, 75 L. T. Rep. 606; (1897) A. C. 69;

Abrath v. North-Eastern Railway Company, 55 L. T. Rep. 63; 11 App. Cas. 247;

Edwards v. Midland Railway Company, 43 L. T. Rep. 694; 6 Q. B. Div. 287;

Cornford v. Carlton Bank, 80 L. T. Rep. 121; (1899) 1 Q. B. 392; on appeal, 81 L. T. Rep. 415; (1900) 1 Q. B. 22.

H. Drysdale Woodcock, who appeared for the respondent, was not called upon to address their Lordships.

At the conclusion of the argument for the appellants their Lordships took time to consider their judgment.

May 6.—Their Lordships' judgment was delivered by

LORD LINDLEY.—The question raised by this appeal is whether a limited company is responsible for a libel published by one of its officers. The action has been tried three times. The plaintiff obtained a verdict and judgment every time, with damages which have been every time increased. Counsel for the company feel that it would be useless to send the case back for another trial, and they therefore ask that the last verdict and judgment should be set aside and judgment entered for the company. The facts are shortly as follows: The appellants are an assurance company incorporated with limited liability and carrying on business in New South Wales. From Jan. 1900 until June 1900 the respondent Brown (the plaintiff in the action) was in the service of the company as an insurance agent at Tamworth. Brown was introduced to the company by Fitzpatrick, who was employed by the company as a superintendent of agencies under the terms of an agreement dated the 12th June 1899. His duties will be referred to presently. Shortly after leaving the employment of the company—namely, in the month of July—Brown entered the service of a rival company called the Standard Life Association, and while in the service of such company Brown visited divers of the policy-holders in the appellant company and endeavoured to induce such policy-holders to leave the appellant company and to insure in the Standard Life Association, and for the purpose of bringing about such a result made statements derogatory to the appellant company. Fitzpatrick learned that such statements had been and were being made, and he published the libel complained of. It was a circular letter sent to several persons insured in the appellant company in answer to inquiries made by them. It was plainly defamatory. Some statements contained in it were not true, and Fitzpatrick knew that they were not true. There was evidence of

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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express malice on the part of Fitzpatrick. There is no note of the learned judge's summing up, but the jury found a verdict for the plaintiff, gave him 650*l.* damages, and found that "Fitzpatrick was acting in publishing the libel within the scope of his employment and in the course of his employment." Judgment was accordingly entered for the plaintiff for this sum and costs; and the Supreme Court refused to set aside the verdict and enter judgment for the defendants and refused to grant a new trial. Hence the present appeal. Counsel for the appellants contended, first, that the verdict was wrong in finding that Fitzpatrick acted in publishing the libel within the scope and in the course of his employment; and, secondly, that even if he did, yet the malice with which he wrote it cannot be imputed to the company. In support of this proposition reliance was placed on the well-known judgment of the late Lord Bramwell in *Abrath v. North-Eastern Railway Company* (55 L. T. Rep. 63; 11 App. Cas. 247). It will be convenient to dispose of the second question first. There is no doubt that Lord Bramwell held strongly to his opinion that a corporation was incapable of malice or motive, and that an action for malicious prosecution could not be maintained against a company. Lord Cranworth in *Western Bank of Scotland v. Macleod* (L. Rep. 1 H. L. Sc. 145) had expressed a similar opinion as to the liability of corporations for frauds. But these opinions have not prevailed, and their Lordships are not prepared to give effect to them. If it is once granted that corporations are for civil purposes to be regarded as persons—i.e., as principals acting by agents and servants—it is difficult to see why the ordinary doctrines of agency, and of master and servant, are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases, in questions arising out of contract, and in questions arising out of torts and frauds; and to apply them to one class of libels and to deny their application to another class of libels on the ground that malice cannot be imputed to a body corporate appears to their Lordships to be contrary to sound legal principles. To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious. Their Lordships concur with the view of the Acting Chief Justice in this case that if Fitzpatrick published the libel complained of in the course of his employment, the company are liable for it on ordinary principles of agency. Fitzpatrick's letter, although published on a privileged occasion, was not itself privileged; and not being privileged the letter must be treated as any other libel written and published by an officer of the company. There remains, however, the important question whether there was evidence on which the jury could properly find that the publication of the letter was within the scope of Fitzpatrick's authority or, what is the same thing, within the scope of his employment. He was engaged by a written agreement; he was a superintendent; he was to act under instructions given to him by properly authorised officers and in accordance with the rules and regulations of the company. He was to devote his whole time to furthering the company's business. He was to receive and pay money, keep proper accounts, and to supervise various agencies under him.

He was to be paid a salary of 5*l.* a week and a commission on policies procured by him. The written agreement did not state more precisely what his duties were. Witnesses were called to throw further light upon the subject. Mr. Eedy, the general secretary of the company, said that if policy-holders wanted to know why the company did not prosecute Brown for his statements about the company, Fitzpatrick should have communicated that matter to the head office before taking action. "It would have been his duty." Another witness said his duty was to appoint and look after agents, and "to stand as an intermediate between the assured and the office. His authority is to secure business and save business and to visit policy-holders whose policies have lapsed or are likely to lapse. In the district itself there is no one above him." It is clear that the scope of Fitzpatrick's authority and employment was wide and by no means clearly defined. In considering the scope of his authority and employment, their Lordships agree with the Acting Chief Justice in thinking that the jury were entitled to act on their own knowledge of colonial business and habits. They were entitled to consider the necessities of the case arising from the size and nature of the district placed under Fitzpatrick's supervision and what would naturally be done in the colony by a person in his position. He had no actual authority express or implied to write libels nor to do anything legally wrong; but it is not necessary that he should have had any such authority in order to render the company liable for his acts. The law upon this subject cannot be better expressed than it was by the Acting Chief Justice in this case. He said: "Although the particular act which gives the cause of action may not be authorised, still if the act is done in the course of employment which is authorised, then the master is liable for the act of his servant." This doctrine has been approved and acted upon by this board in *Mackay v. Commercial Bank of New Brunswick* (30 L. T. Rep. 180; L. Rep. 5 P. C. 394) and *Swire v. Francis* (37 L. T. Rep. 554; 3 App. Cas. 106), and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick v. English Joint Stock Bank* (16 L. T. Rep. 461; L. Rep. 2 Ex. 259), which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords in *Houldsworth v. City of Glasgow Bank* (42 L. T. Rep. 194; 5 App. Cas. 317, 326), and has been followed in numerous other cases. Such being the evidence, their Lordships cannot judicially hold that there was no evidence to warrant the jury in finding that it was within the scope of Fitzpatrick's authority and employment to write to policy-holders in order to counteract the mischief which Brown was doing to the business of the company; and although Fitzpatrick went too far and made charges against Brown which he knew were not true, their Lordships are of opinion that the company are legally responsible for what he wrote. As regards the verdict being against the weight of evidence, it must be borne in mind that Simpson, J., who tried the last action, was satisfied with the verdict, and he reports that the judges who tried the two previous actions were also satisfied with the verdicts given in them.

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Their Lordships see no reason for thinking the verdict wrong on the evidence adduced. Their Lordships will therefore humbly advise His Majesty to dismiss the appeal, and the appellant company must pay the costs.

Solicitors for the appellants, *Charles Russell and Co.*

Solicitor for the respondent, *J. H. Galbraith.*

April 19 and May 14.

(Present: The Right Hons. Lords MACNAUGHTEN, DAVEY, and LINDLEY, and Sir ARTHUR WILSON.)

GLENWOOD LUMBER COMPANY v.
PHILLIPS. (a)

ON APPEAL FROM THE SUPREME COURT OF
NEWFOUNDLAND.

Occupation of land—Right of occupier as against wrongdoer—License to cut timber—Effect of—Consolidated Statutes of Newfoundland (second series), c. 13, s. 51.

The effect of a licence to cut timber on Crown land under c. 13, sect. 51, of the Consolidated Statutes of Newfoundland (second series) is to confer a title to the land and an exclusive right of occupation in the licensee, subject to the reservations contained in the Act; and therefore such licensee has lawful possession of timber lying on the land which was cut by a trespasser before the date of the licence, and is entitled to damages for its removal.

Judgment of the court below affirmed.

The Winkfield (85 L. T. Rep. 668; (1902) P. 42) approved.

APPEAL from a judgment of the Supreme Court of Newfoundland affirming a judgment of Morison, J. in favour of the respondent, the plaintiff below.

The action was brought to recover a quantity of timber, or its value, and for damages, under circumstances which appear fully in the judgment of their Lordships.

Sir J. S. Winter, K.C. (of the Colonial Bar) and W. H. Cozens-Hardy appeared for the appellants.

J. Eldon Bankes, K.C. and Dumas for the respondent.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 14.—Their Lordships' judgment was delivered by

LORD DAVEY. — In 1898 the appellants and the respondent Phillips respectively applied to the Governor in Council of the Colony of Newfoundland for licences to cut timber on certain blocks of timber land near the Main River flowing into Gander Lake in that colony. The respondent Phillips is hereafter referred to as the respondent. The practice appears to be for such applications to be first considered in the Colonial Secretary's office, and if they are approved a notification is sent to the Minister of Agriculture and Mines, from whose office the licences are then issued. On the 16th Nov. 1898 the Deputy Colonial Secretary wrote a letter of that date to the Minister of Agriculture and Mines inclosing

four licences to cut timber which (he stated) had been approved by his Excellency the Governor, and had been granted to the following persons—viz., to the respondent two blocks, one of which is the area in question in this litigation, and to the appellants two other blocks. The respondent's agent was informed by the Colonial Secretary on the 15th Nov. 1898 that the grants to him had been passed, but no licence was issued until the 20th Jan. 1899. On the 17th Oct. 1898 the appellants, without any title to do so but (as stated in their case) "expecting and believing" that their application would be granted by the Government, commenced cutting timber on land which was comprised in the licence afterwards granted to the respondent, and they continued such cutting, notwithstanding a formal notice from the respondent, until the 23rd Jan. 1899. At that date the timber which had been cut by the appellants either lay on the ground or was piled on the land near the river. None of it was removed until after the 23rd Jan. The respondents' licence, which was dated the 20th Jan. 1899, was granted under the Great Seal of the Colony, in pursuance of sect. 51 of cap. 13 of the Consolidated Statutes of Newfoundland (second series). The Crown thereby "licensed" to the respondent, his executors, administrators, and assigns, all that tract, piece, or parcel of land particularly described to hold for the purpose aforesaid (i.e., for cutting the timber thereon), for the term of twenty-one years from the date of the licence, at an annual rental of ninety-six dollars, and the payment of a bonus of forty dollars on execution. There was a proviso that persons might at all times make and use roads upon and travel over the ground licensed, and that nothing therein contained should prevent any person taking standing timber without compensation to be used for certain public works by the Government, the authority of the Surveyor-General being first obtained, and that persons settling by lawful authority within the ground licensed should not be interrupted in clearing and cultivation by the licensee. The appellants contended that this instrument conferred only a licence to cut timber and carry it away, and did not give the respondent any right of occupation or interest in the land itself. Having regard to the provisions of the Act under the powers of which it was executed and to the language of the document itself, their Lordships cannot adopt this view of the construction or effect of it. In the so-called licence itself it is called indifferently a licence and a demise, but in the Act it is spoken of as a lease, and the holder of it is described as the lessee. It is not, however, a question of words, but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself. By sub-sect. (7) of sect. 51 of the Act it is enacted that the lease shall vest in the lessee the right to take and keep exclusive possession of the lands described therein subject to the conditions in the Act provided or referred to, and the lessee is empowered (amongst other things) to bring any actions or suits against any party unlawfully in possession of any land so leased and to prosecute all trespassers thereon. The operative part and *habendum* in the licence is framed in apt

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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language to carry out the intention so expressed in the Act. And their Lordships have no doubt that the effect of the so-called licence was to confer a title to the land itself on the respondent. Subsequently to the 23rd Jan. 1899 the appellants proceeded to remove the logs which they had cut before that date. On the 20th June 1899 the respondent commenced an action against the appellants. In the statement of claim it is alleged (1) that the appellants on the 20th Jan. 1899 and divers other dates wrongfully entered on the respondent's land and cut down the respondent's trees; (2) that the appellants detained from the respondent the respondent's goods and chattels—that is to say, 15,500 logs—and the respondent claimed a return of the said goods and chattels or their value, and by the 3rd paragraph the respondent claimed an injunction. The defence was a traverse of the allegations in pars. 1 and 2. This defence was, after trial, amended by adding specific allegations that the land described was not the respondent's land, and the trees stated to have been cut down were not the respondent's trees, and the logs stated to have been detained were not the respondent's logs. The action was tried before Morison, J., and by his judgment, dated the 27th Aug. 1900, it was adjudged that the respondent should recover from the appellants 521,979ft. of lumber then piled in the appellants' mill, or 3132 dollars their value, and 468 dollars for other lumber, and 400 dollars damages and costs, and that a sum of 1174.50 dollars (which the respondent had agreed to pay to the appellants for sawing the logs after the date of an interlocutory injunction) be set off against the damages and costs. There was an appeal from this judgment, which, by an order dated the 2nd April 1901, was ordered to be dismissed with costs. The present appeal is from the latter order. The first and principal point taken for the appellants at their Lordships' Bar was that the logs having been cut before the date of the commencement of the respondent's title did not vest in, and were not the property of, the respondent. It was also contended that at any rate an alteration should be made in the details of the judgment. An endeavour was made by the learned counsel for the appellant to restrict the second paragraph of the statement of claim to logs cut after the 20th Jan. 1899. Their Lordships cannot accept this narrow construction of the statement of claim, and they think that the action was in substance for trespassing on the respondent's lands, and for detinue of the logs removed from his lands after the 20th Jan. 1899. The action was in fact so treated by the learned judge at the trial. It was then said that at any rate the logs were as between the respondent and the Crown, the property of the Crown. The answer to this argument is that the appellants were wrongdoers in every step of their proceedings. There is not a hint in either of the pleadings or the evidence of any title in the appellants to cut the trees. Indeed, any such title is negatived by their own statement in their case that they acted in expectation only that they would afterwards acquire a title, and by the evidence, and their Lordships cannot listen to the suggestion of counsel that the appellants may have had a licence from the Crown. The appellants were wrongdoers in entering on the lands of the respondent for the purpose of removing the logs, and also in

removing the logs which were certainly not their property. The respondent on the other hand was, in their Lordships' opinion, lessee and occupier of the lands, and as such, had lawful possession of the logs which were on the land. It is a well-established principle in English law that possession is good against a wrongdoer and the latter cannot set up a *jus tertii* unless he claims under it. This question has been exhaustively discussed by Collins, M.R. in the recent case of *The Winkfield* (85 L. T. Rep. 668; (1902) P. 42.) In *Jeffries v. Great Western Railway Company* (26 L. T. Rep. O. S. 217; 5 E. & B. 802). Lord Campbell, C.J. is reported to have said: "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him having no title in himself is a wrongdoer, and cannot defend himself by showing that there was title in some third person, for against a wrongdoer possession is title." The Master of the Rolls, after quoting this passage, continues: "Therefore it is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all, and therefore, as between those two parties, full damages have to be paid without any further inquiry." Their Lordships do not consider it necessary to refer at any greater length to the reasoning and authorities by which the Master of the Rolls supports this conclusion and are content to express their entire concurrence in it. The learned counsel for the appellants recently moved before their Lordships for leave to make a further statement as to matters which he said had not been considered in the argument. The application was unusual, but their Lordships thought it better to hear the motion. Attention was then drawn to the statement in the judgment of the learned judge as to the agreement of the 7th Sept. 1899 entered into between the parties in the course of the litigation. The agreement itself is not in the record and is not referred to in the appellants' case, and it was obviously not intended to be relied on in support of their appeal. Nor does it appear to their Lordships to give them any assistance. These considerations dispose of the appellants' principal point, and it is unnecessary for their Lordships to discuss the opinion expressed by Morison, J. that the communication to the respondent that his application for a licence had been granted would give him as from that date a good title to the logs, although the licence was not completed until a later date. The appellants' point on the form of the judgment is that the learned judge should have allowed them as against the respondent the expenses of cutting the trees and floating the logs down the river, as well as the expenses of sawing and piling. The latter expenses were allowed by arrangement between the parties. There was no arrangement as to the former. Their Lordships think that the judgment is in the form usual in actions for detinue, and it would not be right to impose on the respondent the obligation of paying the appellants the expenses of their wrongful acts as a condition of recovering what must be considered in this action as his property, although such expenses might properly, but would not

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necessarily, be taken into account in estimating the alternative damages. Their Lordships will humbly advise His Majesty that the appeal be dismissed, and the appellants will pay the costs of it, including the costs of the motion made by Sir James Winter subsequent to the hearing.

Solicitors for the appellant, *Burn and Ber-ridge*.

Solicitors for the respondent, *Godden, Son, and Holme*.

April 20 and May 14.

(Present: The Right Hons. Lords MACNAGHTEN, DAVEY, and LINDLEY, and Sir ARTHUR WILSON.)

LUKEY AND ANOTHER v. SYDNEY HARBOUR TRUST COMMISSIONERS. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Sydney Harbour Trust Act 1900, ss. 27, 68—Wharfage rates—Private wharf—"Interest in land existing at the time of the passing of the Act—Payment of rent.

By the Sydney Harbour Trust Act 1900, s. 68, the Harbour Commissioners constituted by the Act were directed to collect in respect of all vessels berthed "at any wharf vested in the commissioners" . . . "wharfage and tonnage rates according to the provisions of the Wharfage and Tonnage Act 1884." The Act of 1884 did not apply to private wharfs.

Held (affirming the judgment of the court below), that the rates granted by the later Act were to be levied on goods landed at a wharf vested in the commissioners though it was in the occupation of a private person.

Held, further, that the fact that the lessee of a wharf who remained in occupation of the wharf after the expiration of his lease, and had applied for a renewal of the lease, and had paid rent in advance pending such renewal, had not "an interest in such lands" within sect. 27 of the Act.

APPEAL by special leave from a judgment of the Supreme Court of New South Wales.

The action was brought by the appellants against the respondents for an injunction and damages under circumstances which appear fully from the judgment of their Lordships.

Haldane, K.C. and *B. Farrer* appeared for the appellants.

Asquith, K.C. and *Vaughan Hawkins* for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 14.—Their Lordships' judgment was delivered by

Sir ARTHUR WILSON.—The Australian Gas Light Company held leases from the Crown of certain wharfs adjoining its own lands in Kent-street, Sydney, expiring on the 31st Dec. 1899, and a like lease of another wharf adjoining its own land at Mortlake, expiring on the 31st Dec. 1900. Those leases were granted under the Crown Lands Act of 1884, which by sects. 5 and 6 prohibits, amongst other things, the leasing of Crown

lands except under and subject to the provisions of the Act, while sects. 89 and 145 with the regulations made under the last-mentioned section lay down stringent conditions which must be complied with in order to give validity to such leases as those held by the company. On the 28th Nov. 1899, while the Kent-street leases were still in force, the company applied for a renewal of them. And on the 31st Jan. 1900, while the Mortlake lease was still in force, the company applied for a renewal of that lease. Nothing is shown to have been done at the time upon either of those applications; but the company continued in occupation of the wharfs. On the 21st Jan. 1901 the Under Secretary for Lands wrote to the company regarding the Kent-street premises, referring to its "occupation" "of the sites of terminated special leases," and requesting the Company to pay into the Treasury Department a sum of money "being rent at the former rates for the years 1900 and 1901." Payment was made as requested, and a receipt was given headed "suspense account," describing the money as "rent" on the expired leases, and adding the words, "Awaiting reference to Lands Department. Leases expired." A like payment was made on the 31st Dec. 1900 in respect of the Mortlake wharf, and a like receipt given. On the 14th May 1901 the company's application of the 28th Nov. 1899 for renewed leases of the Kent-street premises was refused by Government on the ground that the power to grant such leases had become vested in the Harbour Trust Commissioners under the Sydney Harbour Trust Act 1900. The company's application of the 31st Jan. 1900 for a renewed lease of the Mortlake premises does not appear to have been specifically answered, but it is obvious that the legal disability was the same in both cases. The Sydney Harbour Trust Act 1900, just referred to and relied upon by the Government as having altered the legal position, was passed on the 11th Feb. 1901, and was declared to come into force on the previous 1st Nov. 1900, which day was made the commencement of the Act. That Act constituted a body of Harbour Commissioners. Sect. 27 vested in them all Crown lands within the boundaries of the port, "subject to the interest of any persons in such lands existing at the time of the passing of this Act." Sect. 29 enacts that: "No lease or licence in force at the commencement of this Act of or relating to any Crown land hereby vested in the commissioners shall be in any manner affected by this Act." Sect. 68 directs the commissioners to collect in respect of all vessels berthed "at any wharf . . . vested in the commissioners or in respect of all goods . . . shipped on or unshipped from any vessel so berthed wharfage and tonnage rates according to the provisions contained in the Wharfage and Tonnage Act of 1880 and Acts amending the same, which Acts are *mutatis mutandis* hereby incorporated . . . subject to the provisions hereinafter mentioned; and all the powers therein contained are hereby conferred upon the commissioners." Other provisions followed. The Wharfage and Tonnage Act of 1880 so incorporated is an Act of general application in the colony. It authorised the levy of inward and outward wharfage rates, not exceeding those in the schedule, on goods shipped or unshipped upon wharfs of two kinds, public wharfs and private

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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sufferance wharfs, both of which terms are defined; and the Act contains other provisions in connection with such wharfs and such wharfage rates. On the 29th May 1901 the commissioners claimed payment by the company of wharfage rates on coal unshipped at the Kent-street and Mortlake wharfs since the 11th Feb. 1901, the date of the passing of the Sydney Harbour Trust Act 1900. The correspondence which followed did not lead to an agreement. On the 27th Aug. the commissioners gave notice that unless the company paid the wharfages already due and agreed to pay them in the future vessels would not be allowed to berth at the wharfs after the 1st Sept. And in pursuance of this notice berths were refused to certain vessels. The present suit was thereupon brought on the 6th Sept. 1901 by the company and by Gainford (who was interested in the matter by reason of his being under contract to supply coal to the company) against the commissioners, claiming an injunction, a declaration against the right of the commissioners to wharfage, and damages. A temporary injunction was, in the first instance, granted *ex parte*. This was followed by a motion to continue the injunction, on the hearing of which the case between the parties was fully gone into; and Walker, J. made an order continuing the injunction, thus disposing of the whole suit on the merits. The Full Court, on appeal, unanimously reversed the decision of the learned judge, and dissolved the injunction. Against that decision the present appeal has been brought. The question for decision is whether, as the learned judges of the Full Court held, the commissioners had the right to levy wharfage dues upon goods landed at these wharfs, for if they had everything else follows and the appeal fails. In the arguments before their Lordships the case for the appellants was placed upon two grounds. It was contended, first, that the commissioners have power to levy wharfage rates only in the cases of public wharfs and private sufferance wharfs; and that, as the wharfs in question are mere private wharfs, not falling within either of those descriptions, sect. 68 of the Sydney Harbour Trust Act did not authorise the levy of wharfage upon them. It was argued that, as the wharfage rates granted by that section are to be levied according to the provisions of the earlier Wharfage and Tonnage Act which is incorporated, and as that Act granted wharfage only upon two classes of wharfs, the later Act must be similarly restricted. And in support of this, it was pointed out that in sect. 32, and perhaps in other places of the later Act, the distinction between private wharfs and others is recognised as still subsisting, and as material for some purposes at least. Their Lordships agree with the learned judges of the Full Court in thinking that the language of sect. 68 of the Sydney Harbour Trust Act is too clear to admit of such an interpretation. The wharfage rates granted by it are to be levied according to the provisions of the earlier Act, but they are granted in express terms upon any wharf vested in the commissioners. It was contended, secondly, that by reason of the payment and receipt of rent in respect of the wharfs for the year 1901, under the circumstances already stated, the company had at the date of the passing of the

Sydney Harbour Trust Act, an interest in the wharfs within the meaning of sect. 27; that that interest was valid for the whole year 1901, or, in the alternative, for a part of it; that it was protected by the words of sect. 27; and that it was an interest of such a nature as to preclude the levy of wharfage rates by the commissioners. Their Lordships agree with the learned judges of the Full Court that this position is not tenable. The only interest in the wharfs which the company ever contemplated acquiring were the leases for which it applied. The money was paid in the hope of acquiring those leases, but with knowledge that the obtaining of them was quite uncertain, for they never could be granted unless all the conditions prescribed by the law should be complied with; and the facts were clearly shown upon the receipts accepted by the company. The leases never were granted, there never was any right to claim them which could have been enforced against Government, and with the passing of the Sydney Harbour Trust Act, the possibility of their being granted by Government came to an end. Whether the company is entitled to claim a return by the Government of any part of the money paid is a question which is not raised in this suit or between these parties. Whether, if the Crown had proceeded against the company for damages as a trespasser, the company could have pleaded leave and licence in answer is a question which also is not raised. But it would be difficult to hold that the company had acquired an interest in the wharfs without in effect holding that they obtained a demise in a manner rendered impossible by the Crown Lands Act. But supposing that it could be held that the company had an interest in the wharfs, what would the character of that interest be? It could only be some kind of right, complete or incomplete, in the company to the possession or occupation or use and enjoyment of the wharfs as its private wharfs. And it has been already shown that wharfage rates are to be levied on private wharfs as well as on others. The supposed interest, therefore, which has been contended for would have been ineffectual for securing the object for which it was invoked. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs.

Solicitors for the appellants, *Hemsley and Co.*
Solicitors for the respondents, *G. M. Light.*

April 28, 29, and May 14.

(Present: The Right Hons. the LORD CHANCELLOR (Halsbury), Lords LINDLEY and KINROSS, and Sir ARTHUR WILSON.)

SMITH v. MCARTHUR AND OTHERS. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND.

Law of New Zealand—Licensing Act 1895, s. 3, 8, sub-s. 4—Licensing poll—Poll null and void—Renewal of existing licences.

By the New Zealand Licensing Act 1895, s. 3, "No licence of any description shall be granted or renewed until the electors of the district have previously determined in manner hereinafter

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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provided (1) whether the number of licences existing in the district is to continue; (2) whether the number of licences existing in the district is to be reduced; (3) whether no licences are to be granted in the district."

By sect. 8, sub-sect. 4, if "none of the proposals respecting licences in the district is carried by the prescribed majority . . . the number of licences shall continue as they are until the next licensing poll."

A "licensing poll" was taken in the N. district, in accordance with the provisions of the Act, but was afterwards declared void on the ground of certain irregularities.

The appellant, who was the holder of a licence in the district, afterwards applied to the licensing committee for a renewal of his licence.

No objection was made to the renewal, but the committee held that, under the circumstances, they had no power to renew any licence.

Held, that the contingency of the poll taken being legally null and void was covered by sect. 8, sub-sect. 4, and that all existing licences continued in force until the next licensing poll.

Judgment of the court below reversed.

APPEAL from a judgment of the Supreme Court of New Zealand dismissing a motion for a writ of *mandamus* to the licensing committee of the Newtown district to grant the application of the appellant, an hotel-keeper, for the renewal of his licence under "the Licensing Acts," the committee having refused to do so on the ground that they had no longer any jurisdiction to issue licences in the district in consequence of a poll of the electors under the Alcoholic Liquors Sale Control Act Amendment Act 1895, having been declared void on the ground of irregularities in the taking of the poll.

The appellant had for some time been the holder of a publican's licence in respect of his hotel, and the licence was on the 4th June 1902 renewed for the year ending the 30th June 1903.

At the date of the renewal the hotel was situated in the licensing district of Wellington Suburbs.

Under the Alcoholic Sale Control Act 1893 the licensing districts are the electoral districts for the time being of the colony. These districts are altered in accordance with the results of each quinquennial census, the new districts coming into force on the dissolution or expiration of the then existing Parliament. Licences are granted and renewed in each district by a licensing committee consisting of the stipendiary magistrate and persons elected by the electors of the district.

Under a proclamation by the Governor of the Colony, which came into effect in Nov. 1902, a new electoral district was constituted under the name of the Newtown Electoral District, composed of portions of the previous electoral districts of Wellington Suburbs and Wellington City, and including the hotel, and the new electoral district thereupon became a licensing district.

The last licensing poll for the Wellington Suburbs District, held under the Alcoholic Liquors Sale Control Act Amendment Act 1895, took place in 1899, and the result was that the proposal that the number of licences existing in that district should continue was carried.

On the 25th Nov. 1902 a licensing poll for the licensing district of Newtown took place, and it was declared that a proposal that no licences should be granted in that district had been carried.

Subsequently the last-mentioned poll was declared void on the ground of irregularities in the taking of it.

An application was made under the Licensing Act 1881 to the Governor to appoint a day for a new poll, but it was not acceded to.

The respondents were subsequently elected members of the licensing committee for the Newtown district, Mr. M'Arthur (the stipendiary magistrate) being appointed chairman.

At the annual meeting of the committee on the 5th June 1903 an application was made by the appellant for a renewal of his licence in respect of the hotel.

The committee refused the appellant's application and all other applications for licences, on the ground that they had no jurisdiction to grant licences or renewals of licences within the district.

Actions were then brought in the Supreme Court by the appellant and four other applicants against the licensing committee, in each case for a *mandamus* to the respondents to grant, or in the alternative to hear and determine, the applications.

The appellant's motion for a *mandamus* and similar motions in the other four actions came on for hearing in the Supreme Court in July 1903.

The court (Stout, C.J., Denniston and Cooper, JJ.) delivered judgment, dismissing the appellant's motion for a *mandamus* with costs, Conolly and Edwards, JJ. dissenting.

Danckwerts, K.C., Vaughan Hawkins, and Skerrett (of the Colonial Bar), appeared for the appellant.

Northcote for the respondent.

The arguments turned entirely upon the sections of the colonial statutes, which are set out in the judgment.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 14.—Their Lordship's judgment was delivered by

LORD LINDLEY.—This is an appeal from a judgment of the Supreme Court of New Zealand, dismissing a motion for a writ of *mandamus* to the licensing committee of the Newtown district, to grant or, in the alternative, to hear and determine, the appellant's application for the renewal of his licence under "the Licensing Acts." The court refused to do so on the ground that they had no jurisdiction to grant the application. The practical result of this decision is that, so far as the Newtown district is concerned, the Licensing Acts are brought to a deadlock. Existing licences in the district cannot be renewed, and no new licences in it can be granted. The facts are as follows: The appellant had for some time been the holder of a publican's licence in respect of a hotel called the Park Hotel, and such licence was on the 4th June 1902 renewed for the year ending the 30th June 1903. At the date of such renewal the hotel was situate in the licensing district of Wellington Suburbs. Under a proclamation by the Governor of New Zealand,

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dated the 13th Aug. 1902, which came into effect on the 5th Nov. 1902, a new electoral district was duly constituted under the name of the Newtown electoral district, consisting of parts of the previous electoral districts of Wellington Suburbs and Wellington City and comprising the said hotel; and such new electoral district thereupon became, under the provisions of the Licensing Act 1881, and the Acts amending the same, a licensing district. On the 5th Dec. 1896, and again on the 6th Dec. 1899, licensing polls were duly taken under the Licensing Acts in each of the districts of Wellington Suburbs and Wellington City, the result in each case being that the proposal that the number of licences then existing should continue was carried. The licence for the Park Hotel was duly renewed from time to time by the licensing committee for Wellington Suburbs district. The last of such renewals was on the 4th June 1902, the licence then issued being in force to the 30th June 1903. On the 25th Nov. 1902, a licensing poll of the electors of Newtown district was taken, under sect. 4 of the Act of 1895, but subsequently on an inquiry, held pursuant to sect. 7 (c) of the said Act and the Regulation of Local Elections Act 1876 this poll was duly declared void on the ground of irregularities committed by the officers appointed by statute to take it. The respondents were afterwards duly elected members of the licensing committee for the Newtown District, and on the 7th May 1903, the appellant gave notice of his intention to apply, and on the 5th June 1903, at the annual licensing meeting for Newtown District, he applied to the respondents for a renewal of his licence. No objection was lodged or made affecting the appellant or his house, but the licensing committee refused his application and all other applications for licences, holding that they had no jurisdiction to grant licences or renewals of licences within the district. The appellant and four other applicants then commenced actions in the Supreme Court against the respondents, the licensing committee, for a *mandamus* (in each case) to the respondents to grant (or in the alternative to hear and determine) the applications respectively. The appellant's motion for a *mandamus* was heard (together with similar motions in the four other actions) before the Supreme Court (consisting of Stout, C.J., and Denniston, Conolly, Edwards, and Cooper, JJ.) on the 8th, 9th, 14th, 15th, and 16th July 1903. Judgment was reserved, and on the 31st July 1903 the court (by a majority of three judges against two) gave judgment dismissing the appellant's motion for a *mandamus* with costs. Hence this appeal. The Licensing Acts which have to be considered are those of 1881, 1882, 1889, 1893, 1895, and 1902. The difficulty which has arisen turns mainly on the true construction of sect. 3 of the Act of 1895, taken in conjunction with sect. 2 (3) of the same Act and of sect. 21 of the Act of 1893. Their Lordships will deal with these presently, but it must not be forgotten that there is in New Zealand a statutory Interpretation Act (1888, No. 15). By sect. 4 of that Act, "Words importing the singular number include the plural number." By sect. 5 (clause 2) Amending Acts are to be read as incorporated with the Acts amended, and by clause 7, "Every Act and every provision or enactment thereof shall be deemed remedial . . . and shall ac-

cordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit." Passing now to the sections of the Act of 1895 above referred to, sect. 3 is clear and free from all ambiguity. It runs thus: "No licence of any description shall be granted or renewed until the electors of the district have previously determined in manner hereinafter provided—(1) Whether the number of licences existing in the district is to continue. (2) Whether the number of licences existing in the district is to be reduced. (3) Whether no licences are to be granted in the district." The "manner hereinafter provided" is to be found in sects. 4 to 7, and is by a poll of the electors of the district; which poll (called the "licensing poll") is to be taken on the day appointed for the electoral poll and simultaneously with such poll. If this section stood alone there could be no renewal of the appellant's licence until a licensing poll for the Newtown District had determined the questions above mentioned, and so long as there is no licensing poll for that district there can be no renewal. But sect. 2 (3) says that "Sect. 3 of this Act shall not come into operation until the day next before the day appointed for the . . . licensing poll first taken after the commencement of this Act." This, it will be observed, is a postponing section only. But the effect of the two sections together seems plainly to be that sect. 3 is to come into operation on the day appointed for the licensing poll described in sect. 2 (3) as the licensing poll first taken after the commencement of the Act. The Act came into operation on the 31st Oct. 1895. It is evidently assumed, however, that the licensing poll referred to will be taken. The contingency that there will be no poll, or that the poll taken in fact will be legally null and void, seems, however, to be covered by sect. 8 (4) which is as follows: "If the returning officer finds that none of the proposals respecting licences in the district is carried by the prescribed majority, then he shall notify the licensing committee thereof, and the number of licences shall continue as they are until the taking of the next licensing poll, subject nevertheless to the power of refusing to renew licences objected to under sub-sects. 1-4 inclusive of sect. 81 of the principal Act" (the Act of 1881), "and subject also to the provisions of the Licensing Acts relating to forfeiture or increase of licences." In connection with these sections there is another specially applicable to new districts—viz., sect. 21 of the Act of 1893. This section is as follows: "Where a district constituted under this Act or the principal Act has been abolished or altered, and has been constituted or divided into new districts, the poll in force in such first-mentioned district at the time of such abolition or alteration shall continue or remain in force in such new districts until the period arrives for taking the next triennial poll, and shall have the same force and effect as if such poll had been taken in such new districts." Although this section speaks of a "district," the Interpretation Act already referred to justifies a construction which will make the section applicable to one or more new districts constituted out of two or more previously existing districts. The section is as much required in the last case as in

the case of a subdivision of only one district, and although it may be true that the section was inserted to meet the inconvenience arising from the creation of new districts out of one old district, their Lordships see no reason for confining this section to that particular case. The object aimed at by the Legislature is plainly apparent from the enactments above referred to. Subject to any objections which might be made to any particular licensee or house, the object of the Legislature plainly was to continue in every district and new district formed out of it, all existing licences, until a licensing poll should have decided which of the three courses mentioned in sect. 3 of the Act of 1895 should be pursued in that district. The difficulty of giving effect to this intention in this particular case is due entirely to the fact that sect. 2 (3) is so expressed as to postpone the operation of sect. 3, not to the decision of the poll, but to the day before the day appointed for taking it. But sect. 8 (4) shows that existing licences may, in certain cases, continue in force beyond that day. The language of sect. 21 of the Act of 1893 is more elastic than the language of sect. 2 (3) of the Act of 1895. In both cases, however, the language points to a time rather than to the event which was to happen at that time, but the event, i.e., the result of the poll, is the governing factor. To ignore this, and to adhere to language so literally as to defeat the plain intention of the Legislature instead of so construing the words as to give effect to that intention, is to run counter to sect. 5 (7) of the Interpretation Act, which, after all, only expresses what is meant by the old legal maxim *Qui hæret in littera hæret in cortice*. Their Lordships will therefore humbly advise His Majesty to allow the appeal, and to order a *mandamus* to issue to the licensing committee to hear and determine the appellant's application and to order the respondents other than Alexander McArthur, who was a nominal defendant only, to pay the costs of the action. The respondents, other than the first respondent (Alexander McArthur), must pay the costs of the appeal.

Solicitors for the appellant, *Blyth, Dulton, Hartley, and Blyth*.

Solicitors for the respondents, *Shaen, Roscoe, Massey, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

April 27 and May 4.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

In the Goods of PRYSE. (a)

APPEAL FROM THE PROBATE DIVISION.

Probate—Practice—Sole beneficiary under will not named as executor—Executor according to the tenour of the will—Grant of letters of administration with will annexed.

A person constituted universal devisee and legatee by a will, but not named as executor, is entitled

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

to administration with the will annexed, but not to probate.

In the Goods of Oliphant (1 Sw. & Tr. 525) considered.

Decision of the President of the Probate Division (Sir Francis Jeune) affirmed.

ELIZABETH PRYSE, who died on the 14th Jan. 1903, by her will dated the 16th Aug. 1901 gave all her property, "viz., freehold farm, stock and crop, and the household furniture," to her daughter Sophia Evans absolutely, subject to the payment of a mortgage debt of 60l. upon the farm.

There was no other beneficiary under the will, and no executor was appointed by the will.

The testatrix's daughter Sophia Evans applied for a grant of probate of the will as executrix according to the tenour thereof.

The registrar declined to allow probate to issue being of opinion that the daughter was not the executrix according to the tenour on the construction of the will.

The daughter applied to the President of the Probate Division (Sir Francis Jeune) to decree probate of the will to her as executrix according to the tenour thereof.

The President on the 7th March 1904 refused her application.

From that decision the daughter now appealed.

Griffith Jones for the appellant.—No person is nominated by the will to pay the testatrix's debts, and the daughter takes all the property of the testatrix subject to the payment of a mortgage debt. I submit that being so constituted the universal devisee and legatee of the testatrix, the daughter is to be regarded as executrix according to the tenour of the will, and is entitled to probate:

Androvin v. Poilblanc, 3 Atk. 526;

In the Goods of Oliphant, 1 Sw. & Tr. 525, at p. 527

The old practice of the registry was, no doubt, not to grant probate, but administration with the will annexed, to a person who was not named in a will as executor, but who, as being beneficially entitled as universal legatee, was to be regarded as executor according to the tenour of the will. But that practice was departed from in *Androvin v. Poilblanc* (*ubi sup.*), and probate should in such a case be granted. Moreover, having regard to sect. 1 of the Land Transfer Act 1897, which has modified the law in respect of the disposition of land, there is a reason why the old practice should not be followed. The practice which was adopted in *Androvin v. Poilblanc* (*ubi sup.*) should be either substituted for that practice or substituted for it at the discretion of the court. The old practice should not be followed in the present case for an additional reason—namely, that some trespasses might be committed on the land, and if so, there would substantially be no remedy. At any rate, there might be some difficulty, because the most appropriate remedy might be some remedy which would prevent a wrong being done at the moment when it was being committed. He referred on this point to

Rez v. Inhabitants of Horsley, 8 East, 405.

Cur. adv. vult.

May 4. — The following judgments were delivered:

VAUGHAN WILLIAMS, L.J.—In this case we postponed our decision in order that we might

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consult the judges of the Probate Division and ascertain for certain what is the practice of that division of the court. Now, it is admitted, quite irrespective of those inquiries, that for a very large number of years—one hundred years, I think, or a great many years, anyhow—the practice of the Probate Court in cases where someone is not named as executor in a will, but who has such an interest and such duties in connection with it as that, in spite of not being named as executor, he might be executor according to the tenour, and looked to to act as such, has been not to grant probate, but to grant letters of administration with the will annexed. That being admitted to have been for a long time the practice, it was suggested that it had been recognised in the case of *In the Goods of Oliphant* (1 Sw. & Tr. 525, at p. 527), that that practice might be departed from in certain cases. And it was further suggested that by reason of the law having been modified by statute in respect of the disposition of land, there was a reason why the prevailing practice should not be followed, and that the practice which was suggested in *Androvin v. Poilblanc* (3 Atk. 526), and referred to in the case of *In the Goods of Oliphant* (*ubi sup.*) should be either substituted for it, or substituted for it at the discretion of the court. Now, in the first place, I have come to the conclusion that so far as the rights and interests of the applicant here are concerned it does not make the slightest difference whether that which is granted is probate or letters of administration with the will annexed. It was suggested that if all that was granted was letters of administration with the will annexed, it might be that some trespasses might be committed on the land, and that, if that was done, substantially there would be no remedy. I cannot agree there. So far as the remedy in the shape of an action of trespass is concerned, there can be no doubt that now, as indeed always has been the case, as is evidenced by the decision in the case of *Rex v. Inhabitants of Horsley* (8 East, 405), which was brought to our notice, a person getting letters of administration was entitled to bring an action for the trespasses committed in the interval, and was entitled to do that notwithstanding the fact that there is not the same relation in the case of letters of administration that there is in the case of title under probate. Then it was suggested that there might be some difficulty because the most appropriate remedy might be some remedy which would prevent a wrong being done at the moment when it was being committed. But there again the remedy is quite sufficient. If necessary, there could be no sort of difficulty in obtaining the appointment of a receiver. Under these circumstances, the first conclusion I come to is that there is no real interest of the applicant which is in the slightest degree taken from her by the fact that that which was granted was letters of administration with the will annexed as distinguished from probate. Then upon the question of what the present practice is, the President of the Probate Division has informed me that the practice is still that which has been in force for so very many years; and he has further informed me that to alter the practice would make considerable trouble and confusion in the office. Under these circumstances, it seems to me that this appeal fails altogether.

STIRLING, L.J.—I am of the same opinion, and for the same reasons. It is clearly laid down in the case of *Foster v. Bates* (12 M. & W. 226, at p. 233) that "the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of an intestate; and that he may recover against a wrongdoer who has seized or converted the goods of the intestate after his death, in an action of trespass or trover." All the authorities on this subject were considered by the Court of Common Pleas in the case of *Tharpe v. Stallwood* (12 L. J. 241, C. P.), where an action of trespass was held to be maintainable. The reason for this relation back given by Rolfe C.J. in *Long v. Hebb* (Styles, 341) is, that otherwise there would be no remedy for the wrong done. That law, as laid down by Parke, B., is stated with reference to an action of trespass or trover with regard to goods. But in the case of *Rex v. Inhabitants of Horsley* (8 East, 405, at p. 410), Lord Ellenborough treats the law which was applicable to that case—which was a case of goods—as being applicable to the case of leasehold property passing to the administrator. Now, that being so, and regard being had to the terms in which the Land Transfer Act of 1897, sect. 1, is expressed—namely, that "Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real"—that is to say, a leasehold—"vesting in them or him"—I think that the substantial ground on which this appeal is based fails, and that the practice of the Probate Court ought not, after having been so long established, to be altered now.

COZENS-HARDY, L.J.—I agree, and I have nothing to add.

Appeal dismissed.

Solicitors: A. J. Hughes and Hughes, Aberystwith and London.

March 21, 22, and May 17.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

Re WRIGHTSON; BATTIE-WRIGHTSON v. THOMAS. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Construction—Limitations in strict settlement—Contingent remainders or executory devises—Failure for remoteness.

A will, dated in 1854, contained a series of limitations in strict settlement under which, on the death of A. without issue in 1891, B. became tenant for life in possession, with remainder to the plaintiff, his eldest son, an infant, as tenant in tail, with divers remainders over, including a remainder to C., the plaintiff's uncle, who was born in 1860, for life, with remainders over.

By a codicil, dated in 1868, the testator directed and declared that no devise of any of his real estates devised under or by virtue of his will should have a vested interest therein or be entitled to the possession of the same until the attainment of the age of twenty-four years, any-

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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thing contained in his will or any law or usage to the contrary notwithstanding.

The testator died in 1879.

Held, that, regard being had to the terms of the codicil, the limitations of the will took effect by way of executory devise and not by way of contingent remainder; and had failed for remoteness.

Decision of Farwell, J. affirmed.

WILLIAM BATTIE-WRIGHTSON by his will, dated the 28th July 1854, devised certain freehold estates to the use of his brother Arthur Bland Wrightson for life, with remainder to the use of his first and other sons successively according to seniority in tail male, with remainders over in the like form in favour of his brother Richard Heber Wrightson and his first and other sons successively, with remainders in favour of the first and other sons of his brother Henry Wrightson successively according to seniority in tail male, with remainder in favour of the first and other sons of his brother Thomas Barnardiston Wrightson successively according to seniority in tail male, with remainder in favour of the first and every other son of Charles Edward Thomas and Georgiana Mary his wife successively according to seniority in tail male, with remainder to the first and every other daughter of Charles Edward Thomas and Georgiana Mary his wife successively according to seniority in tail male, with an ultimate remainder to the use of Richard Heber Wrightson in fee. And the testator declared that if any person whom he had thereby made tenant in tail male should be born in his lifetime or in due time after his decease, then and in every such case the estate in tail male thereby limited to that person should cease and in lieu thereof the testator devised the estates to the use of the person respectively whose estate in tail male should have so determined for the term of his or her life, and after his or her decease to the use of his or her first and every other son successively according to seniority in tail male.

By a second codicil to his will, dated the 14th Dec. 1868, the testator directed and declared that no devisee of any of his real estates devised under or by virtue of his will should have a vested interest therein or in any part thereof or be entitled to the possession of the same or any part thereof until the attainment of the age of twenty-four years, anything contained in his will or any law or usage to the contrary notwithstanding.

The testator died on the 10th Feb. 1879.

An originating summons was taken out on behalf of Robert Cecil Battie-Wrightson, an infant (who claimed to be entitled as devisee, appointee, and legatee under the will and codicils of the testator) by Lord John Pakenham Joicey-Cecil, his next friend, for the determination (*inter alia*) of the following questions:

Whether upon the true construction of the will and second codicil the estate and interest of the plaintiff in the property to which the second codicil applied was (a) absolute; (b) vested, subject to being divested upon death under the age of twenty-four years; or (c) contingent upon attaining the age of twenty-four years.

If it be held that the estate and interest of the plaintiff was contingent as aforesaid, then whether such estate or interest failed upon the death of William Henry Battie-Wrightson, the plaintiff's

father, in respect of any and what part of the property to which the second codicil applied as being (a) a contingent remainder not vesting upon the determination of the particular estate; (b) an executory limitation void for remoteness; or (c) on any other and what ground.

The summons was adjourned into court and came on to be heard before Farwell, J. on the 17th Dec. 1903, when the following judgment was delivered:—

FARWELL, J.—It is unfortunate that this testator, who had an excellent real property will drawn for him, should have added a codicil in the way that he has done. I do not see how the plaintiff can succeed on any view, for I am unable to adopt Mr. Levett's ingenious suggestion of indefeasibly vested. But the question that really arises is between Mr. Jenkins' client and Mr. Warmington's and Mr. Upjohn's clients that the will and codicil are to be read together. Now, under the will there are a series of limitations which undoubtedly are remainders to A. for life, with remainder to his first and other sons in tail, and so on. The codicil is in these terms: "This is a codicil made by me"—and so on—"to be annexed to my will and to be taken as part thereof, and I do hereby direct, prescribe, and declare that no devisee or appointee of any of my real estates devised and appointed under or by virtue of my said will shall have a vested interest therein or in any part thereof or be entitled to the possession of the same or any part thereof until the attainment of the age of twenty-four years anything contained in my said will or any law or usage to the contrary notwithstanding. And I do ratify and confirm my said will in every respect except where the same is hereby altered or revoked as aforesaid." I premise by saying that the question of perpetuity of course is laid aside altogether until I have construed the will. It is immaterial for the purpose of construing the will. Now, there is, no doubt, no rule which is better settled than that if limitations can take effect as remainders they are so to take effect, and are not to be turned into executory devises. On the other hand, if the testator has used words which show that he was not contemplating a contingent remainder, but an executory devise, effect must be given to that intention. And the question is whether he has shown such an intention here. In my opinion he has. The codicil expressly excludes from possession any person who would take under the will unless he has attained twenty-four when the period arrives. Now, a remainder is a thing which by its very nature must be ready to take possession on the determination of the preceding particular estate. The testator has in effect said: "By a will and codicil I have given to A. for life a particular estate, and, when that particular estate determines, the next estate is not to take possession and therefore is not to take effect as a remainder, but the next estate is to be one that is to go to a man if he attains twenty-four." That cannot take effect as a remainder. The mere mention of the necessity of possession, to my mind, excludes the contemplation of the possibility of it being given as a remainder. I think that the case comes exactly within the expression of Chitty, J. in *Dean v. Dean* (65 L. T. Rep. 65; (1891) 3 Ch. 150): "The testator has used such a form of gift as on the

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face of it is inapplicable to a remainder; and consequently the court is precluded from applying the rule that every gift which can take effect as a remainder must not be construed as an executory devise. The court cannot construe the gift as a remainder." It is said that this construction will produce curious results. Leaving out the question of perpetuity, it appears to me that it is much more likely to have given effect to the testator's intention that the persons whom he names first should receive his bounty rather than the persons he names later. Although those he has named first might not have attained the given age at his death, they can only do that if the gift is construed as an executory devise. In my opinion this reference to possession is sufficient to show, and in fact does necessarily show, that the testator has in effect stated that the limitations in his will are not to be remainders because they are not to take effect in possession on the determination of a particular estate, but are to remain in *medio* unless and until the donee shall have attained twenty-four. Of course, as regards the real estate in which the legal estate is outstanding, no question arises, so that in any case there is the extraordinary result, if I were to accede to Mr. Warmington's argument, that the estate would go in different fashions according as to whether the legal estate is outstanding in the realty and copyholds. But it goes now, subject to Mr. Bramwell Davis' argument, to Mr. Jenkins' client, who is claiming under the heir-at-law of the testator and as customary heir.

From that decision the plaintiff's uncle, the defendant Charles Freeman Thomas, now appealed.

Warmington, K.C. and Upjohn, K.C. (with them Cozens-Hardy) for the appellant.

Levett, K.C. and P. F. S. Stokes; Jenkins, K.C. and George Lawrence; Maugham; and Butcher, K.C. and F. L. Wright for the several respondents.

The arguments sufficiently appear from the judgments.

Cur. adv. vult.

May 17.—The following written judgments were delivered:—

STIRLING, L.J.—[His Lordship stated the facts of the case as above set forth, and continued:] One of the questions raised in this action is as to the effect of the codicil on the limitations contained in the will of the testator. It was held by Farwell J. that, regard being had to the terms of the codicil, the limitations of the will took effect by way of executory devise and had failed for remoteness. From this decision an appeal has been brought, on the hearing of which two contentions were raised: (1) that the limitations ought to take effect as vested remainders liable to be divested in the event of the death of the devisee under twenty-four years of age; (2) that the limitations ought to be held to take effect as contingent remainders. As to the first contention, the law is thus stated by Best, L.C.J. in *Duffield v. Duffield* (3 Bli. N. S. 260, 331; 1 Dow. & Cl. 268, 311): "It has long been an established rule for the guidance of the courts of Westminster in construing devises that all estates are to be holden to be vested except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts

cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt, and what seems to make a condition is holden to have only to have the effect of postponing the right of possession." In the present case it seems to me that the codicil expresses so clearly that the attainment of the age of twenty-four years is a condition precedent to the vesting, that the court cannot treat the limitations in the will as creating vested remainders without deciding in direct opposition to the terms of the codicil, which directs, not merely that no devisee is to have a vested interest in the estates until the attainment of the age of twenty-four years, but also directs that until that event the devisee must not be entitled to possession, a right to which a vested remainder, even if liable to be divested, would confer on the devisee upon the determination of the prior estates. As to the second contention, it is, no doubt, well settled that if a limitation can take effect as a contingent remainder it cannot operate as an executory devise. It is, however, laid down by Mr. Fearn (Contingent Remainders, pp. 398-9): "That notwithstanding the will may give a preceding estate of freehold capable in its own nature of supporting a contingent remainder; yet, if an ulterior limitation wants that connection with or relation to it which is requisite to constitute it a remainder, it may take effect as an executory devise if confined to the limits prescribed by law for estates of that future description." It has accordingly been held that, where it appears that the ulterior limitation is not intended to commence in all circumstances immediately on the expiration of that particular estate, it is incapable of taking effect as a remainder and may operate as an executory devise: (see *Re Lechmere and Lloyd*, 45 L. T. Rep. 551; 18 Ch. Div. 524; *Dean v. Dean*, 65 L. T. Rep. 65; (1891) 3 Ch. 150; *Symes v. Symes*, 73 L. T. Rep. 684; (1896) 1 Ch. 272). The question therefore is reduced to this, whether on the fair construction of the codicil the testator intended that the devises referred to in the codicil should in all cases take effect on the determination of the prior limitations. I think not. The limitations in the will are legal vested remainders. The meaning of the codicil appears to me to be that on the determination of any prior limitation in the will the succeeding limitation should not come into operation by way of entitling the devisee to possession unless and until the devisee attained the age of twenty-four years, but that, if he should attain that age, then he should enter into actual enjoyment of the estate intended for him. If, for example, an elder brother of the testator died leaving a son under twenty-four, I do not think the meaning was that he and the younger sons of that brother should be deprived of the estates and that these should pass to a son, who had attained twenty-four, of a younger brother of the testator; but that the limitation in favour of a son under twenty-four should not take effect in interest or in possession unless and until he attained twenty-four. Effect can be given to such a disposition only by way of executory devise. The case of *Russell v. Buchanan* (2 Cr. & M. 561; 6 Sim. 628) does not conflict with this decision, the language of the testator in the will there dealt with differing materially from that which is

found in the codicil which gives rise to the present litigation. In my opinion, therefore, the decision of Farwell J. was right, and the appeal fails.

COZENS-HARDY, L.J.—This is an appeal from a judgment of Farwell, J., who has held that the limitations of the testator's real estates under which the plaintiff claims failed upon the death of William Henry Battie-Wrightson as being executory devises void for remoteness, and that the real estates accordingly passed to the testator's heir-at-law. Under the will dated in 1854 there are a series of limitations in strict settlement under which on the death without issue in 1891 of Richard Heber Wrightson the said William Henry Battie-Wrightson, who died in 1903, became tenant for life in possession, with remainder to the plaintiff, his eldest son, an infant, as tenant in tail male, with divers remainders over, including a remainder to Charles Freeman Thomas, the plaintiff's uncle, who was born in 1860, for life, with remainders over. There is no question of construction on the limitations of this skilfully-drawn will. But the testator made a second codicil in 1868 which creates all the trouble. [His Lordship read the codicil, and continued:] The question which arises for our consideration is what is the effect of the will and second codicil taken together, and for this purpose the rule against perpetuities or the doctrine of remoteness must be put aside. (1) On the part of the plaintiff it is urged that there is nothing in the codicil sufficiently explicit to cut down the clear vested estate tail created by the will, and that the words referring to "a vested interest" only mean that the plaintiff's interest is not to be absolute and indefeasible until he attains twenty-four, or, in other words, that his estate tail is liable to be defeated by a condition subsequent in the event of death under twenty-four. This view might, perhaps, have been taken had not there been the subsequent words which direct that the plaintiff is neither to have a vested interest nor to be "entitled to the possession." Under those circumstances I feel driven to give to the words "a vested interest" their proper technical meaning. It is further urged on the part of the plaintiff that the codicil is void for uncertainty, or at least is so difficult to construe and so inconsistent with the general scheme of the will that it ought to be disregarded. This argument has tempted me, but I cannot see my way to adopt it. I hold, therefore, that the plaintiff cannot succeed under the limitations of the will because he was not twenty-four at his father's death, or under the codicil, assuming it to operate by way of executory devise, because of remoteness. (2) On the part of the defendant Charles Freeman Thomas it is urged that the effect of the codicil was simply to make the remainders under the will contingent remainders, and that, as the plaintiff was not twenty-four when the particular estate of his father's determined, the plaintiff's contingent remainder failed, and that the estate of the defendant Charles Freeman Thomas was the first estate ready to arise and take effect in remainder at the moment of the determination of the particular estate. The general and well-established rule that where limitations can take effect as remainders they are not to be treated as executory devises is strongly relied upon. And, while admitting that recent autho-

rities have held that this rule is not absolute and may yield to words clearly indicating an intention to the contrary, it is argued that no such words are to be found in the present case, and that mere negative words ought not to be regarded as equivalent to positive words of disposition. (3) But on the part of the heir-at-law it is urged that the codicil shows a plain intention to dispose of the property in a manner inconsistent with contingent remainders, and necessarily involving the creation of executory devises. The codicil deals with every kind of estate, with life estates as well as with estates tail, and with estates in possession as well as with estates in remainder. It says, in effect, that the plaintiff, whose father is dead, shall not be entitled to possession until he attains twenty-four—a provision which is inconsistent with the idea of a legal remainder which must take effect on the father's death. The codicil contemplates a possible gap between the death of the tenant for life and the attainment of twenty-four, and that involves a disposition taking effect by way of executory devise, and not by way of contingent remainder. In support of this contention, the decision of Sir George Jessel in *Re Lechmere and Lloyd* (45 L. T. Rep. 551; 18 Ch. Div. 524), of Kay, J. in *Miles v. Jarvis* (49 L. T. Rep. 162; 24 Ch. Div. 633), and of Chitty, J. in *Dean v. Dean* (65 L. T. Rep. 65; (1891) 3 Ch. 150) are relied upon as having relaxed the stringency of the old rule. Farwell, J. has adopted this view and decided in favour of the heir-at-law, and I do not see my way to differ.

VAUGHAN WILLIAMS, L.J. expressed his concurrence in the foregoing judgments.

Appeal dismissed.

Solicitors for the appellant, *Pennington and Son.*

Solicitors for the respondents, *Foyer and Co.; Tyrrell, Lewis, Lewis, and Broadbent.*

Tuesday, April 19.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

WILSON v. TWAMLEY. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Landlord and tenant—Lease—Breach of covenant—Covenant not to "do or suffer to be done" an act—Act done by sublessee—Liability of lessee.

The lease of a licensed public-house contained a covenant by the lessee, for himself and his assigns, that he would not do or suffer to be done on the premises any act whereby the licence might be forfeited or indorsed, or the renewal withheld.

The defendant, who was the assignee of the lease, sublet the premises by a lease which contained covenants similar to those in the superior lease.

The sublessee was convicted of an offence against the licensing laws committed on the premises and the licence was indorsed, in consequence whereof the renewal of the licence was subsequently refused.

Held (affirming the judgment of Kennedy, J.), that the defendant had not, within the meaning of the covenant, done or suffered to be done the act

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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whereby the licence was lost, and that he was not liable in damages for breach of the covenant in an action brought by the lessor.

APPEAL of the plaintiff from the judgment of Kennedy, J. at the trial of the action with a jury.

The plaintiff brought this action to recover from the defendant damages for breach of a covenant contained in the lease of a public-house.

By a lease dated the 29th Aug. 1892, Henry Wilson, thereafter called the lessor, demised to Edward Earnie, thereafter called the lessee, a public-house for the term of thirty-five years at the yearly rent of 80*l*.

The lease contained a covenant by the lessee, for himself, his heirs, executors, administrators, and assigns, that he would use the premises as a public-house or beer-shop only, and that he would carry on and suffer on the premises, or any part thereof, no other trade, business, or manufacture, during the term, without the previous consent in writing of the lessor, and particularly would not do or suffer to be done on the premises, or any part thereof, any acts whereby the licence necessary for using the premises as an inn, beer-house, or public-house with billiards, as then used, might be forfeited or indorsed, or the renewal withheld, and would at all times take proper legal steps and proceedings and endeavour to procure a renewal of the necessary licences for so using the premises.

On the 5th Dec. 1892 the lessee, with the consent of the lessor, assigned all his interest in the lease to the defendant, who thereafter duly paid the rent of the premises.

Henry Wilson died in 1894, and the reversion expectant upon the lease of the premises became absolutely vested in the plaintiff.

The defendant sublet the premises to Kingston by a lease which contained covenants to the same effect as those contained in the lease of the 29th Aug. 1892.

On the 7th Dec. 1901 Kingston was convicted of the offence, under sect. 13 of the Licensing Act 1872, of serving a drunken man upon the premises, and the licence was indorsed.

In consequence of that conviction the licensing justices, at the ensuing annual general licensing sessions, refused to grant a renewal of the licence, and the premises afterwards remained unlicensed.

Kingston continued to reside upon the premises for some time after the licence expired.

The plaintiff brought this action to recover damages from the defendant for breach of the above covenant, whereby the licence was indorsed and the renewal thereof refused.

The action was tried before Kennedy, J. with a jury. The jury assessed the damages at 150*l*. The learned judge held that the defendant had not suffered to be done the act whereby the licence was lost, within the meaning of the covenant, and gave judgment in favour of the defendant (88 L. T. Rep. 803).

The plaintiff appealed.

English Harrison, K.C. and *C. Herbert Smith* for the appellant.—The decision of the learned judge was wrong. Upon the true construction of this lease there is an absolute covenant by the lessee that no act will be done upon the premises by any person whom he has permitted to occupy the premises whereby the licence may

be lost. The assignee is responsible for the acts done by his tenant. The case of *Bryant v. Hancock* (78 L. T. Rep. 397; 81 L. T. Rep. 96; (1898) 1 Q. B. 716; (1899) A. C. 442), upon which the learned judge relied in the court below, is clearly distinguishable from the present case. In that case the covenant was that the lessee would not "wilfully do or suffer any act"; and the decision simply turned upon the use of the word "wilfully." The covenant in the present case is wider in its terms, and is not qualified by the word "wilfully." In this case the intention of the parties to be gathered from all the provisions of the lease clearly is that the licence is to be protected from danger through any act of the person who may be carrying on the business on the demised premises. The contention of the defendant amounts to this, that under this lease a sub-lessee may commit any acts which endanger the licence and the lessor has no remedy. The defendant is the assignee of the lease, and he cannot relieve himself from liability under this covenant by saying that the person whom he has put into possession of the premises has done the act which caused the loss of the licence.

R. M. Bray, K.C. and *F. Russell* for the respondent.—The judgment of the learned judge was right. The question is whether this covenant is an absolute or qualified covenant. It is clearly a qualified covenant, and is within the decision in *Bryant v. Hancock* (*ubi sup.*) It is true that in that case the covenant was more qualified than the covenant in the present case; but still this covenant is qualified, for it is not a covenant that no act shall be done, but only that the lessee will not permit or suffer an act to be done. The lessee covenants for himself and his assigns that he will not do any act by which the licence will be lost; then, that he will not suffer any such act to be done, and those words do not mean that he covenants that no act shall be done. The lessee does not permit or suffer an act to be done merely because his sublessee does the act. A lessee is not responsible for the acts of his sublessee unless he has expressly so covenanted. The Licensing Act 1872 (35 & 36 Vict. c. 94) contains, in sect. 17, provisions whereby any licensed person who "suffers" any gaming to be carried on upon the premises, or "suffers" his house to be opened or kept or used in contravention of 16 & 17 Vict. c. 119, is made liable to a penalty. Under that Act it has been held that where gaming is carried on with the knowledge of the servant of the licensee, but without the knowledge of the licensee himself, the licensee does "suffer" gaming to be carried on, because the prohibition is absolute, and the licensee is responsible for the acts of his servant:

Bond v. Evans, 59 L. T. Rep. 411; 21 Q. B. Div. 249;

Bosley v. Davies, 33 L. T. Rep. 528; 1 Q. B. Div. 84.

There is a great distinction between acts done by a servant and acts done by an underlessee. A man may well be said to permit or suffer to be done the acts which his servant does, but not the acts of his underlessee. By merely putting a tenant in possession of premises the landlord cannot properly be said to permit or suffer the acts which his tenant does:

Bryant v. Hancock (*ubi sup.*).

In *Toleman v. Portbury* (22 L. T. Rep. 33;

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L. Rep. 5 Q. B. 288) it was held that a lessee had not broken a covenant not to "permit" a sale by auction upon the premises because his sublessee had permitted an auction. There can be no distinction between the words "permit" and "suffer," and that decision is absolutely in point.

English Harrison, K.C. replied.

COLLINS, M R.—This is an appeal from the judgment of Kennedy, J. upon the construction of a covenant contained in a lease, the action having been brought to recover damages for breach of covenant. The lease in question was a lease of a public-house. This action was brought by the lessor against the assignee of the lease for breach of a covenant in these terms: "And will use the said premises as a public-house or beer-house only, and will carry on or suffer on the said premises, or any part thereof, no other trade, business, or manufacture during the said term, without the previous consent in writing of the lessor, and will not do or permit to be done on the said premises, or any part thereof, any act or thing which may be a nuisance or annoyance to the lessor or adjoining occupiers, or use the said premises for any immoral purpose . . . and particularly will not do or suffer to be done on the said premises or any part thereof any act whereby the licences necessary for using the said messuage and premises as an inn, beerhouse, or public-house with billiards, as now used, may be forfeited or indorsed or the renewal withheld, and will at all times take proper legal steps and proceedings and endeavour to procure a renewal of the necessary licences for so using the same." The defendant, being the assignee of the term, sublet to another person and, during the tenure of the sublessee, an offence against the Licensing Acts was committed by the serving of intoxicating liquor to a person who was drunk, and thereupon the renewal of the licence was refused at the next annual general licensing meeting. Upon those facts the lessor has brought this action for damages for breach of the covenant. Kennedy, J. has held that, having regard to the terms of the covenant and the particular act which was alleged to be a breach of the covenant, there was not shown to have been a breach of the covenant. The learned judge held that, the assignee having let the premises to another person, there was not any connection of agency between him and the sublessee, but that the sublessee was an independent tenant, and was in no sense the agent of the assignee, and that therefore, even if the sublessee had suffered to be done an act which was a breach of the licensing laws and endangered the licence, that act was not the act of the assignee; and that unless it could be shown that, under the terms of this covenant, the assignee either did or suffered to be done on the premises the act in question, which caused the licence to be lost, he is not liable under the covenant. It is now contended that that decision was wrong. Both the appellant and the respondent rely upon a decision of this court in a case which went to the House of Lords—*Bryant v. Hancock* (78 L. T. Rep. 397; 81 L. T. Rep. 96; (1898) 1 Q. B. 716; (1899) A. C. 442). That case was to a large extent the basis of the decision of Kennedy, J., but the appellant relies upon it as an authority in his favour. It is always, in my opinion, dangerous to try to construe one covenant by reference to a decision upon another

covenant. But when I come to consider the decision in *Bryant v. Hancock* (*ubi sup.*), I think that it does not touch this case at all. In that case there was a covenant, the first part of which was unquestionably absolute, and was held by the court to be absolute. Another part of the covenant was qualified by the introduction of the word "wilfully," and, *prima facie*, the matter which had to be done "wilfully" in order to constitute a breach of covenant might really cover the earlier part of the covenant, and, if there had not been the qualification of "wilfully" introduced, the act complained of might have come within either part of the covenant. The difficulty in the case was to determine whether the act complained of ought to be taken to come within the first part of the covenant, which was wide enough to include it, and was not in any way qualified; but the court held that, in view of the fact that the covenant was divided into two paragraphs, and that what apparently might be the same matter might be within the terms of both paragraphs, in order to give effect to the qualification the application of the qualified part must be limited to a special class of offences or breach of which the act complained of must be taken to be one. That is why great stress was laid in that case upon the word "wilfully," in order to see whether an act which might fall within the first or unqualified part of the covenant ought in that particular case to be held to come within the qualified part only so as to give a fair meaning to both parts of the covenant. Therefore stress was laid upon the fact that the covenant was intended to be in part qualified. That explanation of that case shows, I think, that it cannot have any special bearing upon the present case. It has been contended that, stress having been laid upon the word "wilfully" in *Bryant v. Hancock* (*ubi sup.*), the decision would have been different but for the use of that word, and that as that word does not occur in the present case, the lessee in this case must be held liable for breach of the covenant. I think, however, that the presence or absence of that word is really immaterial in the case of this particular covenant. If, in the present case, the assignee instead of letting the premises to a subtenant had put in a manager, then it seems to me that he would have come within the terms of the covenant. The assignee would then have substituted another person for himself, and he could not have avoided liability by saying that, although that other person had done or suffered to be done the act complained of, he was not responsible. He would then have placed his *alter ego* in the premises, and must have taken the risk of that person not conforming to the terms of the covenant. He has not, however, done that, but has sublet the premises. There was not, therefore, that connection between him and the delinquent, and the offence was not his offence; and he cannot be made liable under the terms of the covenant unless he has done or suffered to be done on the premises an act of the nature described in the covenant. In my opinion that is *prima facie* the meaning of the words "do or suffer to be done." The word "suffer" involves some action or abstention from action on the part of the particular person who is said to suffer a thing to be done although he does not do it himself. I think that the question also rests upon authority. In the case of *Toleman v. Port-*

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bury (22 L. T. Rep. 33; L. Rep. 5 Q. B. 288), which has been cited as a decision upon the point, a lessee covenanted not to permit an auction to take place upon the premises; he sublet the premises to a person who held an auction upon the premises; thereupon proceedings to enforce a forfeiture were taken against the lessee upon the ground that he had permitted an auction to be held upon the premises. The defence, which was held to be good by a large majority of the judges, was that it was not the act of the lessee when the sublessee caused an auction to be held upon the premises, and that the act of the sublessee was not the act of the lessee; that the sublessee was not the agent of the lessee, and that therefore the auction held by the sublessee was not an auction permitted by the lessee. It seems to me that the same reasoning applies in the present case, and that the act of the sub-tenant in permitting the act to be done was not the act of the assignee. Upon these grounds I am of opinion that the decision of Kennedy, J. was right, and that this appeal fails.

ROMER, L.J.—I am of the same opinion. I will first deal with the suggestion made on behalf of the appellant that he is entitled to succeed because there has been a breach of the covenant that the premises shall be used as a beerhouse or public-house only. Now, to my mind it is clear that that covenant is not an absolute covenant on the part of the lessee that the public-house shall always during the continuance of the term remain licensed, or a covenant by which the lessee takes upon himself the obligation that the licence shall not be forfeited and shall always be renewed. Take, for example, the case where, through no fault of the lessee and through no breach of the covenant, but for other reasons—as, for instance, because there are too many public-houses in the neighbourhood—the licence is not renewed, and thereby damage is caused to the lessor. Could it be said that under this covenant the lessee would be liable for that damage? To my mind it is clear that that could not be said. The covenant is clearly aimed at the use of the premises during the term as a public-house only, and not for the purpose of any other trade or business. In my opinion, there would not be any breach of the covenant by the lessee remaining in the premises without doing more after it turned out that the licence would not be renewed. That point, however, has not been raised or dealt with in the action. Even if it had been, and if there had been a breach of that covenant, it appears to me that there would not have been any damage resulting to the plaintiff, because the continuance to reside in the premises after the licence had been lost would not make the lessee liable for loss accruing through the non-renewal of the licence. Therefore it is clear that the appellant's case cannot succeed upon that ground. Now I will pass on to the main point in this appeal, which is whether there has been a breach by the assignee of the covenant not to do or suffer to be done on the premises any act whereby the licence may be forfeited or indorsed, or the renewal thereof withheld. It is to be observed with regard to this covenant that it certainly is not an absolute covenant that no such act shall be committed; it is a limited covenant which is limited in two ways.

In the first place, it is limited as a covenant on behalf of the lessee, his executors, administrators, or assigns. I will pause here to consider this first limitation. The word "assigns" has a clear, definite legal meaning, and it does not include underlessees. I do not know of any benevolent rule of construction to be applied to covenants in leases which will justify the court in giving to the word "assigns" a more extended meaning so as to include underlessees. Certainly that cannot be done unless there is something in the lease which renders it necessary to do so. In the present case it is clear that the meaning of the word "assigns" ought not to be extended, for this reason, among others, that the lease contemplates underletting. The only provision in the lease with reference to underletting is that it shall not be effected without the consent in writing of the lessor; but it is also provided that that consent shall not be unreasonably withheld in the case of a responsible tenant. Underletting is naturally contemplated in this lease, because otherwise a public-house like this cannot be carried on. It is not, as a rule, carried on by the lessee, but by an undertenant. Therefore in this case it is clear that it would be impossible to say that the word "assigns" in this covenant includes underlessees. It is also clear that this covenant is limited in another respect. The covenant is not, on behalf of the assigns, that such an act shall not be done; it is only a covenant that the executors, administrators, or assigns will not do or suffer to be done such an act upon the premises. A man may do an act himself or by his agent or servant; but he certainly cannot do it by an undertenant unless he has authorised the undertenant to do it. It cannot be suggested that in this case the undertenant was authorised to do the act complained of and that therefore there has been a breach of the covenant. The act which the defendant is said to have suffered to be done upon the premises was that the undertenant, by his servant, permitted a drunken man to be served. Did the defendant "suffer" that act to be done. It seems to me that, looking at the circumstances, he clearly did not "suffer" that act to be done. That being so, the plaintiff cannot succeed on that part of the covenant. It only remains for me to make a few observations with respect to the last point taken on behalf of the appellant. It was said that the undertenant was let into possession without the consent of the lessor, but that was really neither alleged nor proved. Even if it had been, the underlessee would still have been the underlessee. It could not be said that, even if there was a breach of covenant by not obtaining the consent of the lessor, that fact turned the underlessee into an agent or servant. Nor, as Kennedy, J. held, could it be said that there was any estoppel which prevented the defendant from saying that as a matter of fact this man was an undertenant and was not his manager, servant, or agent. This last point in no way assists the appellant. I agree that the judgment of Kennedy, J. was right, and that this appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. I agree that the appellant cannot rely upon that part of the covenant which prohibits the use of the premises for any other purpose than that of a public-house. The covenant, when it is examined, goes on to point out what is the meaning of that

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prohibition, because the obligation is not to carry on any other trade on the premises. It cannot be said in this case that some other trade has been carried on upon the premises because the house, as a consequence of the loss of the licence, has lost any character except that of a dwelling-house. The next point raised was that there was something in the nature of an estoppel because the plaintiff had no knowledge of the underlease, and the undertenant was in truth only a manager, the house being a tied house. But it clearly appeared that there was a properly created undertenancy, and that the person who was let into possession was not put into the premises as a manager for the defendant. There is no ground, therefore, for saying that this case differed from a case in which the consent of the lessor to an underlease had been given. How can it be said, when an undertenancy was created, that the defendant suffered to be done the act of the undertenant? The effect of the underletting was that the complete control of the premises passed into the hands of the undertenant, and it must have been known, when the underletting of the premises was contemplated in the lease, that the underlessee would have no power to supervise what was done upon the premises by the undertenant. If the consent of the lessor was obtained, it seems to me that it might just as well be said that the lessor suffered the act to be done as that the lessee suffered it to be done. The judgment of the learned judge was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Pearce and Rowe*.

Solicitors for the respondent, *Beaumont, Son, and Rigden*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Friday, April 15.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

POLLEY v. FORDHAM. (a)

Action against justice—Issue of distress warrant—Limitation of action—Time of conviction or distress—Public Authorities Protection Act 1893 (56 & 57 Vict. c. 61), s. 1.

In February the defendant, who was a magistrate, convicted the plaintiff of an alleged offence against the Vaccination Acts, and in April the plaintiff having failed to pay the fine inflicted the defendant issued a warrant of distress, which was executed against the plaintiff's goods.

In an action for illegal distress:

Held, that the limitation imposed by sect. 1 of the Public Authorities Protection Act 1893 ran from the date of the issue of the warrant of distress and not from the date of the conviction.

APPEAL from His Honour Judge Smyly, sitting at the Shoreditch County Court.

The plaintiff was on the 11th Feb. 1903 convicted by Mr. Fordham, a metropolitan magistrate, for neglecting to have two of his children vaccinated, and was fined 1l. and 16s. costs in each case.

The plaintiff having failed to pay the fines,

Mr. Fordham, on the 11th April 1903, issued a warrant of distress against the plaintiff's goods.

On the 17th April 1903 a distress was put in on the plaintiff's premises, and was paid out by the plaintiff under protest on the 29th April.

On the 8th July 1903 a divisional court made an order absolute quashing the convictions against the plaintiff on the ground that, the children being eighteen months of age, the plaintiff had been improperly convicted.

On the 26th Aug. 1903 the plaintiff issued his summons in the County Court against Mr. Fordham, claiming damages for illegal distress.

It was contended, on behalf of the defendant, that the action was out of time, and that the defendant was protected by the Public Authorities Protection Act 1893.

The learned County Court judge held that the plaintiff's action was barred by sect. 1, subsect. (a), of that Act, as the injury was suffered by the plaintiff from the conviction on the 11th Feb., more than six months before action brought, and he entered judgment for the defendant.

The plaintiff appealed.

By the Justices Protection Act 1848 (21 & 22 Vict. c. xlv.), s. 3:

And be it enacted, that where a conviction or order shall be made by one or more justice or justices of the peace and a warrant of distress or of commitment shall be granted thereon by some other justice of the peace *bona fide* and without collusion no action shall be brought against the justice who so granted such warrant by reason of any defect in such conviction or order or for any want of jurisdiction in the justice or justices who made the same, but the action (if any) shall be brought against the justice or justices who made such conviction or order.

Kingsbury for the appellant.—The conviction and the distress were separate acts. The learned County Court judge held that they were absolutely connected, and that they were bound to date from the conviction. He referred to

Justices Protection Act 1848 (21 & 22 Vict. c. xlv.), ss. 2 and 3.

The conviction stands by itself, and the distress is not a necessary consequence of that conviction. We could not proceed for the distress until the conviction was quashed, that is clear from sect. 2 of the Justices Protection Act 1848. The action is brought, and the time runs from the wrong done, which is the putting in of the distress. He also referred to

Sects. 6 and 8 of the Justices Protection Act 1848;

Carey v. Bermondsey Borough Council, 67 J. P. 447;

Brittain v. Kinnaird, 1 Brod. & Bing. 432; 21 E. R. 680.

Robertson for the respondent.—The whole point is simply whether these two things, the conviction and the distress warrant, were separate or the same; that is to say, whether the distress warrant dates back to the date of the conviction for the purpose of the limitation. In other words, whether the distress warrant can be regarded as a separate act or merely an aggravation of damages, and whether the magistrate, having issued his conviction, did anything else so as to take the case out of the Statute of Limitations. The conviction states "and in default of payment it is adjudged that the sums due under this

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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adjudication be levied by distress and sale of the defendant's goods." That is to say, as far as the conviction goes it provides for distress, and, having convicted in that form, the magistrate, as far as an action against him is concerned, has done everything for which he is liable in an action. The mere fact that later on a distress warrant is ministerially issued by him makes no difference. Sect. 3 of the Justices Protection Act 1848 is in my favour, and it shows that, where there are two justices concerned, the one who convicts and the other who issues the distress warrant, the action is brought against the justice who convicts. Sect. 13 of that Act regards the levying of the distress as part of the damages and not as the substantive cause of action against the justice. Here, too, the levying of the distress ought to be treated as part of the damages which can be recovered by an action on the conviction, and not as a substantive or separate distress.

LORD ALVERSTONE, C.J.—I express no opinion as to whether this action can be maintained or as to whether there is a defence to it. The only point before us is whether the County Court judge was right in applying this Statute of Limitations to this alleged right of action, so as to bar the proceedings, and whether in fact he has rightly declined to entertain the action upon the ground of the lapse of six months. I think we have only got to construe for this purpose sub-sect. (a) of sect. 1 of the Public Authorities Protection Act 1893, which was a new enactment with a statutory limitation, and must be construed strictly. That says: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect: (a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of." The act complained of here was not the conviction. The act complained of here was the trespass to the plaintiff's premises by the levying of the distress. So far as it has any bearing on the case, sect. 3 of the Justices Protection Act 1848 does not seem to me to have anything to do with the question of time. Sect. 3 is for the purpose of protecting a justice who has issued a warrant upon a conviction which was apparently legal, and then subsequently it turns out that he ought not to have issued that warrant, and then an action is brought against the justice who made the original order. In this case I think where the action is for trespass and there is a plea of justification under a distress warrant, it requires the usual strict enactment with regard to a statutory limitation to say that that period is to run not from the date of the real cause of action, the entry, but from some time date anterior, which is supposed to give the authority for the proceeding under which the entry was made. It may be that there are enactments to which Mr. Robertson has referred, which enable you to claim as damages if you have got a cause of action matters of aggravation in respect of subsequent acts done.

That is quite possible, but I am unable myself to see any statute which enables us to say that the right of action for wrongful entry has been taken away because brought too late if the action is commenced within six months of the act which is alleged to be wrong. I think if it was intended to ante-date the period of limitation to an earlier date, there must be clear and distinct language to that effect. Whatever may be the result of this action when it comes to be heard, I think the case must go back to the County Court judge to entertain.

WILLS, J.—I am very clearly of the same opinion. It seems to me the act complained of is the distress, and nothing else. No such thing was ever heard of as an action for making an order against a person without jurisdiction. If the order is not followed by consequences against the individual it comes to nothing. One used to be in former days very familiar indeed with matters of this kind. I do not know how many declarations I have drawn in my old pleading days for levies of one sort and another—complaints that people had been distrained upon against whom there was no right of distress or to enforce consequences of a similar nature, but such actions were always actions of trespass, and nothing else. The complaint used to be that the defendant had wrongfully entered the house or premises of the plaintiff and had done so and so. Then any question which arose about the warrant, the conviction, or order on which the erroneous proceedings by way of distress and entry were founded was raised on a defence setting up that it was justified because of the warrant and the conviction or order on which the warrant was founded. But the action itself was not for erroneous exercise of jurisdiction, but was for making a distress and breaking and entering a man's premises where there was no right to do so.

KENNEDY, J.—I agree.

*Appeal allowed.*Solicitors: *H. T. Nicholson; Solicitor to the Treasury.*

April 18 and 19.

(Before CHANNELL, J.)

SMYTH (app.) v. STRETTON (resp.). (a)

Revenue—Income tax—Master at school—Provident fund scheme—Additional allowance—Allowance to go to fund—Income Tax Act 1842 (5 & 6 Vict. c. 35), s. 146, sched. E.

Under a provident fund scheme at D. College the following increases of salaries came into operation: (a) Assistant masters having not less than five, but less than fifteen years' service, an increase of 5 per cent.; (b) those having fifteen years' and over, 7½ per cent.; (c) a further addition equal to those sums subject to certain conditions.

The whole of these increases were not to be paid to the masters, but were to be accumulated at compound interest to form the fund.

The conditions above referred to were that masters of less than ten years' service who resigned or ceased to belong to the college from any other cause than ill-health were to be entitled to increase

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(a) and the accumulations thereof, but not to increase (c); if the master retired from ill-health, the governors in addition to (a) might grant him (c); and in the event of death both (a) and (c) were to be paid to his legal representative. Masters of over ten years' service were to receive on retirement before the age of sixty the total sum due under (a) or (b) and (c) with accumulations, and in the case of death the same was to be paid to his legal representative. Masters removed for misconduct or, having been guilty of misconduct, allowed to resign were not entitled to (c).

Held, that these increases of salary were sums really added to the salary, and were assessable to income tax under sect. 146, sched. E, of the Income Tax Act 1842.

CASE stated by the Income Tax Commissioners for the division of East Brixton.

The respondent, one of the assistant masters of Dulwich College, appealed against an assessment made upon him under sched. E of the Income Tax Acts in the sum of 385*l.* in respect of his emoluments as assistant master received from the governors of Dulwich College for the year ended the 5th April 1901, on the ground that the assessment included 35*l.* not liable to taxation, being the amount placed to his credit by the governors under the provident fund scheme for the year 1900.

The material parts of the scheme in question were as follows:—

As to the present assistant masters:

1. That the following increase of salaries shall be granted from the date on which the scheme comes into operation, subject to the conditions hereinafter mentioned: (a) Assistant masters having not less than five years' but less than fifteen years' service, an increase of 5 per cent.; (b) assistant masters having not less than fifteen years' service and over, an increase of 7½ per cent.; (c) a further addition, equal in amount to the above sums, shall be granted from the same date to the assistant masters alluded to in (a) and (b), such addition being, however, subject to the conditions provided by par. 5; (d) assistant masters not having fifteen years' service shall, on reaching that period, be eligible for the increase sanctioned by (b) and (c); (e) in the case of the few present assistant masters of advanced age, it shall be open to the governors to grant the maximum increase alluded to in (b) and (c).

As to future assistant masters:

2. That future assistant masters shall in like manner, on attaining five years' service from the date of their appointment, be entitled to the increase of 5 per cent. as in clause 1 (a), and to the additional increase of 5 per cent. as in clause 1 (c), but shall not be entitled to any further increase.

As to all assistant masters:

3. That all assistant masters shall be required to become members of the fund at the expiration of five years from the date of their respective appointments.

4. That the whole of the above increases of salary shall not be paid to the masters, but shall be retained by the governors and accumulated at compound interest for the purpose of forming the said provident fund, but subject to the provisions hereinafter contained.

5. That assistant masters having less than ten years' service who may resign their appointments, or from any other cause than ill-health cease to belong to the college, shall be entitled to receive the total increase sanctioned by (a) and the accumulations thereof, but shall not receive the additional increase sanctioned by (c) or the accumulations thereof. In the event of any such assistant master retiring from ill-health, the governors, in addition

to the increase sanctioned by (a), may grant him the further 5 per cent. sanctioned by (c), and the accumulations thereof. In the event of death of any such assistant master whilst in the service of the college, the 5 per cent. due by (c) as well as under (a), with the accumulations thereof, shall be paid to his legal representative.

6. That assistant masters who shall have served ten years or upwards, and who may retire before the age of sixty from any other cause than misconduct, shall receive the total sum due to them respectively under (a) or (b) and (c), and the accumulations thereof. In the event of death before the age of sixty whilst in the service of the college, the full amount credited the assistant master in the fund books shall be paid to his legal representative.

7. That assistant masters who shall at any time be removed for misconduct, or having been guilty of misconduct may be allowed to resign—such misconduct not being certified to by the master of the college—shall not receive the additional increase sanctioned by (c) or the accumulations thereof.

The appellant contended (1) that he had no actual enjoyment of the sum of 35*l.*, it being in the nature of a bonus at the end of his career as a master at the college, and that he could not raise any money on the sum; (2) that with respect to a moiety of the sum it was uncertain whether it would ever be received, as under paragraph (c) of the scheme power was reserved by the governors to refuse such part of the grant—in other words, that the moiety was contingent, not vested in character, and therefore could not be described as income in any way.

It was also argued that the sums credited under the scheme did not form the subject of agreement when the appellant entered the employ of the governors, or of any subsequent agreement, and that it was open to question whether they were legally recoverable.

In support of the assessment the Crown surveyor quoted the charging words under sched. E of the Income Tax Act 1842, s. 146, whereby all emoluments "accruing by reason of such offices" are made liable to assessment, and contended that the whole amount credited was practically an addition to the annual income, performing the function of a payment to a superannuation fund, and thus relieving the appellant from the necessity of making similar provision out of the salary actually paid to him during the year in question; that the possibility of forfeiture was too remote to affect the question, and that the scheme did not comply with the conditions laid down for deduction in the way of life insurance premiums by sect. 54 of 16 & 17 Vict. c. 34, as amended.

The commissioners were of opinion that the sum of 35*l.* was not liable to taxation, and reduced the assessment accordingly from 385*l.* to 350*l.*

The *Solicitor-General* (Sir E. Carson, K.C.) and S. A. T. Rowlatt for the appellant.

Danckwerts, K.C. and Ellis J. Griffith for the respondent.

April 19.—CHANNELL, J.—This case was argued before me yesterday, and I think it better for me to give judgment in it whilst the matter is fresh in my mind, though I cannot say that I am altogether satisfied with the decision that I am about to come to. It seems to me to depend upon this: There is a scheme established by the governors of Dulwich College, and the question is whether the true effect of that scheme is to

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increase the salaries of the assistant masters, imposing at the same time an obligation upon them to deal with a portion of the increased salaries in a certain way, or whether the true effect of the scheme, when you look at the substance of it, is not really to increase the salaries, but to give to the masters upon their ceasing to hold the position of assistant masters gratuities or allowances. I do not use the word "gratuities" in the sense that there is no consideration for it, because the services of the masters during the time that they serve, after the arrangement is made, are no doubt consideration for it, but retiring bonuses, or something of that kind, when they cease. If that is the true effect of the scheme, then I do not think it becomes salary for the purposes of taxation, and, on the whole, I agree with what Mr. Danckwerts says, that you must look at the substance of it and not the words. But, at the same time, I do not say that you must disregard the words, because the fact is, as I think it is in this case, that the objects of the scheme could have been carried out in two different ways. It could have been done either by increasing the salaries and saying: "If we increase your salaries you must devote a certain portion of them to certain purposes," or it could have been carried out by giving them retiring bonuses. Then, if you are left in doubt as to which of those two ways the governing body have in fact carried it out, I do not think you can do otherwise than look at the words they use, to see if they really understood the words that they were using. Now, in this case this scheme deals with two different percentages of 5 per cent. each; there is another of $7\frac{1}{2}$ per cent., which does not apply to this particular master, but stands on precisely the same footing as the first 5 per cent. that we have to deal with and we may leave that out. There are two percentages of 5 per cent. under clause (a) and clause (c) in the first section of the scheme. They are substantially different in my opinion. They both come under the same words as to the increase of salary, and each party is entitled to draw an argument, and each party has drawn an argument from the fact that they are lumped together. The Solicitor-General and Mr. Rowlatt say that (a) is quite clearly in their favour, and therefore that I must come to the conclusion that the entirety is an increase of salary. On the other hand, Mr. Danckwerts says that (c) is quite clearly in his favour, and it is not a sum which the assistant masters ever get at all except as a matter of discretion and bounty, and that therefore I must take it as that is heaped together with it, that neither (a) nor (c) are increases of salary. That prevents me from getting much benefit from either argument; they must be set-off against one another, and one has to look at what the real substance of the thing is. In this case I have to deal with a decision which certainly is very much in point, and that is the decision of *Bell v. Gribble* and *Hudson v. Gribble* (88 L. T. Rep. 186; (1903) 1 K. B. 517). That establishes, if authority were wanted (I think for the main proposition authority clearly existed before) that a sum recoverable by way of salary or wages is not the less salary or wages taxable because for some reason or other the person who receives it has not got the full right to apply it just as he likes. The fact that income which is income but which has even by operation of some statute to

be devoted compulsorily to some purpose or another does not prevent it being income. That is decided, of course, by one of the various Mersey Docks cases—namely, *Mersey Docks v. Lucas* (49 L. T. Rep. 781; 8 Ap. Cas. 891). But this case of *Bell v. Gribble* goes a little further. There is the case dealt with by Mathew, L.J.: "Suppose in the case of a marriage settlement a man agrees to set apart out of his salary at his office so much every year by way of investment. According to Mr. Asquith's argument that would not be income, but really it is clear in each of the cases I have mentioned the payment is purely voluntary, and is of the same character as a payment made by a thrifty man who out of his salary reserves so much every year for old age or for contingencies." Now, the case is quite clear where a man has a salary from his office, which is what the Lord Justice puts, and by agreement with somebody else, I presume his father-in-law, has bound himself to set apart a certain portion of that salary year by year, and save it and invest it for the benefit of his wife and children. That case is quite clear; it still is income, although he has contracted with somebody else to employ it in a particular way, and to save it; but the decision in *Bell v. Gribble* and *Hudson v. Gribble* goes beyond that, because it applies the same rule to a case where the money comes from the person with whom the contract is made to apply it in a particular way. In *Bell v. Gribble* it was a case of an Act of Parliament of the city of Manchester enabling them to establish this provident fund for their servants, but it was dealt with as a case of contract, and was a case of contract, of course; the statute was merely the authority of the corporation to contract, and the servants who became servants, and who need not have become servants, were dealt with as contracting with the corporation upon those terms. It is an extension of the illustration Mathew, L.J. was giving, because there is a substantial difference between a sum placed out of the disposal of the person who is being dealt with as having got the enjoyment of it, if it is placed out of his disposal by a contract with the person from whom he gets it. There is a distinction between that and his getting it from one source and contracting with another person to deal with it in a certain manner. I think it is a substantial difference. I may illustrate it by what I think is a pretty well known illustration relating to a technical subject, though not of use beyond an illustration, and that is the law in reference to bills of sale. If a borrower is getting from a lender an advance on a bill of sale it is legitimate to treat the entire sum purporting to be advanced as now advanced notwithstanding that there are some deductions made from that sum for the purpose of paying sums which the borrower is by some other existing independent obligation liable to pay, such as to deduct sums payable for rent, and so on. Those may be properly treated, as I understand the law, as part of the advance, and the advance may be stated as an advance of the entire sum, notwithstanding a portion of it is detained by the lender for the purpose of paying the sum due on an existing obligation of the borrower for his rent or for other matters. But if a sum is detained by the lender from the borrower for some agreed bonus or for something that there is no obligation of

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the borrower to pay other than the obligation created by the contract that is being made between the parties at the time, then you may not state the entire amount to be an advance made at the time. That illustrates what I mean—that there is a substantial difference between a sum being detained by the person who would otherwise pay it, by reason of a right to detain it that is created as part of the same contract which he is carrying out, and to that extent, therefore, it seems to me that the decision in *Bell v. Gribble* and *Hudson v. Gribble* goes beyond what the previous cases and the illustration of *Mathew, L.J.* has established. But it is binding, and it seems to me that it creates a difficulty in my saying that the governing body here did not mean as to both of these sums really to increase the salary, and to increase the salary with a view of enabling the assistant masters, without losing money, to take part in this provident fund, and not only enabling them to do it, but binding them to do it. In *Bell v. Gribble* the servants were bound to make those payments or to allow those deductions as part of the terms of their service, just as here this becomes part of the engagement of these assistant masters from the time that it came into operation, and whether they are previous masters or newly-appointed masters really makes no difference for the purpose. I think, under the circumstances, that I am bound to hold that this scheme really meant what it said; that it did mean to increase the salaries, and to provide that as to one portion of the increase the assistant master should have it in any event. All the clauses show that as to the first 5 per cent. the masters were to have it, or their representatives were to have it if they died, and they were even to have it if they left by reason of some misconduct, and they were to have it not year by year, but when they left, and with compound interest. The scheme has been criticised by somebody in reference to the grammar of clause 4, and, I think, criticised with some grounds; it also may be criticised on the ground that it does not state at what rate of interest this compound interest was to be, nor does it state for anybody who had to assess the compound interest what he would want to know what was done as to rests, whether it was to be annual or half-yearly, or how the compound interest was to be calculated. It is not absolutely complete if it is to be criticised, but that does not make any difference for the purpose that I have to consider. In reference to the first 5 per cent., it seems to me that it must have been meant to be that which it is said to be, viz., an increase of salary payable at a future date, and when payable, payable with compound interest; and therefore I do not think the case would have been arguable if that provision stood alone. It does not stand alone. The next one, if it stood alone, would certainly be very arguable. I am not quite clear about it now, but it seems to me that being put as it is with the other sum which is clearly salary, and being in express and clear words used, not by ignorant people, notwithstanding what I have said as to their grammar and other things, but by people—namely, the governors and masters of this college—who must be considered to understand quite well what they say, stated distinctly to be salary, and it seems to me not by any means

necessary to prevent it being salary, because there is a binding obligation. As to this sum (c), it is to be left in the hands of the governors of the college upon certain specific terms which are that the masters are not to have it in every possible event, for they are not to have it if they do not serve for ten years unless their non-service for as much as ten years depends on the case of ill-health; and then in the case of ill-health it is discretionary with the governors to give it. So in that case, if they have served for less than ten years, they do not get this sum (c) as of right, and also if they are removed for misconduct or have resigned to avoid being removed for misconduct, they do not receive that sum, but that sum in those cases, if it is not given to them, goes into a general fund which the governors are to distribute to exceptional and special cases requiring and deserving assistance. Therefore each man when he pays down, if you may call it paying down, or when he has deducted from what otherwise would be his salary the sum (c), when he is paying over or submitting to the deduction of that sum, he is paying it in the nature of a premium in respect of advantages which he is probably to get, advantages secured to him for certain in certain events, which he may not get in certain other events, but he is also purchasing the right to have or to ask for and possibly to get it if he happens to be specially unfortunate, and therefore in that sense, the sense of this fund "specially deserving" he has a possibility of getting an additional allowance out of the sums which other gentlemen have contributed. Gentlemen who have served for five years and therefore come into this charge, but have not served for ten, and have gone out perhaps to some better appointment elsewhere, will have paid certain sums which they will not get back, and those go to increase the fund, and each person who subscribes to the fund has a chance of getting a portion of those funds. The result is it is like a premium paid down for an insurance in certain events, a sum paid for advantages which you may or may not get, or get to a greater or lesser extent. It is exactly like the case of a person being obliged to insure his life; that would not prevent the sum being salary. In one sense it is a hard case on these assistant masters. It is a ground of complaint (it is not for me to say if it is legitimate or not) against the income tax that it charges in the same way income arising from a man's own work and exertions, out of which there is a moral obligation at any rate to put something by for his family and those dependent upon him, and for his old age and chance of illness. It treats that, for the purpose of taxation, on exactly the same footing as income arising from capital, which capital remains intact and is there for the man in his old age or his children. It is an objection to be made to the tax, but there is the tax—it exists—and considerations of that sort, it seems to me, cannot be taken into account in considering whether a particular case comes within the principles of the taxation. Of course the Legislature has done something for persons in that position—it is a very little—but something in the way of the provision that exists as to deducting the premiums on life assurances. That is done to meet the grievance. This case though it may possibly come within the mischief which that particular provision is meant to meet, does not

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come, as it seems to me, within any of the statutory relief that has been given. Of course it is not a life assurance within the meaning of that, nor can it possibly be said, and it is not argued by Mr. Danckwerts in an argument which has assisted me very much, that it comes within the express words set out in this case about certain deductions allowed by Act of Parliament which was one of the things considered in *Bell v. Gribble*. But this case could not be said to come within that, and does not. The result seems to me to be that I must take this sum as a sum which really has been added to the salary and is taxable, and it is not the less added to the salary because there has been a binding obligation created between the assistant masters and the governors of the schools that they should apply it in a particular way. *Judgment for the Crown.*

Solicitors: *Solicitor of Inland Revenue; Druces and Attlee.*

April 18 and 19.

(Before CHANNELL, J.)

SMITH (app.) v. DAUNEY (resp.). (a)

Revenue—Inhabited house duty—Unoccupied furnished house—House Tax Act 1803 (43 Geo. 3, c. 161)—House Tax Act 1808 (48 Geo. 3, c. 55)—House Tax Act 1825 (6 Geo. 4, c. 7)—House Tax Act 1851 (14 & 15 Vict. c. 36).

The tenant of a dwelling-house which is kept furnished, although during the year of assessment it has not been used for the purposes of residence and no one has dwelt or slept therein, is liable to inhabited house duty under the House Tax Act 1851.

CASE stated by Commissioners for the General Purposes of the Income Tax and for executing the Acts relating to inhabited house duties for the division of the Isle of Wight.

The respondent appealed against an assessment to inhabited house duty made on the sum of 100*l.* at 8*d.* in the pound for the year ended the 5th April 1901 upon the annual value of a certain dwelling-house belonging to him, situated at Luscombe-road, Shanklin, in the Isle of Wight.

It was admitted by the appellant on behalf of the Crown that the dwelling-house in question for the entire year ended the 5th April 1901, although furnished, had not been used for the purposes of residence, and that no one had dwelt therein or slept therein.

The premises in question, with a garden attached, are held by the respondent, under a lease for a term of 990 years from 1865 or thereabouts, at an annual ground-rent of 15*l.*

The respondent furnished the house in 1877, and it was furnished during the year of assessment (1900-1), and still remains so furnished.

The premises were furnished by the respondent with the intention primarily of using them for occasional residence as a country residence for himself and his family, and up to the year 1895 he resided with his family in the house for a few weeks in most years.

In the year 1896 the respondent let the house

as a furnished residence to a Mr. Wardlaw, whose tenancy expired in 1898.

In each year since the latter year, with the exception of the year of assessment (1900-1), the house has been let by the respondent as a furnished house for a few weeks, but the respondent or his family have only resided in the house for about a month in 1902.

At no time during the year of assessment (1900-1) was the house let or actually resided in by any person whosoever, nor (except as hereinafter appears) was any caretaker employed to look after it. During the year of assessment the house was only used by the respondent for keeping his furniture in. The furniture was not packed away and the carpets were kept down, and the premises were ready for the use of the respondent or any person to whom he might let them as a furnished residence. The keys were kept by the respondent's agent at Shanklin. The windows and doors were occasionally opened by the agent to air the house. A gardener has always been employed by the respondent, and was so employed during the year of assessment once a week, or, if necessary, twice a week, for the purpose of attending to and keeping the garden referred to above in order, and occasionally some of the produce, such as a few apples and pears, was during the year of assessment and is now sent to the respondent.

For the year of assessment and for the previous and subsequent years the income tax schedule A, land tax and poor rates, and other rates were paid by the respondent in respect of the house, the respondent being assessed as the occupier thereof, and inhabited house duty has also been paid in respect of the premises by the respondent for all the above years except the year of assessment (1900-1), the respondent being assessed as the occupier thereof.

The respondent claimed that the house was not chargeable with duty as an inhabited dwelling-house within the meaning of the Act 14 & 15 Vict. c. 36, inasmuch as it was not inhabited, dwelt in, or slept in at any time during the period in question, and that there was no statutory enactment or legal decision which declares that an uninhabited house shall be deemed an inhabited dwelling-house if it has furniture in it. In support of his contention he referred to the case of *Riley v. Read* (4 Ex. Div. 100).

The surveyor of taxes contended that the inhabited house duties are imposed by the Act 14 & 15 Vict. c. 36, on inhabited dwelling-houses of the yearly annual value of 20*l.* and upwards, and that that Act kept alive the various powers, provisions, rules, regulations, directions, exemptions, forfeitures, and pains contained in the unrepealed sections of the Acts 43 Geo. 3, c. 161; 48 Geo. 3, c. 55; 57 Geo. 3, c. 25; 5 Geo. 4, c. 44; 6 Geo. 4, c. 7; 2 & 3 Will. 4, c. 113 and 3 & 4 Will. 4, c. 39, and made them applicable to the assessment and collection of the inhabited house duties as fully and effectually as if they were re-enacted therein; that every inhabited dwelling-house is required by law to be assessed, and that the house assessed in this case was undoubtedly a dwelling-house, and that it was not necessary that a dwelling-house should be slept in or dwelt in to render it liable to assessment; that in view of 6 Geo. 4, c. 7, ss. 2, 3, a house furnished as a dwelling-house, although not

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dwelt in for any particular year or portion of a year, could not be taken or deemed to be unoccupied and not liable to assessment, and that the case of *Riley v. Read* (sup.) relied on by the respondent was not a case in point. The house referred to in that case was a building, the ground floor of which was occupied for the ordinary purposes of a club, and the upper floors as offices, and it had never been furnished as a dwelling-house or used as a residence.

In further support of his contention that it was not necessary that the house should be slept in to render it liable to assessment to the inhabited house duties, he referred to 57 Geo. 4, c. 25, ss. 1, 2, and 5 Geo. 4, c. 44, s. 4, by virtue of which it was necessary that, before exemption could be granted in respect of a dwelling-house used solely for trade or professional purposes, the persons claiming exemption should prove residence in a taxable dwelling-house elsewhere, and that this proof was required until the Act 30 & 31 Vict. c. 90, s. 25, abolished its necessity, some sixteen years after the present Inhabited House Duty Act, 14 & 15 Vict. c. 36.

The commissioners were of opinion that the contention of the surveyor could not be sustained. The Acts of Parliament referred to impose a tax on inhabited dwelling-houses only, and the question for their consideration was whether this building was an inhabited house within the meaning of those Acts, though no person dwelt therein, inhabited it, or slept thereon. The statutes say that what is taxable is an "inhabited dwelling-house." If "inhabitable dwelling-houses" were the thing mentioned no difficulty would have arisen, but as the Acts speak not of "inhabitable dwelling-houses," but of "inhabited dwelling-house," they were of opinion they were bound to put a construction on the word "inhabited." Was this such a place, since no person resided on or dwelt therein? If there were any statute defining the expression and showing that the term "inhabited" was meant to apply to such a case as the present, or if there were any authority to show that the expression might apply to a mere constructive occupation—in other words, if there were an Act of Parliament or decision of a court of law which showed that a dwelling-house might be taxed as an inhabited dwelling-house in which no person slept, dwelt, or resided, though furnished—they would be bound by such Act or decision, but in the absence of that they felt they must put their interpretation on the words of the statute, and they were accordingly of the opinion that the interpretation of "inhabited" is "to dwell," "to live," "to hold as dweller," "to occupy for all purposes of life," or "occupied by inhabitants," and they were unable to interpret the expression in any other mode.

The commissioners therefore disallowed the assessment.

The *Solicitor-General* (Sir E. Carson, K.C.) and *S. A. T. Rowlatt* for the appellant.—The mere fact that no one has dwelt or slept in this dwelling-house during the year of assessment or had used it for the purposes of residence makes no difference and it is liable to duty under the House Tax Acts. It was an occupied house for it was kept furnished, and the premises were always ready for the use of the respondent or for anyone to whom he might desire to let it. The

true test is whether the house is occupied, and a furnished house is an occupied house. They referred to

Reg. v. St. Pancras Assessment Committee, 37 L. T. Rep. 126; 2 Q. B. Div. 581.

When the whole scheme of the House Tax Acts is examined, it is clear that the liability to duty depends upon occupation and not on whether the house is or is not inhabited. Throughout the whole of the Acts, with one exception, the word used is "occupier," and the exception is the phrase "inhabitant or occupier." By sect. 10 of the House Tax Act 1803 (43 Geo. 3, c. 161) it is provided that houses occupied at the time of assessment are to be brought into charge at the full yearly rent at which the same are worth to be let as set forth in the two schedules to that statute. Those two schedules are repealed, but in their place are those attached to the House Tax Act 1808, which granted new duties in place of those in the old Act. In sched. B., which is a schedule of the duties made payable on all inhabited dwelling-houses, in rule 1 of the rules for charging these duties it is stated: "The said last-mentioned duties to be charged annually on the occupier or occupiers for the time being of every such dwelling-house." Again, sect. 15 of the Act of 1803 provides that unoccupied houses are to be inserted in the assessment, and the occupier, on coming into occupation, is to give notice, otherwise he is to be charged for the whole year instead of from the end of the preceding quarter. Further, houses becoming unoccupied after assessment are to be charged for the whole year unless notice is given. In order that the liability to duty may be discharged where a lease has come to an end after assessment, there are three requisites necessary—namely, that the tenant must quit, that the tenancy must have determined, and the premises must be wholly unoccupied. This appears from rule 5 of sched. A to the Act of 1808. In sched. B to that statute there are certain exemptions, and case 5 relates to a house left in the care or charge of any person or servant who resides therein for the purpose only of taking care of it, but it was pointed out in *London Library v. Carter* (62 L. T. Rep. 466; 2 Tax Cas. 594) that this provision only applies to an empty house. The provisions of sect. 15 of the Act of 1803 and sched. A, rule 5, to the Act of 1808 were extended by sect. 2 of the House Tax Act 1825 (6 Geo. 4, c. 7), where relief was granted on houses becoming unoccupied although not at the expiration of the occupier's lease or demise, and it is noticeable that the words there used are "The duty thereon shall be discharged . . . for the particular quarter or quarters . . . during which it shall appear . . . such house . . . shall have continued for each entire quarter wholly empty and unoccupied." The inhabited house duty was taken off by the House Tax Act 1834 (4 & 5 Will. 4, c. 19), but by the House Tax Act 1851 (14 & 15 Vict. c. 36) the powers and provisions of the former Acts were to be again in force except as therein provided, and it is under this Act of 1851 that the present duties are payable. When all these statutes are looked at, the whole question is one of occupation, and they clearly show that if you occupy you inhabit. There are several Acts which give exemptions from the duty—namely, the House

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Tax Act 1817 (57 Geo. 3, c. 25), the House Tax Act 1824 (5 Geo. 4, c. 44), and the Customs and Inland Revenue Act 1878 (41 & 42 Vict. c. 15)—but, except, perhaps, in the case of the caretaker, there has never been any suggestion that there must be habitation—i.e., in order to make the house liable for duty. There have been several cases in Scotland which show that occupation is habitation. They referred to

Re Scottish Widows' Fund and Life Assurance Society, 12 Sc. L. Rep. 275; 1 Tax Cas. 7;

Re Glasgow Coal Exchange, 6 Rettie, 850; 16 Sc. L. Rep. 457; 1 Tax Cas. 211;

Re Scottish Widows' Fund and Life Assurance Society (No. 2), 7 Rettie, 491; 17 Sc. L. Rep. 314; 1 Tax Cas. 245;

Glasgow Corporation v. Inland Revenue, 18 Sc. L. Rep. 1.

A. T. Lawrence, K.C. and C. C. Scott for the respondent.—This house during the year of assessment was not inhabited in any sense of the word. The House Tax Acts only impose duty on inhabited houses. The word "occupier," we admit, is used in a large number of the sections of the statutes, but they are merely what may be called the machinery sections used for the purpose of assessing the duties. The Crown here are trying to construe the machinery of the Act as if it were the charging part of the Act. When construing these statutes it must be borne in mind that two duties are imposed by them—namely, the window tax and the inhabited house duty. Window tax was payable in respect of houses occupied, and that is why the words "occupier" and "occupation" are used in the statutes. Inhabited house duty required habitation for it to attach to a house. It is because the words "occupier" and "occupation" are used in these machinery sections that much confusion has arisen. Under the words in sect. 10 of the House Tax Act 1803 you can only bring inhabited houses within the words of sched. B of the Act of 1808. In order to make a house liable to inhabited house duty it must have been slept in during the year for which it is assessed. They referred to

Clifton College v. Thompson, 74 L. T. Rep. 168; (1896) 1 Q. B. 432;

Riley v. Read, 4 Ex. Div. 100;

Lambton v. Kerr, (1895) 2 Q. B. 233.

Even although it may have been slept in it may not be liable to duty as in the case of the exemption 5 in sched. B of the Act of 1808. In sect. 62 of the Act of 1803 the words are "every dwelling-house inhabited or not inhabited," which shows there is a distinction between the two, and distinguishes the houses liable to the window tax and those liable to inhabited house duty. Again, in the Act of 1817 (57 Geo. 3, c. 25) the two duties are distinguished, for, in reciting the Act of 1808 (48 Geo. 3, c. 55), it says: "Certain duties were granted to His Majesty upon houses, windows, and lights, as set forth in the schedule to the said Act annexed, marked A, and upon inhabited houses, as set forth in the schedule to the said Act annexed, marked B." There the word used is "inhabited" so as to show the difference between the two duties charged. That there is a distinction between a furnished and an occupied house appears from sect. 3 of the House Tax Act 1825 (6 Geo. 4, c. 7). The Scottish cases

that have been cited do not bind this court, and do not correctly state what is the law in England. Lord Brampton's judgment in *Grant v. Langston* (82 L. T. Rep. 629; (1900) A. C. 383) overrules them, certainly so far as this country is concerned.

Rowlatt in reply.

CHANNELL, J.—In this case there is a question of some nicety arising under a somewhat peculiar fact. There is a house which during the year of assessment was fully furnished and ready for occupation as a dwelling-house, but, in point of fact, during the year nobody slept in it or inhabited it in the ordinary sense of physically inhabiting it or living there. It was a house in the Isle of Wight that the owner had been in the habit of visiting from time to time with his family as a country residence and also, in recent years at any rate, had been in the habit of letting furnished to other people to occupy in a similar way, but when he was not there in residence and had not let it he did not leave any servant or caretaker of any kind living in the house. There was a house-agent close by who had the key of it, and he showed people over the house, if necessary, and he occasionally sent in someone to open the windows and air the place, and so on. But at no time during the actual year of assessment was the house lived in in the ordinary way. It was ready for use as a dwelling-house and ready for habitation, but it was not in point of fact inhabited. At the same time it was occupied, because leaving the furniture there is for ordinary purposes, certainly including in particular the purpose of rating to the poor rate, occupation. It is a certain amount of use of the house, and I do not think it is questioned that what happened in this case would amount to occupation, although it is said, and certainly in the ordinary use of the word rightly said, it was not in fact inhabited. Under these circumstances is the inhabited house duty payable? The duty is imposed in respect of inhabited houses not of habitable houses. That much is, of course, quite clear. It was so in reference to the old Acts, and it is so in express terms in reference to the Act which really is the one which one has to consider—namely, the Act of 14 & 15 Vict. c. 36 (1851)—which reimposed the inhabited house duty which had been an existing tax, and which had been taken off some few years before. When this Act was passed, the window tax, which was a tax which existed for a great number of years, was taken off, and the inhabited house duty was restored, probably with variations as regards amount or anything of that sort, which does not concern me here. There was the tax imposed upon inhabited dwelling-houses by the first section, and by the second section all the powers, provisions, rules and regulations, directions, exemptions, fines, forfeitures, pains and penalties contained in any of the prior Acts with reference to the duties on inhabited houses were to be enforced in reference to the duties as reimposed. When you come to look at those various provisions, it is quite clear that in all the provisions in reference to the mode of charging the duty in reference to the period during the year of assessment for which relief from the duty was to be granted the word that occurs is "occupied" and not "inhabited," and it appears as if the Legislature were treating the two words as meaning

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the same thing. Unless you can say either that "inhabited" means "occupied" or that "occupied" means "inhabited" you will get into difficulties in some one or other of the sections throughout the Act. There is a substantial difficulty to see how the thing is to be worked out. Before going to the clauses of the Act it seems to me as well just to refer to the dicta upon the subject—I think they are only dicta—to which I have been referred. In Scotland it has been stated in two or three cases, and particularly emphatically and clearly in one case—*Glasgow Corporation v. Inland Revenue* (18 Sc. L. Rep. 1)—that "habitation" in this section is the same thing as "occupation." The Lord President at page 3 of the Scottish Law Reporter in the year 1880 in the number the case is reported in, says: "It is needless to say at this time of day that an inhabited house does not mean a place of residence—that habitation in the sense of the statute may consist of any kind of occupation of a house or building. If it be not unoccupied—that is to say, without any use made of it at all—then it is an unoccupied house within the meaning of the Act, and, being occupied, it is also within the meaning of the statute an inhabited house." If that passage correctly states the law in England as well as in Scotland—and there is no reason why it should be different, because this statute and the tax extends to Great Britain, and it is given in Scotland on the same terms as it is given in England—the present case seems to me to be quite clear. It is said, however, that there are dicta in England to the contrary, and the principal one, and probably the latest one, and one which certainly I should be inclined to follow if I were clear that it applied to the present case, is a statement by Wright, J. in the case of *Clifton College v. Thompson* in 1896 (74 L. T. Rep. 168; (1896) 1 Q. B. 432). There was a question of a master's house and some other buildings in reference to Clifton College, and in dealing with one question the learned judge said: "That being so, the only ground on which the Crown could succeed would be that the college is assessable for the remainder of the premises as being a dwelling-house, or as including some other dwelling-house to which the rest is attached and occupied with that dwelling-house. But the premises which I have just mentioned"—I think he is referring to the chapel, library, sanatorium, gymnasium, racquet courts, fives courts, swimming baths, museum, and so forth—"do not appear to me to be capable of being treated as inhabited dwelling-houses at all. Boys do not dwell in or inhabit any class-room or gymnasium, or any of these other places; they neither dwell there or inhabit there, nor does anybody else so far as the case shows." Then we come to the passage there was a question about. "Then in addition to that on the second point to which I have adverted" (and I think that was shown by Mr. Lawrence to mean "the second point upon which I am now adverting") "it seems to me that the weight of authority in this country is to the effect that nothing is inhabited as a dwelling-house for the purposes of these Acts unless someone sleeps there." There is no doubt he had been referred to the Scottish cases, and to this particular one from which I have read a passage, and also had been referred to a case of *Riley v. Read*

(4 Ex. Div. 100), which is an English case which has something on the point in it, but not very much; but he has also been referred to another case in England. He had not been referred to many cases, but he deals with it in this short way in his judgment: "It seems to me that the weight of an authority in this country is to that effect that nothing is inhabited as a dwelling-house for the purposes of these Acts unless someone sleeps there." As I say, if I knew exactly what authorities the learned judge was referring to, and that he had this point in his mind, I think I ought to follow that; but I am not quite able to understand. In the first place, he does not tell us which are the cases he does refer to which lead him to that conclusion, and in the next place what he is referring to is not so much to the fact that somebody does sleep there or that there is no sleeping accommodation, but he is referring to the character of the use that is made of this place—as a class-room, gymnasium, and so—and I do not think he is meaning to say that if those places included a bedroom for a caretaker or somebody or other that the assessability for inhabited house duty would depend upon whether or not the bedroom was slept in during the year of assessment. I think he is rather referring to the character of the occupation of what he had before him—that it was not occupation including sleeping accommodation or occupation in the nature of it. In point of fact, laying stress not only upon the word "inhabited," but upon the phrase "inhabited dwelling-house." There being somewhat of an uncertainty as to what that means, the fact that it is only a dictum, and the fact that there are clear decisions in Scotland seem to me practically to leave this quite open, so that I have to go back and look at the statute a little more carefully than I have hitherto done. In this case it seems to be admitted—I think it would have to be admitted, but it seems to me expressly admitted—that if this gentleman in the year in question had done that which in most of the years since he has had the house he has done—namely, lived in it for a few weeks, or let it for a few weeks—then he would have been assessable to the inhabited house duty for the entire year. All the provisions which deal with dividing up the year of assessment into periods for which the tax is to be paid and periods for which it is not to be paid, clearly seem to deal with the question of occupation and not habitancy. The word "occupied" at any rate occurs in all of them, and the test is when it comes to be occupied and so on. It is "occupation" in all those sections that govern the question whether or not a portion of the year is a portion in respect of which the tax is to be paid. That being so, if it is correct to say that this house would have been taxable for the whole year if the owner of it had left it for the greater part of the year in exactly the condition in which he has left it—namely, furnished, with a key at a house-agent's close by, nobody actually in it but for a month in the summer—but had gone down and lived there with his family and his servants, then one has to see how that would come about. It seems to me that it would come about in this way: When the assessment is made, if the person whose duty it is to go and make the assessment goes to the house, and finds it furnished and in that sense

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occupied, he has not to inquire whether anybody was sleeping there the night before, or whether anybody is going to sleep there on that night, but he is to assess it. That, I think, appears from the 10th section of the Act of 1803, and the 15th section of the same Act. The 10th section reads thus: "And every dwelling-house, cottage, or tenement, of whatever description occupied at the time of making the assessment shall be brought into charge in respect of the duties set forth in the schedule marked (A) by the respective assessors." Now, that schedule marked (A) relates to the window tax and not to the inhabited house duty. The section then continues: "And in their default by the respective surveyors and inspectors herein mentioned, according to the number of windows therein, subject to the powers of discharging the same as after-mentioned." Then we get to the portion that seems material for the present case: "And every dwelling-house, cottage, or tenement and other the premises therewith occupied and hereby charged." Now, "the premises therewith occupied and hereby charged" clearly relate to the premises which are, for the purposes of the charge, to be included with the dwelling-house in the charge, such as certain outbuildings and things of that sort, and amongst other things they include the garden, provided it does not exceed one acre. That is, "the premises therewith occupied and hereby charged"—not all the premises therewith occupied, but so much of the premises therewith occupied as is hereby charged. The section then goes on: "As set forth in sched. (B), being together of the annual rent of 5l. or upwards, shall also be brought in charge in the like manner, according to the full and just yearly rent at which the same is really and *bona fide* worth to be let in respect of the duties set forth in the said schedule marked (B)." And if any assessor omits to charge and so on then he is subject to a penalty, "whether the occupier of any such house, cottage, or tenement shall be entitled to be discharged from the same in manner herein-after mentioned or not." The 15th section corresponds with it, but relates to houses which are unoccupied at the time of making the assessment. It says: "Every house or tenement which shall happen to be unoccupied at the time of making the assessment shall be inserted as such in the assessment with the annual rent at which the same might be let if the same shall amount to 5l. or upwards, and the assessors, and in their default the surveyors, and inspectors, shall cause the same to be certified to the said commissioners from the time of such house or tenement coming into the occupation of any person or persons." So that if the house is occupied at the time of making the assessment, it is to be charged subject to the right of the person to be discharged, if any of the provisions of the statute enable him to be discharged. It seems to me, therefore, at the time of making this assessment the assessor would have to put it in, because he would find it occupied, and that it would not be his business to inquire: "Was it slept in last night; is it going to be slept in to-night?" or anything of the sort. It is occupied, it is habitable, it is a dwelling-house, it is ready for occupation as a dwelling-house, and not for something else. If it had no bed-room furniture in it or anything of that sort, but only class-room furniture or gymnasium apparatus or

something of that sort, it would come under a different category as not being a dwelling-house at all, apart from the word "inhabited." But in the condition in which this is, it is "occupied" as a dwelling-house although not "inhabited" as a dwelling-house, because it has the full furniture of a dwelling-house there, and is "occupied" for rating purposes. It seems to me, therefore, it is to come into charge, and, as I say, I think that is admitted in the argument for the respondent here, because it is agreed that he would be chargeable for the whole year if he had occupied or inhabited it at any period. That being so, it seems to me that even if the first operative words, as I may call them, of the section granting the tax would not in their ordinary interpretation of house duty cover it, it is brought in it by this section, which directs that it shall be charged subject to such power as there is for the person charged to be discharged under any of the various sections of the Act. If that is the true interpretation, it is, I think, quite clear that there is no section of the Act under which the respondent can get discharged on the ground neither he nor anyone else had slept in the house during the year in question. None of the sections in reference to dividing up the period into times the house is occupied and times when it is unoccupied apply, and it seems to me that the result, therefore, will be practically that which the Scotch judges appear to have said it was—namely, that for the purposes of this statute a house is to be deemed to be an inhabited dwelling-house if, in point of fact, there is an occupier of it. Of course the fact of there being an occupier of it does not necessarily make him an inhabitant of it. There may be an inhabitant of a house who may be a servant, and his inhabitation may amount to occupation by somebody else, his master. That is the sort of case which may no doubt arise, but it seems to me that if, as here, such occupation as there may be of the house is an occupation of it as a dwelling-house as distinguished from the case dealt with by Wright, J. of a class-room and gymnasium, and things of that sort—if this house is ready to be slept in when the owner or anyone he sends there wants to sleep there, then it is inhabited within the meaning of these statutes. I think that is the better interpretation on the whole. You have either to read "inhabited" in the first part as meaning "occupied" or "occupied" in a great many of the other parts as meaning "inhabited," and there is a choice between the two, and, having regard, amongst other things, to the analogy of rating, although it depends on different words, I think on the whole that the proper conclusion to come to is that the tax here has been imposed upon a house in such conditions as this one. I may just add that if the proposition contended for, that a house which was in the condition in which this house has been for the whole year could be released from a proportion of the tax by reason of its being in that condition for a portion of the year, could be maintained, it seems to me absolutely certain that this question must have arisen long ago, because it is an extremely common case. The particular case that has arisen here—namely, the house being occupied, uninhabited in this way for the entire year—is no doubt a somewhat rare one. It is not often that furnished houses are left without someone sleeping in them and un-

protected for an entire year, and that accounts for the question not having arisen and been decided during the number of years which have elapsed since this tax was imposed. If the other proposition was contended for, it would be a very strong argument indeed against it that had never been set up during all this number of years. From the first imposition of the tax, I suppose nearly 100 years have passed; at any rate, it has existed for at least 100 years, and, considering the number of cases in which houses must have been left in this sort of state for a portion of the year, if it were contended that that gave relief for a portion of the year it would be a very strong argument against such contention; but that contention has not been set up, and it is to a considerable extent in consequence of that position of things that it appears to be agreed that relief does not exist for the portion of the year for which the house is in this condition, and it seems to me that it is taxable when it is for the whole year in that same position. On the whole, therefore, I think my judgment must be for the Crown.

Judgment accordingly.

Solicitors : Solicitor of Inland Revenue ;
Worthington Evans, Bird, and Co.

Supreme Court of Judicature.

COURT OF APPEAL.

July 23, 24, and 27, 1903.

(Before VAUGHAN WILLIAMS, ROMER, and
STIELING, L.JJ.)

BARQUE QUILPUÉ LIMITED v. BROWN. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

*Charter-party — Detention at port — Loading —
"Regular turn" — Custom of port — Delay caused
by number of vessels chartered — Option.*

*A charter-party provided that a sailing vessel was
to load a cargo of coal at N. "in regular turn"
from B. Colliery or any of the collieries the
freighters might name. No time for loading
was fixed.*

*At the port of N. it was necessary to obtain a
loading order from the colliery before a loading
berth was allotted.*

*When the vessel arrived, a great many vessels were
waiting to load from B. Colliery, and in con-
sequence sixty-seven days elapsed before a coaling
order could be given to the vessel.*

*The charterers, who were the owners of B. Colliery,
had sold a cargo of that coal to be shipped by
this vessel.*

*Held, that the words "regular turn" referred to the
colliery turn as distinguished from the port turn
both upon their proper construction and also
having regard to the regulations and practice of
the port.*

*Held, also, that the defendants had not chartered
an unreasonable number of vessels to arrive at
the port about the same time so as to make it
impossible that the vessel should be able to load
within a reasonable time; and that the proba-
bility of delay was known to and contemplated*

*by the shipowners when they entered into the
charter-party.*

*Held, therefore, that the charterers had not acted
unreasonably, and were not liable for the deten-
tion of the vessel.*

Decision of Kennedy, J. affirmed.

APPEAL of the plaintiffs from the judgment of
Kennedy, J. delivered the 2nd Dec. 1902.

The plaintiffs commenced the action to recover
damages for detention of the sailing ship
Quilpué at Newcastle, New South Wales, under
a charter-party dated the 6th Feb. 1900, made
between the plaintiffs, as shipowners, and the
defendants, as freighters.

The charter-party, so far as material, provided
that the ship should with all convenient speed
proceed to Newcastle, "and there in the usual and
customary manner load in regular turn from
Brown's Duckenfield Colliery, or any of the
collieries the said freighters may name, a full and
complete cargo, which the said freighters bind
themselves to ship."

The defendants were the owners of Brown's
Duckenfield Colliery, and chartered vessels to
load with their coal.

On the 6th April 1900 they sold a cargo of their
coal to be shipped by the Quilpué to certain
persons in Valparaiso.

At the port of Newcastle coals are shipped in
large quantities from about twenty collieries, none
of which can produce a greater daily output than
1100 tons, the coals from the Wallsend and the
Duckenfield Collieries being in greater demand
than from the others.

The collieries are all some distance from the
port, and the coals are conveyed by railway to the
loading place, which is called the Dyke, where
the vessels are loaded by means of cranes, which
are quite sufficient to load more than the output
of the collieries, but there is no place at the Dyke
for the storage of coals.

The loading is under the control of Railway
Commissioners, and No. 2 of the port regulations
provides: "Vessels requiring berths at cranes for
the purpose of loading or unloading cargoes shall
obtain same in the order of their arrival in port,
provided . . . the necessary loading orders
have been lodged."

The regulations also provide that the cargo
must be shipped continuously, and that not less
than a certain number of tons a day must be loaded
under penalty of fines, and that steamers shall
have preference.

Evidence as to the working of these regulations
was taken on commission, and on this evidence
Kennedy, J. found a well-established practice
with reference to sailing vessels that the loading
was "a loading in turn of their arrival *inter se*,
subject to their being on what I may call colliery
turn with the colliery from which they are
chartered to receive their coal."

Under the regulations it is necessary in order
to obtain a berth to lodge a coaling order from
the colliery, but the colliery can only give an
order in turn of the ships booked to it. There-
fore a ship booked to the collieries whose coal is
in greater demand was under greater risk of
delay than a ship booked to one of the others.
This practice was the necessary result of the
nature of the colliery output, together with the
absence of any facility for storage at the Dyke,

(a) Reported by W. O. BIAS, Esq., Barrister-at-Law.
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and the necessity of sending the coal by the railway.

The *Quilpué* arrived at Newcastle on the 3rd Aug. 1900 (her cancelling date being the 31st Aug. 1900), and there were then over twenty ships waiting to load from Brown's Duckenfield Colliery. She was not berthed for loading until the 6th Oct. 1900, and the loading was finished on the 9th of that month.

As the result of the practice at Newcastle, twenty-seven vessels booked to other collieries which arrived after her were loaded before her, and eleven which arrived before her were loaded after her.

Kennedy, J. held that the defendants were not liable for the delay, as the words in the charter-party, "in regular turn from Brown's Duckenfield Colliery," referred to colliery turn; but that, if they referred to port turn, their effect was the same, having regard to the practice at the port, as the *Quilpué* was loaded in her turn on the books of the colliery. He also held that the defendants had not caused the delay by chartering an unreasonable or excessive number of vessels to load from their colliery and so caused a block of vessels, as it had been proved that in 1900 the number of vessels loaded from the Duckenfield Colliery was less than that for the three previous years, and that it was impossible in the case of sailing vessels to know their precise dates of arrival, especially having regard to the long cancelling dates provided for in their charter-parties.

The plaintiffs appealed.

Carver, K.C. and Leck for the appellants.—The question is what is the meaning of "regular turn" at Newcastle. *Prima facie* it means port turn:

Lawson v. Burness, 1 H. & C. 396;

Stephens v. Macleod, 19 Sess. Cas. (4th series), 38.

At Newcastle, under the regulations of the port, a ship will get a loading berth in order of arrival if the cargo is ready, and the charterer is bound to have the coal ready. Vessels which arrived after the *Quilpué* were loaded before her. This colliery being the property of the charterers, it was not a reasonable performance of the contract to make arrangements which resulted in so many vessels arriving to be loaded at the same time. It is no defence to this claim that there was an unusual demand on the colliery:

Stephens v. Harris, 57 L. T. Rep. 618;

Kay v. Field, 47 L. T. Rep. 423; 10 Q. B. Div. 241;

Gardiner v. Macfarlane, 20 Sess. Cas. (4th series), 414;

Ogmores Steamship Company v. Borner, 6 Com. Cas., 104, 110;

Aktieselskabet Inglewood v. Millar's Karri and Jarrah Forests Limited, 8 Com. Cas. 196, 201;

Tillett v. Cum Avon Works Proprietors, 2 Times L. Rep. 675;

Ashcroft v. Crow Orchard Colliery Company, 31 L. T. Rep. 266; L. Rep. 9 Q. B. 540.

The charterers had an option as to the coal with which the vessel might be loaded, and did not exercise it reasonably:

Tharsis Sulphur and Copper Company v. Morel Brothers and Co., 65 L. T. Rep. 659; (1891) 2 Q. B. 647;

Dobell v. Green, 82 L. T. Rep. 314; (1900) 1 Q. B. 526.

Scrutton, K.C. and Balloch, for the respondents, were not called on to argue as to the meaning of "regular turn."—With reference to the other points. It is impossible to know in the case of sailing ships when they will arrive. The charterers acted reasonably and chartered the other vessels in the ordinary course of business, and are not liable for the delay which took place:

Harrowing v. Dupré, 7 Com. Cas. 157;

Watson v. Borner, 5 Com. Cas. 377.

The *Quilpué* was only detained a reasonable time having regard to the number of ships which were waiting to be loaded from the Duckenfield Colliery. The purchaser of the coal refused to take any but the Duckenfield coal. The option to load with other coal was for the charterers' benefit, and they were not bound to consider the shipowners' convenience:

Robertson v. Jackson, 2 Com. B. 412, 428;

Tharsis Sulphur and Copper Company v. Morel Brothers and Co. (ubi sup.);

Bulman v. Fenwick, 69 L. T. Rep. 651; (1894) 1 Q. B. 179;

Dobell v. Green (ubi sup.).

Carver, K.C., in reply, referred to

Carlton Steamship Company v. Castle Mail Packets Company, 77 L. T. Rep. 332; (1897) 2 Q. B. 485; affirmed on appeal, 78 L. T. Rep. 661; (1898) A. C. 488.

VAUGHAN WILLIAMS, L.J.—This is an action for detention of the sailing ship *Quilpué* at Newcastle, New South Wales, where she was detained for the purpose of loading for sixty-seven days. The plaintiffs allow a period of thirty days, and they claim damages for detention for the balance of thirty-seven days. Two questions, broadly, arise in this case. The first arises upon the construction of the charter-party, which provided that the ship should with all convenient speed proceed to Newcastle, "and there in the usual and customary manner load in regular turn from Brown's Duckenfield Colliery, or any of the collieries the said freighters may name, a full and complete cargo of coals which the said freighters bind themselves to ship." Mr. Carver addressed to us an argument in which he contended that "regular turn" there meant "in the order of the arrival of the ships." I do not agree with him. I do not think that is the meaning of the words here. He cited cases to us which do show *prima facie*, and unless there is something to lead to a different conclusion, that these words "in regular turn" mean "in regular port turn"; but none of these cases show that "in regular turn" cannot mean in regular colliery turn as distinguished from regular port turn. In my judgment, in this case, the words "in regular turn from Brown's Duckenfield Colliery or any of the collieries the said freighters may name" do refer to colliery turn as distinguished from port turn. Indeed, not only does that seem to me to be, from a grammatical point of view, the meaning of these words, but when the condition of these collieries which are referred to in this charter-party are considered and also the regulations of this particular port, which were perfectly well known to all the parties to the charter-party, both the plaintiffs and the defendants, it is hardly possible, in the first place, to avoid the conclusion that the parties to this charter-party must all of them have contemplated that the ship would

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be loaded in accordance with colliery turn. The second rule of the port regulations provides: "Vessels requiring berths at cranes for the purpose of loading or unloading cargoes shall obtain the same in the order of their arrival in port, provided they are considered suitable by the berthing master and the necessary loading orders have been lodged, and their loading in such order will not in any way interfere with the loading of vessels then under and in turn before them except as hereinafter referred to." When that rule is considered, bearing in mind the fact, as found by Kennedy, J. and really obviously known to everybody concerned in this business, that no one of the collieries could load more than 1100 tons a day, because 1100 tons a day was the maximum output of each one of these collieries, one cannot help coming to the conclusion that the practice at this port must necessarily have been a practice governed and controlled by the colliery output. Under those circumstances I have not the least doubt but that Kennedy, J. was perfectly right in the construction which he put upon these words in this charter-party, and in the conclusion which he has arrived at as to what must guide one in determining what "regular turn" means here. The second point in the case is, that in this contract, and in every other contract, there is an implied contract by each party to it that he will not do anything on his part to prevent the other party to the contract either performing the contract or to delay the other party in performing the contract. I agree. I think it may be generally said that there is an implied contract to that effect imported by the law into every contract, just in the same way as you import into every contract that the various things to be done by the one party and the other are to be done, if no time is specified, within a reasonable time. You may call that, in each of these cases, an implied contract. Perhaps it is, but I only wish to safeguard myself against supposing that the law easily implies any special affirmative contract. I think it is very rare indeed that the law either does or ought to imply such a contract. I agree that the particular contract which the plaintiffs rely upon is implied really in every contract so far as I know. It is said that, there being that contract, the defendants here made breach of it, and did prevent, or unduly delay, the plaintiffs in the performance of the contract. The way in which it is put is twofold. First, it is said that if the defendants were under an obligation to load a cargo from this particular colliery and none other—that is, the Duckenfield Colliery—they really prevented the plaintiffs from loading it, because they entered into contracts with such a large number of ships to take coal from that colliery at or about the same time that the coal ought to have been loaded into the plaintiffs' ship as to make it impossible that the vessel should be able to load within a reasonable time; and it is said it does not matter whether that was done after the contract was entered into or before the contract was entered into; because a man not only contracts that he will not do anything to render the performance of the contract impossible or to delay it unreasonably, but he also warrants that at the time of the entering into the contract he has not already done acts rendering the performance of the contract impossible, or which would unduly delay the per-

formance of it. I will assume that that is the proper way of stating the implied contract, although I am not at all sure that it is not too wide; but, assuming that, I ask myself, Did these people do anything of the sort? It seems to me that one ought, in a case of this sort, to take into consideration facts which are in the knowledge of all the parties. In the case of *Carlton Steamship Company v. Castle Mail Packets Company* (*ubi sup.*) Rigby, L.J. concurred with the majority of the court in the decision of the Court of Appeal. He says: "I do not think that a delay which arises from a contingency the probability of which must have been perfectly well known to and contemplated by the shipowners when they entered into the charter-party can be considered unreasonable." In this particular case it is perfectly plain that at the time when the shipowners entered into the charter-party under which they were to load in regular turn, meaning thereby regular colliery turn, they must have known not only that the charterers would have prior engagements which would delay the colliery turn of this particular ship, but they must have known also that a delay of the ship for loading for a number of days—certainly between forty and fifty days—was not an impossible or even an unusual thing in loading at this port of Newcastle in New South Wales from these collieries which exclusively supply this port. They must have contemplated that there very likely would be such a delay. Under those circumstances I agree with Kennedy, J. that there is nothing unreasonable here in the charterers making such a number of engagements for ships to go and load at this port of Newcastle, even taking the Duckenfield Colliery alone, as resulted in twenty ships being in waiting for cargoes; ships which had priority over this particular ship, the *Quilpué*, when it arrived. With regard to the additional suggestion that although this might be so, if the only coal which could be loaded was coal from the Duckenfield Colliery, that is not the case here, as the charterers had the option of loading from either of the collieries; and, having that option to select the coal, that option must be reasonably exercised. I think the reasonableness, if that is material, must be reasonableness at the time of the selection of the coal being notified to the ship, which probably was at Newcastle, and not at the time of the sale of the coal, which took place in April, four months before. Taking all this, and assuming in favour of the plaintiffs that the absolute option which in words is given to the charterers to select which coal they choose is an option which has to be exercised reasonably by them, as is stated by Romer, L.J. in his judgment in *Dobell v. Green* (*ubi sup.*), I see nothing to show me in the evidence that this option was unreasonably exercised. It is quite true that as things turned out, as possibly the charterers might have ascertained if they had made a full investigation, the loading might have been done somewhat more quickly if it had been from some other colliery, but, assuming all that, there is nothing to show me that this selection of the Duckenfield coal was unreasonably exercised. I do not think one must leave out of consideration, and it is not unreasonable to suppose, that the considerations which are to affect the charterer in his selection, even at the port of Newcastle, are to be quite

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irrespective of the contracts that have been previously entered into by the charterer. It would not be good for business if the charterer was put in such a position that he would not be able to deal with or sell his cargo until the arrival of the ship at Newcastle. Under those circumstances I think that the judgment of Kennedy, J. was quite right and ought to be affirmed.

ROMER, L.J.—I have come to the same conclusion. On the question of the construction of this charter-party, I agree that the provision in it as to the loading being in "regular turn from" the colliery means loading according to the regular turn of the colliery as found by Kennedy, J. With regard to the other points raised by the appellants, those points depend upon this: Can we find that the defendants hindered the plaintiffs in the performance of the charter-party or prevented them from carrying it out by selecting this particular colliery at the time it was selected by them; or by reason of the overcrowding at the port, and the consequent delay of the ship caused by their having chartered so many ships? In other words, Were the defendants guilty of such unreasonable conduct in the matter as would render them liable for such delay in loading as undoubtedly occurred? As to this, the learned judge in the court below came to the conclusion that the plaintiffs had not established on the facts any such case as was necessary for them to establish as against these defendants; and, after hearing the evidence, I am not satisfied that the learned judge in the court below came to a wrong decision of fact upon the point. That being so, I think that point also fails, and the appeal, as a whole, consequently fails.

STIRLING, L.J.—I am of the same opinion. I find it impossible to differ from the conclusions which have been arrived at by Kennedy, J. I do not think I can usefully add anything. I think the appeal must be dismissed.

Solicitors for the appellants, *W. A. Crump and Son*.

Solicitor for the respondents, *James Neal*.

July 27 and 28, 1903.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

JONES LIMITED v. GREEN AND CO. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Obligation of charterer to have cargo ready—No time fixed for loading—Cargo from specific source—Option of charterer—Knowledge of parties at time of contract.

A sailing ship was chartered to load at N. a "cargo of coals as ordered by the charterers," and they afterwards directed that it should be loaded with coal from W. Colliery. No time for loading was fixed. At the port of N. it was necessary to obtain a loading order from the colliery before a loading berth was allotted. The W. Colliery had a small output, and the coal was in great demand. These facts were known to the parties at the time of the contract. In consequence of the number of ships loading from W. Colliery the ship did not obtain a loading berth for a long time, and, in addition

to being delayed at N., lost a charter-party elsewhere, as she did not arrive before the cancelling date.

The owners brought an action to recover damages for the loss thus occasioned to them.

Held, that the charterers were not bound to have a cargo of coal ready for loading immediately on the arrival of the ship; that the vessel obtained a loading order in due course in her colliery turn and there was then no delay on the part of the charterers, and therefore the cargo was provided within a reasonable time; that the option to select the particular coal was an option for the benefit of the charterers, who were not bound, in exercising it, to consider the benefit or otherwise of the shipowners; and therefore, all parties being acquainted with the practice at the port and the charterers having acted reasonably, they were not liable for the delay.

Decision of Kennedy, J. affirmed.

Little v. Stevenson (74 L. T. Rep. 529; (1896) A. C. 108) considered.

APPEAL of the plaintiffs from the judgment of Kennedy, J. delivered on the 2nd Dec. 1902.

In this action the plaintiffs claimed damages for the detention, at Newcastle, New South Wales, of the sailing ship *Snowdon*, which was chartered by the defendants by a charter-party dated the 14th Feb. 1900, which provided that

The ship shall with all possible dispatch proceed to such loading berth as freighters may name at Newcastle, New South Wales, and after being in a loading berth as ordered, wholly unballasted and ready to load, shall there load in the usual and customary manner a full and complete cargo of coals, as ordered by charterers, which they bind themselves to ship.

The coal was to be conveyed to the west coast of America.

On the 25th May 1900 the defendants informed the plaintiffs that the ship was to be loaded with Wallsend coal.

The *Snowdon* did not arrive at Newcastle until the 1st Sept. 1900. There was a great demand for Wallsend coal, and she did not obtain a loading berth until the 15th Dec. 1900. The defendants had sold a cargo of Wallsend coal to be shipped by the *Snowdon*, and the buyers refused to accept coal from any other colliery.

The custom and circumstances under which coal is loaded at the port of Newcastle are reported in *Barque Quilpué Limited v. Brown* (ante, p. 765); but in this case the form of the charter-party was different, and the charterers were not the owners of the colliery.

The vessel had also been chartered to convey a cargo of nitrate from the west coast of America, but in consequence of the delay at Newcastle she arrived so long after the expected date that the charter-party was cancelled. The plaintiffs therefore also claimed damages for the loss thus occasioned to them.

Kennedy, J. held that the contract was to load the *Snowdon* in her regular turn at the Wallsend Colliery, and this had been done. He also held, on the evidence and the correspondence, that the plaintiffs knew what the custom was as to loading at the port; and that the defendants had not acted unreasonably either in selecting Wallsend coal or refusing to substitute another coal, as they had sold a cargo of Wallsend coal and could

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

not induce the buyers to take the coal from either of the other Newcastle collieries.

The plaintiffs appealed.

Carver, K.C. and Leck for the appellants.—The charterers had no right to postpone the loading for any length of time. They chose the coal with which the vessel was to be loaded, and were bound to have it ready. They must take the risk of not being ready with that coal. The knowledge of the plaintiffs that the ship must take its turn does not excuse the defendants. The selection of the Wallsend Colliery as the one from which the coal was to come was not a reasonable selection, and when the *Snowdon* arrived thirty other ships were waiting:

Arden Steamship Company v. Weir and Co., 41 So. L. Rep. 230;

Harris v. Dreesman, 23 L. J. 210, Ex.;

Grant v. Coverdale, 51 L. T. Rep. 472; 9 App. Cas. 470;

Kearon v. Pearson, 7 H. & N. 386;

Carlton Steamship Company v. Castle Mail Packets Company, 78 L. T. Rep. 661; (1898) A. C. 486;

Re Richardson and M. Samuel and Co., 77 L. T. Rep. 479; (1898) 1 Q. B. 261;

Adams v. Royal Mail Steam Packet Company, 5 C. B. N. S. 492;

Stephens v. Harris, 57 L. T. Rep. 618;

Kay v. Field, 47 L. T. Rep. 423; 10 Q. B. Div. 241;

Elliott v. Lord, 48 L. T. Rep. 542;

Gardiner v. Macfarlane, 20 Sess. Cas. (4th series), 414;

Lilly v. Stevenson, 22 Sess. Cas. 278;

Asquith, K.C. and J. Fox for the respondents.—There was no obligation on the charterers to have the coal ready. The plaintiffs were aware of the exceptional difficulties with regard to the loading of Wallsend coal at Newcastle during that year. The obligation to provide the cargo did not arise until the vessel was at its berth, and when it got there the coal was ready and was loaded. There was no obligation to provide coal from any other colliery than that named in the charter-party:

Little v. Stevenson, 74 L. T. Rep. 529; (1896) A. C. 108;

Tharsis Sulphur and Copper Company v. Morel Brothers and Co., 65 L. T. Rep. 659; (1891) 2 Q. B. 647;

Bulman v. Fenwick, 69 L. T. Rep. 651; (1894) 1 Q. B. 179, 183;

Dobell v. Green, 82 L. T. Rep. 314; (1900) 1 Q. B. 526.

Carver, K.C. in reply.

VAUGHAN WILLIAMS, L.J.—In this case the charter-party contains no mention of "regular turn," and runs thus: "The ship shall with all possible dispatch proceed to such loading berth as freighters may name at Newcastle, New South Wales, and after being in a loading berth as ordered, wholly unballasted and ready to load . . . shall there load in the usual and customary manner a full and complete cargo of" (then there is a blank in which the charterers had the right to insert the name of the Newcastle coals they wished to have, and they did insert "Wallsend coals") "as ordered by charterers, which they bind themselves to ship." Then follow the exceptions, but they are immaterial, because neither side relies on them. The case for the

plaintiffs, who are the appellants, is that those words constitute an absolute undertaking on the part of the charterers that they would have the cargo of coals ready to put on board as soon as the loading berth was obtained according to the custom of the port, and it is said that a loading berth might have been obtained at a very much earlier date than in fact it was, if the charterers had not failed to perform their duty, and that their failure to perform their duty was the cause of the ship being so long in getting a berth. Now, if the appellants could show that the reason of the berth not being given was that the charterers failed in their duty, no doubt they would be entitled to succeed. But, according to my judgment, they have not done so. The case seems to be covered by the judgment of Lord Herschell in *Little v. Stevenson* (*ubi sup.*), which decided that it was not the duty of the charterer to have his cargo ready to load on the mere chance of getting a berth. Lord Herschell took the view that if in the ordinary course it might be expected that a berth would be available if the cargo was ready, and the charterer took upon himself the obligation of having a cargo ready, the loss of the berth would be due to a failure in duty by the charterer. For the appellants Mr. Carver relied, among other cases, on *Grant v. Coverdale* (*ubi sup.*). In delivering judgment in that case Lord Selborne draws a distinction between loading and that which is preliminary to loading having the cargo there ready to load, and he pointed out that where there are exceptions in the charter-party which relate to the loading, nothing in those exceptions would relieve the charterers or merchants from the obligation to have the cargo there ready to load. The decision in that case is shortly put by the Earl of Selborne, L.C. thus: "With that observation I proceed to notice that it is not denied, and cannot be denied, that, unless those words of exception according to their proper construction take this case which has happened out of the demurrage clause, the mere fact of frost or any other thing having impeded the performance of that which the charterer and not the shipowner was bound to perform will not absolve him from the consequences of keeping the ship too long. That was decided under circumstances very similar in many respects in the case of *Kearon v. Pearson* (*ubi sup.*), and decided expressly on the ground, as was pointed out, I think, by all the learned judges, certainly by my noble and learned friend here present (Lord Bramwell), by Wilde, B., and by Pollock, C.B., that there was no contract as to the particular place from which the cargo was to come, no contract as to the particular manner in which it was to be supplied, or how it was to be brought to the place of loading, and that therefore it could not be supposed that the parties were contracting about any such thing." But the present case is entirely different from the case referred to by Lord Selborne, for it is a case in which the source from which the coal was to come was expressly defined. When that is so, I think it is impossible to lay down an absolute rule that the charterer undertakes an unqualified obligation to have the cargo ready whenever it may be reasonably expected that there may be a berth for the ship if the cargo is ready. It may be so sometimes, but it is impossible to say that it must be so. Now, in the

present case, what is the contract so far as the source of coal is concerned, and what is the knowledge of the parties to the contract? I take it that one cannot exclude the knowledge of the parties in the consideration of this matter, because, after all, what we have to consider here is, what was a reasonable time either for the provision of the cargo or for the commencement of the loading, and, when you are considering what is a reasonable time, it seems to me obvious that you must take into consideration those circumstances, which were known to both parties to the contract at the date of the contract, and were taken into consideration by both the parties as affording the basis and foundation of the contract. In the first place, the source of the coal is defined by this contract; first, the coal is to be loaded at Newcastle, New South Wales; secondly, the charterer is to have the right to name the particular colliery from which the coal is to come; thirdly, it was within the knowledge of all the parties that the port of Newcastle, New South Wales, serves a limited number of collieries which are adjacent to that port, and serves no other collieries whatsoever. The whole of the coal which is loaded at Newcastle, New South Wales, is the coal which is the product of these collieries. It was known also to both the parties to the contract that the output of these collieries was a very limited output, not exceeding 1100 tons a day; and also that if sailing ships went to this port of Newcastle, New South Wales, the loading would have to take place according to the regulations of the port there, and that a ship could only get a loading berth if what is called a "loading order" had been obtained from the colliery—that is to say, if the circumstances were such that according to the colliery turn that vessel was entitled to have such loading order. It was also known to both of the parties here that sailing ships undoubtedly were detained a very long time before they could in ordinary course get their loading order from the colliery. This very ship, the *Snowdon*, in the year previous to the year of this charter-party, had to wait for eighty-three days in order to get a loading order according to the colliery turn. As the result of all that, I have come to the conclusion that all the parties to this contract assumed as the basis of the transaction that there would and must be more or less delay, according to the loading turn at the colliery. I have only one more word to say about this. It is true that the correspondence took place between the parties after February, which was the date of the charter-party, still, when it is considered, I cannot help seeing from that correspondence that the charterers and shipowners, both of them, were contracting in view of this state of things; and really as time went on and it came to the knowledge of the parties that there was likely to be a long "stem," as it is called in the correspondence, both parties assume that this long "stem" is a burden which both will have to bear, and that neither party takes upon himself the risk of the long "stem"; and, eventually, when it is certain that the waiting will be for a long time, the shipowners write to the charterers to ask the charterers to try, as a matter of grace, if they can get the purchasers of the cargo, who had purchased Wallsend, to change it to some other coal, and, although the charterers did their best,

they were unable to effect this. It seems to me that all these things which I have referred to clearly bring this case within the authority of *Harris v. Dreesman* (*ubi sup.*), which is most admirably summarised by Mr. Carver in his book on Carriage by Sea, and the particular passage to which I desire to call attention is this. After dealing with what I may call the general duties of the shipowner and the charterer in the earlier section, he says (sect. 254): "On the other hand, the charterer cannot be assumed to have the cargo ready if it is expressly to be provided from a particular place and the charter has been made in view of circumstances by which, as the parties know, the procuring of a cargo from that place may be delayed. And if in such a case no arrangement is made as to the time in which the loading is to be done, the charterer will be allowed a reasonable time for getting the cargo, having regard to the known sources of delay." It seems to me that the present case exactly falls within this passage. It was a case of a cargo to be provided from a particular place. The charter was made in view of certain circumstances by which, as the parties knew, the procuring of a cargo from that place might be delayed. There is no arrangement in this case as to the time in which the loading is to be done, and under these circumstances, in my judgment, this charterer was entitled to a reasonable time for getting the cargo, having regard to the known sources of delay which I have already specified, with reference to these collieries adjacent to this port. Under these circumstances, what has the learned judge found? He has found as a fact—because really this is fact and not law—that there was nothing done unreasonably, and nothing left undone which the charterer reasonably ought to have done in this case. The only suggestion that is made as to anything the charterer could have done is that he could have substituted another coal. To my mind, he did all that he could be reasonably expected to do when he did his best to get the person who became the purchaser under a contract he made to agree to accept another and a different coal than the Wallsend coal. I will assume here another coal could have been got, but it seems to me on the authorities cited before us, which I really do not think I am bound to go into at length, that this option which the charterers had here to select the particular coal was an option which they had to exercise for their own benefit, and they had a right to determine what that coal was, not when the ship arrived in New South Wales, but at any period they chose which they found commercially convenient after the date of the charter-party. The observations which are made by Lord Wensleydale—Parke, B. as he was then—in *Harris v. Dreesman* (*ubi sup.*) are extremely pertinent, and, after all, they are to my mind summarised with perfect accuracy in the passage I have read from Mr. Carver's book. Under these circumstances I think that the judgment of Kennedy, J. in this case must be affirmed, and this appeal dismissed with costs.

ROMER, L.J.—I am of the same opinion. The first point taken on behalf of the appellants is that the charterers were bound to have their cargo of coal ready for loading immediately on the arrival of the ship at Newcastle; and, that being so, the charterers are liable for the delay in

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loading which in fact occurred. But when the charter-party here is looked at, it is clear that, when according to the option given to the charterers they selected the Wallsend as the colliery from which the coal should be loaded, the charter-party became one dealing with a cargo coming from that special colliery at the special port of Newcastle; and I may incidentally point out that it was a charter-party where no special time was fixed by agreement as to the loading and no special provision made as to it. Now, on the facts it is clear that both parties knew all the relevant facts connected with the practice of berthing ships at Newcastle in order to load coal from the collieries there; and I have no hesitation in saying that, in my opinion, it would not be carrying out the true intention of the parties and the true meaning of this charter-party if we did not hold, as I think it ought to be held, that the parties contracted with reference to that common knowledge. What the practice is as to berthing ships at the port of Newcastle has already been fully dealt with by this court in *Barque Quilpué Limited v. Brown* (ante, p. 765). Both parties knew of it; and clearly this contract of charter-party must be dealt with having regard to the common knowledge of what was the practice at Newcastle. I agree with what Vaughan Williams, L.J. has said as to the statement of the law contained in the passage of the well-known book by Mr. Carver, which he has read. I think the principle there laid down is a true principle, and is borne out by *Harris v. Dreesman* (ubi sup.), and also by the decision of the House of Lords in *Little v. Stevenson* (ubi sup.). Applying that principle to the present case, I think, subject to the question whether the charterers acted unreasonably in selecting this particular Wallsend Colliery, the shipowners cannot complain of the delay that arose in the loading berth being obtained. That delay arose by reason of the practice of the port known to both, and, as I have said, considered by both with reference to this contract and owing to circumstances which were unavoidable as far as concerns the charterers. After the loading berth was obtained there was admittedly no delay on the part of the charterers, and under those circumstances it appears to me impossible for us to say the charterers had not got the cargo ready in a reasonable and proper time according to the true contract between the parties. I do not think the two Scotch cases which have been cited—viz., *Lilly v. Stevenson* (ubi sup.) and *Gardiner v. Macfarlane* (ubi sup.)—are authorities bearing upon the present case. In *Ardan Steamship Company v. Weir and Co.* (ubi sup.) no common knowledge of the practice of the port was alleged or proved; and the case of *Harris v. Dreesman* (ubi sup.) and the principle there referred to does not seem even to have been mentioned. The other Scotch case, *Gardiner v. Macfarlane*, as will be seen when the exact questions there decided are carefully considered, really has no bearing upon the question before us. That being so, the only other question in this case is whether in selecting the Wallsend Colliery the charterers acted unreasonably. All I need say is that that allegation is not proved to my satisfaction. In considering questions of this kind, the principle laid down by Bowen, L.J. in *Tharsis Sulphur and Copper Company v. Morel Brothers and Co.* (ubi sup.) ought always to be borne in

mind. In that case, when dealing with the question as to whether the option given to a charterer has been properly exercised in reference to such cases as this, he said: "The option is given for the benefit of the person who has to exercise it. He is bound to exercise it in a reasonable time, but is not bound, in exercising it, to consider the benefit or otherwise of the other party." Applying that principle here, it is clear to me that the learned judge in the court below came to the right conclusion, that the charterers did not act unreasonably.

STIRLING, L.J.—I am of the same opinion. It was not disputed that under this charter-party the charterers were bound to have a full and complete cargo of coals in readiness whenever the ship was in a loading berth. That duty has been fulfilled. No question arises as to that, but what is contended is that the defendants are liable in respect of the delay which occurred before the ship got into the loading berth. As to that, it seems to me that the obligations of the charterers are such as stated by Lord Herschell with reference to another, though very similar, charter-party, in the case of *Little v. Stevenson* (ubi sup.). He says: "Undoubtedly that would impose by implication upon the charterer the duty of doing any act that was necessary on his part, according to the custom of the port, to enable her to get a berth. He could not defend himself from a complaint of the shipowner that his vessel had been delayed by saying that she was not in a berth when she was not there because the charterer himself had failed in some duty to do some act on his part to enable her to get there." And then, later on, he adds: "I do not for a moment deny that he is bound to do whatever is reasonable on his part with the view of getting the ship berthed at the earliest period that is reasonably possible." The question which it seems to me we have to decide is whether the defendants, the charterers, omitted to do anything that was reasonable on their part with a view of getting the ship berthed at the earliest period that was reasonably possible. It seems to me, regard being had to the facts proved in this case, and in particular to the circumstances which were known to all the parties to the charter-party when it was entered into, that to their knowledge the obtaining of a cargo at Newcastle might be delayed. I cannot think that the defendants failed in doing anything that was reasonably possible for the purpose which I have mentioned. With regard to the case of *Ardan Steamship Company v. Weir and Co.* (ubi sup.), it appears to me that, although the charter-party seems to have been in almost identical terms with the present, the facts which were established in that case were different. First of all the learned judge found that there was an absolute failure in the duty of the charterer to provide a cargo at the proper time; and, secondly, there was no evidence of such a state of knowledge as is proved in the present case, which, upon the authority of *Harris v. Dreesman* (ubi sup.), ought to be taken into consideration. I agree, therefore, that the appeal must be dismissed.

Solicitors: for the appellants, *W. A. Crump and Son*; for the respondents, *Parker, Garrett, Holman, and Howden*.

[CHAN. DIV.]

ROBINS v. GODDARD.

[CHAN. DIV.]

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, June 9.

(Before FARWELL, J.)

ROBINS v. GODDARD. (a)

Building contract—Construction—Conclusiveness of architect's certificates—Limitation of right of action.

A condition of a building agreement stated that any defects which might appear within twelve months, and which arose, in the opinion of the architect, from materials or workmanship not in accordance with the drawings and specification or the instructions of the architect, should, upon the directions of the architect, be made good by the contractor at his own cost.

A subsequent condition contained a proviso that "no certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this agreement."

Held, that this proviso did not deprive the architect's certificates of conclusiveness for all purposes, but only so as not to relieve the contractor from liability to make good defects as provided by the agreement—that is to say, as provided by the condition stated above.

WITNESS ACTION.

The plaintiff was a contractor who had agreed to carry out certain additions and alterations to the defendant's premises, Croxley Green, Rickmansworth. The terms on which the plaintiff had agreed to do the work were contained in certain articles of agreement dated the 15th Oct. 1902, and made between the defendant and the plaintiff.

By these articles it was agreed that the works should be carried out in the manner detailed in conditions set forth in a schedule to the agreement. It was also agreed by clause 3 that the term "the architect" in the conditions should mean John Mansfield Ferguson, or, in the event of his death or ceasing to be the architect for the purpose of the contract, such other person as should be nominated for that purpose by the employer.

By condition 16:

The architect shall, during the progress of the works, have power to order in writing from time to time the removal from the works, within such reasonable time or times as may be specified in the order, of any materials which in the opinion of the architect are not in accordance with the specification or the instructions of the architect, the substitution of proper materials, and the removal and proper re-execution of any work executed with materials or workmanship not in accordance with the drawings and specification or instructions, and the contractor shall forthwith carry out such order at his own cost. In case of default on the part of the contractor to carry out such order, the employer shall have power to employ and pay other persons to carry out the same; and all expenses consequent thereon or incidental thereto shall be borne by the contractor, and shall be recoverable from him by the employer, or may be deducted by the employer from any moneys due or that may become due to the contractor.

By condition 17:

Any defects, shrinkage, or other faults which may appear within twelve months from the completion of the works, arising in the opinion of the architect from materials or workmanship not in accordance with the drawings and specification or the instructions of the architect, or any damage to pointing by frost appearing within the like period, shall upon the directions in writing of the architect, and within such reasonable time as shall be specified therein, be amended and made good by the contractor at his own cost, unless the architect shall decide that he ought to be paid for the same; and in case of default the employer may employ and pay other persons to amend and make good such defects, shrinkage, or other faults or damage, and all expenses consequent thereon or incidental thereto shall be borne by the contractor, and shall be recoverable from him by the employer, or may be deducted by the employer from any moneys due or that may become due to the contractor. Should any defective work have been done or material supplied by any sub-contractor employed on the works who has been nominated or approved by the architect, as provided in clause 20, the contractor shall be liable to make good in the same manner as if such work or material had been done or supplied by the contractor, and been subject to the provisions of this and the preceding clause.

By condition 30:

The contractor shall be entitled under the certificates to be issued by the architect to the contractor, and within fourteen days of the date of each certificate, to payment by the employer from time to time by instalments, when in the opinion of the architect work to the value of one hundred pounds (or less at the reasonable discretion of the architect) has been executed in accordance with the contract, at the rate of eighty per cent. of the value of work so executed in the building until the balance retained in hand amounts to the sum of two hundred pounds, after which time the instalments shall be up to the full value of the work subsequently executed. The contractor shall be entitled, under the certificate to be issued by the architect, to receive payment of one hundred pounds, being a part of the said sum of two hundred pounds, when the works are practically completed, and in like manner to payment of the balance within a further period of two months, or as soon after the expiration of such period of two months as the works shall have been finally completed, and all defects made good according to the true intent and meaning hereof, whichever shall last happen. The architect shall issue his certificates in accordance with this clause. No certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this agreement. The contractor when applying for a certificate shall, if required, as far as practicable, furnish to the architect an approximate statement of the work executed, based on the original estimate.

Condition 32 makes provision for reference to arbitration:

In case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor either during the progress of the works or after the determination, abandonment, or breach of the contract as to the construction of the contract or as to any matter or thing arising thereunder (except as to the matters left to the discretion of the architect under clauses 4, 9, 16, and 19 . . .) or as to the withholding by the architect of any certificate to which the contractor may claim to be entitled.

Certificates had been made from time to time by the architect of sums to which the contractor was entitled, and a final certificate was issued on the 24th July 1903.

(a) Reported by H. C. GAIRNS, Esq., Barrister-at-Law.

The entire amount so certified to be due amounted to 2930*l.* 17*s.* 2*d.*, and the present action was for the amount of 1930*l.* 17*s.* 2*d.* remaining unpaid.

Before the issue of the last two certificates, which amounted to over 1300*l.*, the defendant had formally notified the architect that he was no longer to regard himself as entitled to issue certificates; but, in spite of this, the architect had continued to issue certificates as theretofore.

The defendant alleged that the certificates were not duly or properly issued by the architect, and counter-claimed for damages arising in respect of the plaintiff's delay in executing and failure ever to complete the work.

He also claimed to set off the sums expended by him in rectifying defects in the work carried out by the plaintiff.

Duke, K.C. and Beddall, for the plaintiff, stated the facts, and continued:—There is a fundamental objection to the defence and counter-claim, which renders it unnecessary to enter into the question of whether there were in fact any defects. It is impossible for the defendant to make a claim for defects. Condition 30 of the contract states that "no certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this agreement." That is not a provision depriving the architect's certificate of conclusiveness in all cases, but only as provided by the agreement. The scope of the condition is then found by searching the agreement for provisions, and we find condition 17 to be the one in which provisions are made. Condition 17 deals with defects, shrinkage, or other faults which may appear within twelve months from the completion of the works; and in such a case the architect is made the person whose decision fixes the liability of the contractor. Clearly, then, the provision in condition 30 is not intended to render the certificates of the architect inconclusive in ordinary cases, but merely enables him, in spite of his certificates, to insist on the rectification of hidden defects which appear within twelve months of the completion of the works. Here the architect has raised no objection to the works as carried out by the plaintiff, but the defendant is attempting to use condition 30 to enable him to go behind the architect's certificates, although he has not impugned the architect's good faith. We submit that this case is covered by *Lord Bateman v. Thompson* (Hudson's Law of Building, &c., Contracts, 2nd edit., vol. 2, p. 166), which was an exactly similar case.

C. B. Marriott for the defendant.—I submit that condition 30 lays down beyond question that the architect's certificate is not conclusive. This would be absolutely clear except for the additional words, "nor shall it relieve the contractor from his liability to make good all defects as provided by this agreement." I contend that these words do not in any way restrict the previous words, and the right arising thereunder to go behind the architect's certificate:

Hudson's Law of Building, &c., Contracts, 2nd edit., vol. 1, pp. 302, 303.

Further, I submit that the notice given by the defendant to the architect suspending his power to grant certificates would prevent him in any

case from giving conclusive certificates. The architect is clearly not in the position of an arbitrator under this agreement, for there is a separate provision by condition 32 for the appointment of an arbitrator in case any dispute or difference should arise "between the employer or the architect on his behalf and the contractor." If the employer suspended the architect's powers without due cause, he would doubtless lay himself open to an action for damages; but, if he chose to take such risk, I submit that he could suspend the architect's powers at any time. The fact that such a notice had been given shows conclusively that disputes had arisen, and therefore the architect's certificates are not to be treated as final and conclusive:

Lloyd v. Milward, Hudson's Law of Building, &c., Contracts, 2nd edit., vol. 2, p. 454.

FARWELL, J.—So far as this action is concerned, it is an action upon certificates given by the architect in relation to a building contract, and it is really an undefended action. But there is a counter-claim which gives rise to the argument I have heard. It depends upon the construction of the contract, and inasmuch as the contract is issued under the sanction of the Royal Institution of British Architects, and is on a printed form, it is, I suppose, in common use; so that a consideration of what is the true view to be taken in this case becomes of some general importance. Now, one approaches contracts of this nature with the knowledge that a person who desires to employ a builder to carry on work for him also employs for his own protection an architect, whom he appoints, and who is usually imposed on the builder as the judge in relation to any matters which may arise in the course of the execution of the work. In the particular case before me, the builder can recover nothing in respect of his work except under the certificates to be given him by the architect under clause 30 of this contract. Now, that particular clause is qualified by a provision which, in my view, is only explicable by reference to the former clauses in the contract, and is not to be extracted or treated as a separate sentence and read as something apart and by itself. Condition 16 provides: [His Lordship then read the condition.] Then condition 17 is as follows: "Any defects, shrinkage, or other faults which may appear within twelve months from the completion of the works, arising in the opinion of the architect from materials or workmanship not in accordance with the drawings, specification, or the instructions of the architect, or any damage to pointing by frost appearing within the like period, shall upon the directions in writing of the architect, and within such reasonable time as shall be specified therein, be amended and made good by the contractor at his own cost unless the architect shall decide that he ought to be paid for the same." Then reading this with the proviso in condition 30 that "no certificate of the architect shall be considered conclusive evidence of the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this agreement," the contract becomes, to my mind, perfectly reasonable and plain. I should prefer, instead of the word "nor" coupling those two sentences in the proviso, to read it, "No certificate of the

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architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates so as to relieve the contractor from his liability under condition 17," which is really what is the effect of it. If it were not for the express provision in condition 30, it would be open to argument to say: "Condition 16 tells you the architect may give directions as to proper materials and so on during the course of the work. He has, however, given certificates, and, so far as the materials are concerned, he must be deemed to have dealt with them by those certificates." Thus it might be contended that the matter was finally settled, and no longer open to question. This proviso is put in to prevent that; but, that being so, it is only inserted for the purpose of letting in condition 17. That I am correct in this view appears to me to be conclusively shown by the words in condition 17: "Unless the architect shall decide that he ought to be paid for the same." It obviously constitutes the architect, who, as appears in clause 3 of the contract, is a nominee of the employer and employed by him for his protection, the referee as between the two parties. The matters raised by the counter-claim are not, in my opinion, any of those matters which are to be referred to arbitration under the arbitration condition, and, even if they were, that point is not before me at present. The counter-claim only asks me to decide, either by myself or by the official referee, questions as to deficient workmanship or materials not in accordance with the drawings and specification. Now, that is a matter which is provided for by this particular clause 17, and, unless the architect not only expresses his opinion that they are not in accordance with the drawings and specification, but also decides that the builder ought not to be paid for amending and making good the same, I do not see how I can possibly adjudicate in the matter; I have no jurisdiction, and the result is that in my opinion there is no question or counter-claim arising at all in this action. It is simply an undefended action on the certificates, and judgment must go for the amount claimed.

Solicitors for the plaintiff, *Booth and Smee*.

Solicitors for the defendant, *Goddard, Stanton, and Hudson*.

Friday, April 15.

(Before BUCKLEY, J.)

Re LETHBY AND CHRISTOPHER LIMITED;
JONES' CASE. (a)

Company—Transfer—Address of transferor not appearing—Number of share not stated—Refusal of company to register.

Where by a clause of the articles of association of a company every member may transfer all or any of his shares, but every transfer must be in writing and in the usual common form, the fact that the deed of transfer of a member of the company who is selling his only share does not set out the address of the transferor or the number of the share is not sufficient ground for the company to refuse to register the transfer on the ground of irregularity.

MOTION by Edward James Jones that a company should be ordered to register a transfer, dated the 22nd March 1904, of a fully paid-up share numbered 5998 in the capital of the company from Edith Violetta Isley to Edward James Jones as transferee thereof, and that the register of members of the company might be rectified accordingly.

Edward James Jones was formerly one of the managing directors of the company, but, owing to disagreement with his co-directors, was dismissed. He brought an action against the company for wrongful dismissal, which was settled on the following terms: "Plaintiff's costs to be paid by defendants. Plaintiff to receive 600*l.* as agreed damages. Plaintiff's debentures (standing in the name of his wife) to be taken over at par, and plaintiff to transfer the one share which he holds to the company or their nominee."

The company was a private company. The applicant was an accountant, and it was desired that a possibly hostile person should not be in a position to obtain particulars to which a shareholder would be entitled.

About two months subsequent to this arrangement, the applicant, having purchased from Edith Violetta Isley her only share in the company, sent the certificate and deed of transfer to the company, with a request that a new certificate should be sent to him. The deed of transfer contained neither the address of the transferor nor the number of the share. The company refused to register the transfer on the ground of its being irregular, and that it did not comply with the following clause of the articles of association of the company:

Clause 25. Subject to the restrictions of these presents, any member may transfer all or any of his shares, but every transfer must be in writing and in the usual common form, and must be left at the office of the company accompanied by the certificate of the shares to be transferred and such other evidence (if any) as the directors may require to prove the title of the intending transferor.

It was also provided by clause 28 as follows:

The directors may in their discretion, and without assigning any reason therefor, refuse to register the transfer of any share (not being a fully paid-up share) to any person whom they shall not approve as transferee. The directors may also refuse to register any transfer of shares, whether fully paid up or not, on which the company has a lien, or of any shares which the holder has agreed with the company to hold for a period not then expired.

Astbury, K.C. and *G. F. Hohler* for the applicant.—The only clause in the articles under which the company have power to refuse registration is clause 28, and that clause does not apply to this share. The applicant is entitled to have the transfer registered.

Beddall for the company.—The transfer was required to be in common form under clause 25 of the articles. The transfer sent to the company was not correct; the address of the transferor did not appear. It is the practice of all companies to give notice of the fact of a transfer being lodged, and the address on the register was not correct. The company knew that Miss Isley had left the address given on the register, and did not know her present address. Further, the transfer is irregular; it does not give the number of the share. [BUCKLEY, J.—The transferor had only

(a) Reported by W. HUNTER BOND, Esq., Barrister-at-Law.

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one share, and therefore the number was unnecessary: (*Ind's case*, 26 L. T. Rep. 487; L. Rep. 7 Ch. 485; *Bishop's case*, L. Rep. 7 Ch. 296).] The transfer is not in common form, and does not comply with clause 25 of the articles of association.

BUCKLEY, J.—The transferee in this case was once one of the managing directors of the company, but, owing to certain disagreements between him and his co-directors, he became distasteful to the company and was dismissed from his office. He brought an action against the company for wrongful dismissal, which was settled by the company giving him certain damages and taking over his debentures at par, he, on the other hand, agreeing to hand over his share to the company. When the company made this arrangement they ought to have remembered that he could buy another share, and provided against this in the agreement. As a matter of fact, he did buy another share, and applied to the company to register it. The directors have no power under the articles to refuse registration unless the company have a lien on the shares, or the holder has agreed with the company to hold them for a period which has not expired, or unless the share is not fully paid up. The shares of the company are transferable, and the transfer is only regulated by certain regulations contained in the articles. Miss Isley had power to transfer this share, and the only regulation that applied was that the transfer must be in writing and in the usual common form, and must be left at the office of the company accompanied by the certificate of the shares to be transferred. It is contended that the transfer is not in the usual common form, because neither the address of the transferor nor the number of the share appears in the transfer. Miss Isley is described on the register of members and on the share certificate as of the same address, and the transferee sent the certificate with the transfer to the company. There can, therefore, be no doubt as to who the transferor was. Now, as to the absence of the number. Miss Isley only holds one share; there therefore cannot be any doubt as to what share she meant to transfer. She transfers the only one she can. I am of opinion that the absence of the address and of the number of the share were, in the circumstances of this case, wholly immaterial. The numbers are directory only. Mellish, L.J. in *Ind's case* (*ubi sup.*), at p. 487 of the report, said: "I think the numbers of the shares are simply directory for the purposes of enabling the title of particular persons to be traced," and continues: "If, therefore, a holder of shares has the same number of shares which he professes to transfer, or a larger number, and by mistake the wrong distinguishing numbers are put in the transfer, that will not prevent the fifty shares which belonged to him passing to the transferee." Selwyn, L.J. in *Bishop's case* (*ubi sup.*) said: "As there was no doubt whatever either as to the numbers of the shares which he intended to assign or of the intention on the part of the assignee to accept the twenty-five shares, and as he had but twenty-five shares, the circumstance of the numbers being inserted afterwards was perfectly immaterial." As the absence of the address and the number are immaterial, there was no infringement of clause 25 of the articles, and the transfer was in the common form. If, in a deed

of transfer, the i's were not properly dotted, and the t's were not properly crossed, could you then say that the transfer was not in the common form? In my opinion you could not. Under these circumstances I think the applicant is entitled to have the transfer registered, and I make the order which is asked for. As a matter of form, I will join Miss Isley as a co-applicant.

Solicitor for the applicant, A. W. Bartlett.

Solicitor for the company, G. H. Daniel.

April 26 and 27.

(Before BUCKLEY, J.)

KEITH v. TWENTIETH CENTURY CLUB LIMITED. (a)

Ornamental garden—Rights thereto of occupiers of adjoining houses—User by their families and friends—Proprietary club owned by limited liability company—Resident and non-resident members.

By a deed rights of user of an ornamental garden were granted to C. H. B., his heirs, executors, administrators, and assigns, and his or their lessees or sublessees or tenants (being occupiers for the time being) of houses immediately contiguous or adjoining to the ornamental inclosure, and for his or their families or friends in his or their company or without.

A limited company, having purchased certain of the houses from C. H. B. and started a social and residential club for lady workers, authorised and allowed its members to use the garden.

Held, that, as the relation of the members to the club was that of customers, and not sublessees, tenants, or friends, upon the true construction of the deed the company could not authorise such user.

THE plaintiffs in this action were the owners in fee simple as to one and the occupiers as to others of certain houses, Nos. 22 and 23, Stanley-gardens, and Nos. 36, 37, 38, and 39, Kensington Park-gardens, situate at Notting Hill, in the county of London, and were entitled under a deed dated the 25th June 1852 to certain rights over a certain ornamental garden situate between the two rows of houses. They were also the committee of management of the garden.

The defendants were an incorporated company and were registered in 1902 under the Joint Stock Companies Acts, the nominal capital of the company being 10,000l., in 1000 shares of 10l. each, and the registered offices being at Nos. 26, 27, and 28, Stanley-gardens.

The defendant company was registered under the name of the Twentieth Century Club, and the objects of it were to provide, at a reasonable cost, a comfortable home, combined with the facilities of a high-class club, for ladies engaged in professional or other work in London.

In 1902, shortly after their registration, the defendant company purchased the fee simple of four houses, Nos. 26, 27, 28, and 29, Stanley-gardens, and afterwards acquired a lease of No. 25. They acquired these houses for the purposes of the club, and certain ladies joined the club and resided there.

The club, which was of a social character,

(a) Reported by W. HUNTER BOND, Esq., Barrister-at-Law.

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governed by directors, who elected members and controlled its general affairs, contained eighty-eight single and twelve double bedrooms and also a suite of reception apartments, and was a proprietary club, imposing no liability on the members beyond the payment of the annual subscription of 10s. 6d., payable, in the first instance, on application for election, afterwards on the 1st May in each year. Country and non-resident members, by paying an annual subscription of 10s. 6d., could avail themselves of the facilities of the club; they could also have the use of a bedroom if there was one vacant.

Any member who wished to withdraw from the club or to vacate her apartment could do so by giving one week's notice to the honorary secretary in writing. Members could not give orders to or correct the servants, or interfere in any way with the management or organisation of the club.

The members of the club were subject to the following by-laws:

1. Payments for sleeping apartments and board are due and shall be paid weekly.

2. The cost of a furnished sleeping apartment, payable in advance, is 10s. 6d. per week.

13. The club entrance is closed at dusk. Members desiring to enter later than 11 p.m. shall obtain a latch-key (deposit 1s. 6d.) at the office to avoid the risk of being shut out.

15. The directors do not undertake to reserve any particular bedroom for a member if vacated during holidays, &c., unless paid for.

17. The directors reserve to themselves the right, notwithstanding anything stated or implied in the foregoing by-laws, to remove from the club register the name of any member whose room may be required for other use. In every such case a proportionate amount of the last annual subscription will be returned.

There were also regulations as to the uses which the members might make of their bedrooms; they might not bring candles into their bedrooms or use oil lamps or stoves for lighting or cooking purposes; they might not use sewing machines or play musical instruments, knock nails in the walls without permission, or smoke.

By an indenture dated the 25th June 1852 Felix Ladbroke granted to Charles Henry Blake, his heirs, and assigns for ever all that piece or parcel of ground situate and being at Notting Hill (including the site of the houses afterwards built in Stanley-gardens) bounded on the north by Ladbroke-gardens-road, on the east by the Kensington Park-road, and on the south by the ornamental pleasure grounds laid out for the use of the houses in Kensington Park-gardens. And the indenture proceeded:

And this indenture further witnesseth that for the consideration aforesaid he the said Felix Ladbroke doth hereby give, grant, and confirm to the said Charles Henry Blake, his heirs, executors, administrators, and assigns, and his or their lessees and sublessees or tenants (being occupiers for the time being) of the houses now in course of erection or at any time hereafter to be erected immediately contiguous and adjoining to the hereinafter mentioned ornamental inclosure or pleasure ground, and for his or their families and friends in his or their company or without, free use and right of ingress, egress, and regress at all times hereafter into, out of, and upon the said ornamental garden or pleasure ground delineated and described in the plan hereto annexed and coloured green. Together with all rights,

privileges, advantages, and appurtenances whatsoever to the said free use and right of ingress, egress, and regress belonging or in anywise necessary for the full and absolute enjoyment thereof respectively, he and they nevertheless conforming to such rules and regulations as to user of the same as shall be ordered and laid down by the said Felix Ladbroke, his heirs or assigns, and the committee (if any) of the resident inhabitants of the houses adjoining the said ornamental ground to whom the management and control of the said ornamental ground shall be committed for the preservation and the keeping of the same, and also contributing towards the expenses of maintaining and keeping up the same such annual sum not exceeding 2l. 2s. per house as shall be contributed by the owners or occupiers of the other houses on the south side of the said ground. To have and to hold the said free use and right of ingress, egress, and regress with the other rights, privileges, and advantages thereto belonging or appertaining unto the said C. H. Blake, his heirs, appointees, and assigns, and his and their lessees and sublessees or tenants (being occupiers for the time being) of the houses as aforesaid for ever.

At the date of execution of the deed the houses in Kensington Park-gardens had been built, and some of the houses in Stanley-gardens were in course of erection.

The defendants through their predecessor in title, C. H. Blake, were entitled to the benefits of this indenture, and the members of the club from time to time entered and used the gardens in the same manner as the owners and occupiers of the other houses in Stanley-gardens and Kensington Park-gardens.

This was an action brought by the plaintiffs, the freeholder himself not being a party, asking for an injunction to restrain the defendants, their directors, officers, and servants, from authorising or permitting any of the members of the club from entering or using the garden.

By an order of Byrne, J. made by consent on the 3rd March 1904 it was ordered that the following points of law be set down to be argued before the court—namely: (1) Whether the resident members of the club known as the Twentieth Century Club were entitled as of right during their resident membership to enter into and use the gardens. (2) Or whether the defendants were entitled to authorise or allow such entry and user by such resident members. (3) Whether the defendants were entitled to authorise or allow non-resident members of the club to enter and use the said gardens.

Buckmaster, K.C. and G. W. Brabant for the plaintiffs.—The members of the club are neither tenants nor sublessees. To constitute a tenancy there must be some estate or interest carved out of the estate which the landlord has. Here there is nothing of the kind; they have not even got the exclusive right to their bedroom. The occupation is in the nature of a licence, and is not a tenancy:

Watkins v. Overseers of Milton-next-Gravesend, 18 L. T. Rep. 601; L. Rep. 3 Q. B. 350, at p. 356.

Astbury, K.C. and Ashworth James for the defendants.—A portion of a house may for some purposes be a house: (per Lindley, M.R. in *Kimber v. Admans*, 82 L. T. Rep. 22; (1900) 1 Ch. 412, at p. 415). The members of the club are tenants of single rooms; they are tenants within the meaning of the word in the

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deed. Bovill, C.J. in *Stamper v. Sunderland near-the-Sea Overseers* (18 L. T. Rep. 682; L. Rep. 3 C. P. 388, at p. 394) and Willes, J. in *Thompson v. Ward* (24 L. T. Rep. 679; L. Rep. 6 C. P. 327, at p. 351) refer to the occupiers of single rooms as tenants. The grant of an easement extends to all licensees of the grantee even though they are not expressly mentioned in the grant:

Bazendale v. North Lambeth Liberal and Radical Club Limited, 87 L. T. Rep. 161; (1902) 2 Ch. 427.

They also referred to

Cook v. Humber, 5 L. T. Rep. 838; 11 C. B. N. S. 733;

Wood v. Ledbitter, 13 M. & W. 838;

Harris v. Drew, 2 B. & Ad. 164.

BUCKLEY, J. (after reading the deed of the 25th June 1852, and stating the facts as above set out, continued:—)The garden ground in question belongs to a freeholder, who is the common grantor of both the plaintiffs and defendants, but he is not a party to this action. The plaintiffs are asking for an injunction to restrain the defendants from going behind what the plaintiffs say is the grant which is made to them; and they are doing that in the absence of the common grantor, who might have granted, so far as I see, rights to people other than those who are here before me. But I am not trying this action; and the question whether it is complete as to parties is not necessary for my determination, for this reason, that I am only proceeding under an order made by Byrne, J., by which by consent it was ordered that certain points of law raised by the pleadings be set down to be argued. The plaintiffs say that, as regards the use of the garden by the ladies, there will not be necessarily any objection to it on the part of the other householders. Whether there will be ultimately or not I do not know, but they say, as it seems to me, not unreasonably, they want to know what limits there are to the rights of occupiers of the houses under the deed of 1852; because, if they suffer this to go on, and it is not within the deed, they may be prejudiced hereafter in saying what the rights are. Therefore, without any feeling of hostility, but for the purpose of knowing what their rights are, they ask the court to determine the true construction of the deed. There is contained in the deed no words by way of covenant or restriction at all to fetter the purchaser of the ground as to the buildings which he is to put up upon the land. He might, so far as I see, for anything that is contained by implication in the deed, put up residences, or shops, or a factory, or anything he liked. There is nothing about it in the deed at all except the following, which is at least a fair inference, particularly from the language which I have read, that what was in the minds of the parties was residential houses. They were to be built in the neighbourhood of existing residential houses that were already abutting on this garden. Some of them were in course of erection, and, of course, it would be known what their nature was, and they were, in fact, residential houses. They are also spoken of as houses which will be in the occupation of persons who have families and friends. That rather points to residential houses, but, beyond that, I have no guide upon the

language of the deed. The club imposes a large number of restrictions upon its members by its by-laws, and also upon the room which the member is to have; and what seems to me to be contemplated is, that the club staff will go into her room for necessary purposes, and that she will not have the exclusive occupation. Then there is nothing affirmatory, except as to country members, with regard to the right of a member to have a room at all. It is inferred that they will become entitled to a room, but there are no affirmative words directly giving a right to a room. As to country members there is this, that they may have the use of a bedroom if there be one vacant. That seems to imply that town members will have the prior right. Country members will only get one in default of there being a town member who wants a room. But, again, there is no provision as between the town members as to how any member is to have a room in case of competition. I mean, supposing there are two rooms empty and five members want a room, there seems to be no provision at all as to how there is to be any right as between one and another to have a room given to her, and there seems no limit as to the number of members. There may be more town members than rooms. It seems to me to have nothing more in contemplation than that the ladies, if they are paying for the rooms, may ask to have a room, and that a room will presumably be given them upon the payment which is required—namely, 10s. 6d. a week. Then it has been pointed out that this 10s. 6d. a week is payable in advance. Certainly, having paid the rent in advance for her room, the lady has rights; and certainly the document contemplates that during the week, having paid her rent in advance, she will have a room. But is there anything which shows that she is to have any definite and particular room—in fact, that the room she is put into first she is to have for a week? There is nothing about it at all affirmatively. There is only this to guide me, that by-law 15 provides that, "The directors do not undertake to reserve any particular bedroom for a member if vacated during the holidays, &c., unless paid for," from which the inference is that if the member does pay for it during her holidays they will keep it for her until she comes back. That is the fair inference, and that, I think, would involve inferentially the major proposition, that if it were not holidays, as the member was not away, they would keep her room for her, and not remove her into another one. But that is all by way of implication. Now, having regard to all these provisions, the first question I have to answer is, whether these ladies can within the language of the deed be spoken of as lessees, or sublessees, or tenants of the limited company. In my opinion they cannot. I think that all those words imply and involve the existence of some estate or interest in the land by the person who is spoken of as the lessee, sublessee, or tenant. There are many circumstances under which a person makes a payment as the price of a right, and with the result that he has the right of entering upon land and doing something upon land of which, nevertheless, he is not a tenant. As, for instance, if a man pays a sum for the occupation of a stall at the opera or theatre. He pays for the right of occupation of a particular seat to view a particular performance. Or take the case of a

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man who pays for the right to enter a picture gallery and look at the pictures. The right which follows to him is that he is entitled, without being a trespasser, to go into the picture gallery and say: "I have a right over this land—namely, a right to come in and see the pictures." Or take another case. A man pays a sum of money as the price of being allowed to go into a strawberry garden and eat as much fruit as he pleases. Of course, in none of those cases does the person become a tenant at all; he is a licensee. He is a person who cannot be quarrelled with as a trespasser, he being on the land because he has received a licence to go upon the land, but he is not a tenant. He has no estate right or interest in the land as land. He has a right to come upon the land by licence of the person who remains the sole owner of all the estate and interest in the land. I can conceive that every lessee or tenant must be capable of being spoken of as being a person who has some estate or interest in the land carved out of the estate or interest of the person to whom he is the lessee or tenant. Now, in my judgment, these ladies are not, in respect of this right of occupation, anything more than licensees. When the lady has paid her 10s. 6d. in advance for the week she has derived, by virtue of that payment, the right, as against the defendant company, who have taken her money, to be provided with a sleeping-room for a period of seven days, the company, as the person to whom the room belongs, having all the rights to which I have referred. As to the room, which she, in point of fact, had the use of for the time, she is simply a user by licence, and not a tenant. Having so far dealt with the words, "lessees, sublessees, or tenants," I must now consider the words following them—namely, "being occupiers for the time being of the houses." I do not found anything on the difference between an occupier of a house and the occupier of part of a house—of a room in the house. In my opinion, the occupier of a room may be properly spoken of as the occupier of a house, but I think it is plain that those words, "being occupiers, are not words of grant at all, but words of restriction on that which precedes. The user is to the lessee "being occupier of the house"—that is to say, that the lessee who is not an occupier cannot use the garden; if he has underleased, and gone to reside elsewhere, he cannot say he is entitled to use it. You must be able to predicate of the person who wants to exercise the right of user that he is a lessee, and also an occupier. The words occupiers are, as I said, not words of grant, but words of qualification of the lessee. Nothing arises, therefore, upon the fact that these ladies are occupiers of the house. In my judgment they are, but there is no grant to the occupier of the house unless he be also a tenant, and they are not tenants. Then I have to go on to this, that the clause which entitled them to use includes further "his or their families and friends in his or their company or without. "His or their" is the freeholder, or lessee, or tenant, and so on. Now, nothing arises on the word "families." Of course, these ladies are not of the family of the limited company. The family there spoken of is the wife and children and relations of the man who is supposed to be the occupier of the house. This corporation has no family in that sense. But what is the meaning of the word

"friends"? There it seems to me that the first distinction to draw is this: that the lessee or other person—the company in this case—cannot invite anybody they choose to come in merely from friendly motives. Supposing a lady tenant or occupier of one of these houses was interested in a neighbouring Sunday school, and was desirous of inviting all the children from it to come in for an afternoon's play, and have tea with her in the garden, I conceive she could not do that. Or, supposing she had a brother in a factory, employing a number of workmen, and she wished to invite her brother's servants and workpeople to come there with their wives and children for an afternoon, she could not do that from friendly motives. The test is not whether you invite persons to come there from friendly motives, but whether the person is your friend. I am not going to attempt to draw an exact line, and say exactly where friendship begins and ends. I have to look and see whether the ladies I have to deal with here can properly be spoken of as friends of a limited company. Friendly relations may exist between them, but they are not friends within the meaning of this deed. The word by which I should describe them would be "customers." The defendant company are carrying on business; it is no less a business because it is one for the advantage of ladies of small means. The persons who become members of this proprietary club, and make a payment—out of which the company may or may not make a profit—are accepted as such, not because of friendship existing between the one party and the other, but from the commercial relationship between them. The lady finds it worth her while to find a home with the conveniences that are offered to her for the payment demanded, and the company find it worth their while, as proprietors of the club, to accept the payment from her in return for giving her the advantages which they hold out. I think these persons are properly described as customers, and are not properly described as friends. It seems to me extremely difficult to draw the line. I will give one or two illustrations by way of showing what I think upon it. Supposing the inhabitant of one of these houses invites friends to stay with him in his house, he may certainly invite them into the garden. If he has friends to dine with him, they may go into the garden. Supposing he meets a man on his way home, and describes to him the advantages of his house, and asks him to come in with him and see the garden; he is a friend. It does not turn on the duration of the friendship, but on the nature of the relationship between the parties. If the inhabitant of a house takes in a paying guest, it may be a nice question as to whether he is a friend or not. It seems he might be. But if it were a boarding-house, or a private hotel, or a hospital, or board school, or anything of that kind, persons invited by the owner under those circumstances would, in my opinion, not be friends, and I think that therefore they are outside this definition. The first question I have to answer is whether the members themselves have a right. In my opinion they have not. The second and third questions must also be answered in the negative.

Solicitors for the plaintiffs, *Caprons, Hitchins, Brabant, and Hitchins.*

Solicitors for the defendants, *Seaton F. Taylor.*

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KING'S BENCH DIVISION.

April 28 and 29.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

FOSTER v. GREAT WESTERN RAILWAY COMPANY. (a)

Railway—Carriage of goods—Owner's risk—Over-carriage by mistake—Goods forwarded by another route to reduce damage—Liability of railway company.

Barrels of fish were delivered by the plaintiff to the defendants to be carried to J. via S. upon the condition that the defendants were to be relieved from all liability for loss, damage, misdelivery, delay, or detention.

At E., instead of transferring the barrels to another truck to go to S., owing to a mistake they were carried on to T. It being too late to return the barrels to E. and send them via S. to J., the defendants, to save further delay, sent them via W. Owing to this there was a delay in the delivery, and the fish was damaged.

Held, that the defendants were not liable.

Mallet v. Great Eastern Railway Company (80 L. T. Rep. 53; (1899) 1 Q. B. 309) considered and distinguished.

APPEAL from His Honour Judge Lush Wilson, sitting at the Plymouth County Court.

The action was brought to recover damages for breach of contract to carry certain barrels of fish from Brixham to Jersey *via* Exeter and Southampton.

The barrels in question were delivered to the defendants by the plaintiff to be carried, subject (so far as is material) to the following conditions, which were incorporated in consignment notes signed by the plaintiff and addressed to the defendants:

Receive and forward under-mentioned merchandise, to be carried at the reduced rate below the company's ordinary rate, in consideration whereof I agree to relieve the Great Western Railway Company and all other companies over whose lines the merchandise may pass or in whose possession the same may be during any portion of the transit from all liability for loss, damage, misdelivery, delay or detention, except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants, and I also agree to the conditions on the back of this note. This agreement shall be deemed to be separately made with all the companies or persons, parties to any through rate under which the merchandise is carried.

It was agreed at the trial that if the plaintiffs should succeed in the action they would be entitled to judgment for the sum of two items—namely, 2l. 5s. and 7s. 11d.

It was admitted that in the ordinary performance of such a contract as the one in question, the barrels should have been taken off the truck or waggon at Exeter and transferred to a London and South-Western Railway truck or waggon.

In fact, the barrels in question were over-carried to Taunton, where they were discovered and unloaded. When so discovered and unloaded, it was too late to return the same to Exeter so as to catch the Southampton boat to Jersey, and

to save delay the goods were sent *via* Weymouth to Jersey.

It was proved that the fish in question arrived by the Great Western Railway *via* Weymouth at Jersey in a damaged condition, and later than it would have arrived if it had been carried in the ordinary course by the route contracted for.

The learned judge found that the before-mentioned figures represented the damage sustained by reason of such delay, and the question he had to decide was whether on these facts, and having regard to the conditions above set forth, usually called "owner's risk" conditions, the plaintiff was entitled to recover.

His Honour, after stating the facts set out above, continued as follows:—

Mr. Ward, for the plaintiff, contended that the facts of this case are on all fours with the facts in *Mallet v. Great Eastern Railway Company* (80 L. T. Rep. 53), and that I am bound by that decision. I am unable to distinguish for the purposes of my decision the facts in that case from the facts in the present case. The court, so far as I understand the decision, held that in carrying the goods by another route than the one contracted for, the railway company broke their contract, and would not, therefore, avail themselves of the conditions. Mr. Schiller, for the defendants, cited several cases decided before *Mallet v. Great Eastern Railway Company* (*sup.*), in which the courts had held that the conditions applied in cases of misdelivery and delivery short of and beyond the terminus contracted for. The authorities cited do not appear to have been cited to the Divisional Court. I feel bound to say, with great respect to Day and Lawrence, JJ., that I agree with his argument. It appears to me that the contract attaches the moment the consignment note is signed and handed to the defendant company and the goods are received; that the over-carrying the goods to Taunton was an act of negligence; that at the time of unloading the goods at Taunton the injury and some damage had been occasioned; that the sending them *via* Weymouth was not wilful misconduct within the meaning of the exception to the exemption condition, which means "misconduct" to which the will is a party (*Bramwell, L.J. in Lewis v. Great Western Railway Company*, 37 L. T. Rep. 774; 3 Q. B. Div. 195, at p. 206), or a wrong and reckless act of a servant indifferent as to consequences, but was a reasonable act intended to avoid or reduce any damage resulting from the previous act of negligence. But for the decision of *Mallet v. Great Eastern Railway Company*, I should, without hesitation, have held that the defendant company are protected by the conditions of the contract, and should have entered judgment for them. I also think the principle of the decisions cited inconsistent with the decision of *Mallet v. Great Eastern Railway Company*. But as I cannot distinguish the facts of that case from the present, I feel bound by it, and therefore give judgment for the plaintiff for 2l. 12s. 11d.

The defendants appealed.

Schiller (Cripps, K.C. with him) for the defendants.—The learned County Court judge was wrong in thinking that he could not distinguish *Mallet v. Great Eastern Railway Company* (80 L. T. Rep. 53; (1899) 1 Q. B. 309) from the present case. Both *Mallet v. Great Eastern Railway Company* (*sup.*) and *Sleat v. Fagg* (5 Barn. & Ald. 342) are cases where the goods were sent not in accordance with the contract, but by a different route. In this case the fish was sent by the right route, but, by a mistake, it got off that route, and, in order to minimise the damage that arose, the defendants sent it on as

(a) Reported by W. DE B. HENBERT, Esq., Barrister-at-Law.

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quickly as possible. If the defendants, when the mistake had been discovered, had sent it back on to the original route, although there would have been more damage than in fact arose, they clearly would not have been liable, and the mere fact that they did the best they could, when a mistake arose, for the plaintiffs cannot make them liable. The delay arose from the mistake at Exeter. They referred to

Morrill v. North Eastern Railway Company, 34

L. T. Rep. 940; 1 Q. B. Div. 302;

Millen v. Brasch, 47 L. T. Rep. 685; 10 Q. B. Div. 142;

Stevens v. Great Western Railway Company, 52 L. T. Rep. 324.

Duke, K.C. and *Hawke* for the plaintiff.—The last three authorities cited have no bearing on this case, as they were decided on the Carriers Act, and the question that arises here is on a contract—namely, the consignment note. *Mallet v. Great Eastern Railway Company* is in point here, for the damage to the goods did not arise on the route which was contracted for, but on another route by which the defendants chose to send the goods. The words “during any portion of the transit” refer to the transit contracted for, and do not relieve the defendants from the liabilities of negligence committed on another route.

LORD ALVERSTONE, C.J.—In my opinion the learned County Court judge ought to have acted upon that which he undoubtedly felt to be the true view of the law, although I think it is right to say that he may possibly have felt more bound by the decision in *Mallet v. Great Eastern Railway Company* (80 L. T. Rep. 53; (1899) 1 Q. B. 309), or by what appeared to him to be the principle involved in *Mallet's* case than we are. So far as *Mallet's* case is concerned, with very great respect to my brother Sir John Day and my brother Lawrance, I think the extent of the authority of that case, if it is supposed to lay down a principle that the condition cannot apply if the damage happens, or if the injury to the goods happens, upon some part of the route not contemplated by the parties at the time the condition was signed, may require further consideration. I do not wish to say—I do not think I have a right to say—I cannot, of course, overrule it—more than this, that certainly in so far as it lays down any principle which would involve that it must be applied to this case, I think it is at variance with more than one decision of co-ordinate courts, and particularly the decisions which have held that misdelivery to a wrong person will not render the company liable in the absence of something which makes the condition inapplicable, as, for instance, wilful misconduct. Here the misdelivery happened upon a route that was contemplated by the parties. Whatever may be the view as to whether or not *Mallet's* case can be supported upon the ground that it refers to a particular case of an injury occurring upon a route which never formed the basis of the contract, that is really not this case. Here the Great Western Railway Company undertook to carry from Brixham to Jersey, by way of Southampton, which meant that they were to hand over the goods to the South-Western Railway Company at Exeter. Whether at some other place they would also hand them over was not one of the conditions. But they were to hand them over at Exeter. They, by some

mistake, and from causes which do not prevent the condition being applicable, carried the goods on to Taunton, and therefore the breach of contract, in my opinion, occurred on the very route contemplated—namely, that instead of being given to the South-Western at Exeter, the goods were carried on to Taunton, and the breach, so to speak, was complete. What happened afterwards? As I have said, if in any way it could be contended that there was a new route then set up, and a new route as between the parties to which the condition did not apply, I could understand it. But it is agreed (and the case proceeded upon that basis in the court below), finding them at Taunton, instead of sending them to Southampton, which they could have done by sending them back to Exeter and giving them to the South-Western, in which case there would have been delay and the fish would have been spoilt, they endeavoured to do the best they could by sending them to Weymouth, to be forwarded by an early steamer. It seems to me that, if they would have been protected if they had done that which would have caused more delay and given a greater chance of spoiling the fish, to argue that they are liable now, having done the best they could, would be a very dangerous principle to lay down. It would prevent the defendants, who had broken the contract, from doing the best they could to save damages, and possibly to prevent damage, by adopting a reasonable course. Therefore I think their action in sending the fish to Weymouth when they found that they had made a mistake was not sending it by a fresh route in the sense of *Mallet's* case, if that be an authority with regard to that fact. But it was an act on the part of the defendants to do the best they could when they found that they had broken their contract. That brings us back to the question: Aye or no, does this condition protect them in the case of an erroneous carrying on from Exeter to Taunton, instead of delivering to the South-Western at Exeter? That really, I think, cannot be decided against the railway company without overruling the cases which have decided that under such conditions as these they are protected from the consequences of misdelivery where there are no words in the conditions to make them liable. I therefore think that the learned judge was not bound by *Mallet's* case to the extent which he thought he was, and I think he should have followed the principle which he was disposed to follow. I only wish to say that while I do not think the Carriers Act cases are what may be called authorities, because different conditions apply to a certain extent in these Carriers Act cases, I think the principle of them is to a large extent applicable to show that this condition does protect where such a state of things as this happens, and it is not a fresh route in the sense which the learned County Court judge thought, acting upon his view of *Mallet's* case. I think, therefore, that the appeal must be allowed.

WILLS, J.—I am of the same opinion. As to *Mallet's* case, if the circumstances were exactly the same we should be bound to follow it. But they are not exactly the same, and therefore it is not an authority which covers the exact facts of this case. Now, dealing with the case apart from *Mallet's* case, it seems to me the construc-

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tion which Mr. Duke sought to put upon the words of the contract was a very forced one. I think when the contract says: "I agree to relieve the Great Western Railway Company and all other companies over whose lines the merchandise may pass, or in whose possession it may be during any portion of the transit," those words are used to describe and particularise the companies which are entitled to protection. I illustrate what I mean by saying this, that if, instead of doing what they did, the company had sent the fish by the Midland, we will say to Birmingham or anywhere else, that company whose line was not designed to be an original part of the transit would not be protected by this. But I think that in other words, as applied to this case, it means that the Great Western Railway Company and the South-Western Railway Company shall be entitled to the benefit of this contract. Now, what is the contract? It relieves them from all liability for loss or damage, unless the plaintiff proves that such loss arose from wilful neglect on the part of the company's servants. Of course this did not. What really happened was this—that a mistake was made at Exeter upon the Great Western Railway Company's line, which was the line of the original contracting party, and in consequence of that mistake the goods went away on to another portion of their line and were spoilt. It seems to me that that is directly within the terms under which the protection is sought to be obtained.

KENNEDY, J.—I am of the same opinion. With regard to the case of *Mallet v. Great Eastern Railway Company*—speaking solely for myself, of course—I should desire to reserve any question about that case or its correctness. It seems to me that very different considerations apply to this case and to that. Those conditions sufficiently appear by the headnote, which is obviously correct, that it was there owing to their sending the goods by a different route that the damage arose. There the damage arose by reason of an error on the contract route, as it was intended all along to carry it out. The subsequent sending the goods off the route so far as regards the intention of the company (unfortunately, it had no good effect, it is true), so far from increasing, was intended to diminish, and would intend to diminish, the mischief which had happened, owing to the mistake that had occurred while the goods were in transit on the contract journey. That seems to me, I confess, to be a sufficient distinction. I only refer to the mistake at all because the learned County Court judge has evidently from his judgment which has been read, felt himself so much pressed by this case of *Mallet v. Great Eastern Railway Company* that, against his own view, as it would have been had that case not existed, he decided in the way he did. But it seems to me there is a difference between the case of a carrier who pleads the protection of a contract applying to conveyance by a specified route, where he has from negligence, and not from wilful misconduct, but from negligence, not sent the goods by that route at all, which was *Mallet's* case, and this case, where they were duly, faithfully, and correctly sent by the route contracted for. As I understand the facts, when the goods got to Exeter, which is on that route, unfortunately they were not transferred into the truck that would take

them on to Southampton, but were taken on to Taunton. It seems to me there is all the difference in the world between the two cases in the same way that deeds are viewed differently when intention has to be deduced with regard to keeping a contract or not keeping a contract. I think myself that the judgments which my Lord and my brother Wills have delivered are perfectly right. I desire to add nothing more, except that I think that *Mallet's* case is not the same case as this in the essential particulars I have pointed out.

Appeal allowed.

Solicitors: Church, Rendell, and Co., for Watts, Ward, and Anthony, Exeter; R. R. Nelson.

Friday, April 29.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

CORBETT v. PEARCE. (a)

Employer and workman—Employment on barge—Seaman—Employers' Liability Act 1880 (43 and 44 Vict., c. 42).

A man employed on a sailing barge whose main duty is to load and unload her, but who in fact assists in the navigation, such barge being suitable for coasting purposes, and is in fact being used on the sea reaches of the Thames, is a seaman, and so is not entitled to sue for personal damages for personal injuries under the Employers' Liability Act 1880.

APPEAL from His Honour Judge Shortt, sitting at the Brentford County Court, in an action brought under the Employers' Liability Act for damages for injury sustained.

The facts proved in the case were that the plaintiff was employed by the defendant in the *Alexandra*, a sprit-sail barge of thirty-eight tons, and registered under the Merchant Shipping Act as a British ship.

The crew consisted of only two hands, the plaintiff and the captain, who both assisted in loading and unloading the barge. The plaintiff was under the orders of the captain, and whilst his main duty was to assist in the loading and unloading of the barge, yet he in fact assisted in navigating the barge.

It was admitted that, although the barge had not been used for coasting purposes, there was no reason why it should not be so used.

On the day on which the accident happened to the plaintiff the captain was under orders to bring the barge from Oldhaven, on the sea reaches of the river Thames, to Brentford. The barge was sailed up to Woolwich, and was there, with some other barges, taken in tow by a tug. The barges were kept abreast by means of a breast rope, which rope was supplied by the defendant.

On the journey, it being necessary to alter the position of the barges, the plaintiff was ordered by the captain to hold on by the breast rope. The plaintiff did so, and, owing to its defective condition, the breast rope broke. The captain then told the plaintiff to hold on by the tow rope, and, in doing so, received injuries.

The learned judge held it was in consequence of the rope breaking that the plaintiff suffered the

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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injuries complained of. The learned judge also held that the plaintiff was not a seaman but a labourer, and that the accident having been occasioned by the defective rope supplied by the defendant, he was entitled to succeed in his claim under the Employers' Liability Act.

The learned County Court judge delivered judgment as follows, after stating the facts:—

It was argued for the defendant (1) that the barge was a ship within the meaning of the Merchant Shipping Act, and (2) that if so, the plaintiff must be considered a seaman within the meaning of that Act, and consequently cannot be a workman within the meaning of sect. 8 of the Employers' Liability Act 1880 (43 & 44 Vict. c. 42), referring to sect. 10 of the Act of 1875. In support of the first contention, the case of the *Mac* (46 L. T. Rep. 907; 4 Asp. M. C. 555; 7 P. Div. 126) was relied on; and especially the language of Brett, L.J. at p. 130. But granting that a barge may be considered a ship for certain purposes, it does not, in my opinion, necessarily follow that every person employed in or about it is on all occasions to be considered a seaman as *contra* distinguished from a workman. The same learned judge, when Master of the Rolls, in the case of *Yarmouth v. France* (19 Q. B. Div. 650) likened the work done by the plaintiff in that case (who was held to be a workman within the meaning of the Employers' Liability Act) to that of a lighterman who conducts a barge or lighter up and down the river, the navigating of the lighter forming the easiest part of the work; his real labour, that which tests his muscles and his sinews, is the loading and unloading of the lighter. The principal labour of the present plaintiff was of this kind, and I shall therefore hold that the defendant's contention fails. And I give judgment for the plaintiff for 33*l.* and costs.

The defendant appealed.

R. Dunlop for the defendant.—The Employers' Liability Act 1880 (43 & 44 Vict. c. 42) applies to a "workman," and a workman is defined by sect. 8 as "a railway servant and any person to whom the Employers and Workmen Act 1875 applies," and by sect. 13 of that statute of 1875, "this Act shall not apply to seamen or to apprentices to the sea service." Turning to the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) by sect. 742, "seaman" includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship, and "ship" includes every description of vessel used in navigation not propelled by oars. The vessel here was a sprit-sail barge, and the barge was sailed up to Woolwich, and the plaintiff assisted in navigating the barge. The plaintiff was therefore employed on a ship, and was a seaman, and the Employers' Liability Act 1880 does not apply to him. He referred to

Reg. v. Lynch, 77 L. T. Rep. 568; (1898) 1 Q. B. 61;

Oke v. Monkland Iron Company, 21 Sc. L. Rep. 407;

The Ruby, 78 L. T. Rep. 267; 8 Asp. Mar. Law Cas. 389; (1898) P. 52;

Yarmouth v. France, 19 Q. B. Div. 647.

Overend for the plaintiff.—The County Court judge was right. It does not follow that every person employed on a barge is a seaman, and not a workman. The learned judge has found, as a fact, that the principal labour of the plaintiff was loading and unloading—in fact, that he was a workman, and so the Employers'

Liability Act 1880 applies to his employment. He referred to

Salt Union v. Wood, 68 L. T. Rep. 92; 7 Asp. M. C. 281; (1893) 1 Q. B. 370;

Reg. v. Judge of City of London Court, 63 L. T. Rep. 492; 6 Asp. M. C. 547; 25 Q. B. Div. 339.

LORD ALVERSTONE, C.J.—When considering the construction of this section one cannot ignore the fact that seamen have attempted to get the benefits of the Employers and Workmen Act, and so it is impossible to treat the matter as one that has been overlooked by the Legislature. Now, the Employers' Liability Act 1880 is confined to workmen within the meaning of the Employers and Workmen Act 1875, and this earlier statute, in its definition of workmen, excluded seamen. Now, it is contended on behalf of the defendant here that the seamen excluded by this statute are those defined by sect. 742 of the Merchant Shipping Act 1894, which followed sect. 2 of the Merchant Shipping Act 1854. The definition of the word "seaman" in the Merchant Shipping Act 1894 includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship, and by the same section (742) "ship" includes every description of vessel used in navigation not propelled by oars. I am not going to say whether or no anyone doing temporary work on board a ship, such as a painter or a stevedore, would be a seaman within the Acts, but that is certainly not the case here. This man was one of the crew of a barge coming from the sea reaches of the Thames, which barge could be used for coasting purposes. I think here for the purposes of this Act the plaintiff was a seaman and the barge was a ship, and therefore the Act excluded the plaintiff's right to recover. We should be straining the language of the Acts if we were to hold he was not a seaman. The plaintiff assisted to navigate the ship, and while he was so doing he was injured. I do not think the plaintiff can recover under the Act, and the appeal must be allowed.

WILLS, J.—I am of the same opinion. Both upon the construction of the Acts of Parliament and in the ordinary sense of the word the plaintiff was a seaman. What constitutes a seaman amply appears in *Reg. v. Judge of City of London Court* (sup.). The plaintiff had to assist in navigating the barge, and, in ordinary language, he was a seaman, for he had to have a certain amount of knowledge of navigating and of seafaring matters.

KENNEDY, J.—I also think the plaintiff was a seaman, and that he is within the definition of a seaman in the statutes, and also within the ordinary sense of the word. He was employed on a vessel in the sea reaches of the Thames, and such a vessel is within the definition of a ship in the Merchant Shipping Acts. The vessel being a ship, what the plaintiff had to do on board shows that he was a seaman. He therefore cannot recover under the Employers' Liability Act 1880.

Appeal allowed.

Solicitors: *Roland Ward; Holman, Birdwood, and Co.*

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FARTHING (app.) v. PARKINSON (resp.).

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Thursday, May 5.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

FARTHING (app.) v. PARKINSON (resp.). (a)

Food and drugs—Warranty—Notice—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 25—Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), s. 20.

An information having been laid by the respondent against the appellant under sect. 6 of the Sale of Food and Drugs Act 1875, the appellant's solicitors sent on the 2nd Nov. to the respondent the following notice: "We beg to give you formal notice that our client purchased the same butter with a written warranty from G. L. Limited, of 84, C.-st., M. The following is a copy of the warranty in question: 'We guarantee all butters sold by us to be absolutely pure; guaranteed pure butter within the 3rd and 7th sects. of the Margarine Act 1887.' . . . The defendant intends to rely on the foregoing as a defence to this summons."

On the 4th Aug. the appellant had purchased the butter of the wholesale house, and on the invoice was stated: "We guarantee all butters sold by us to be absolutely pure." The appellant was dissatisfied with this, and, when going to the wholesale house the following week, and after the butter was delivered, took the invoice to the wholesale house, who put on it: "Guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act 1887. In case of samples being taken for analysis, show this warranty to the inspector."

Held, that the notice of the 2nd Nov. was a good notice of a defence under sect. 20 of the Sale of Food and Drugs Act 1899.

CASE stated on an information preferred by the respondent against the appellant, under sect. 6 of the Food and Drugs Act 1875, for that the appellant, on the 5th Oct. 1903, at his shop, by one of his employees, did unlawfully and wilfully sell to the respondent, and to his prejudice, as and for a certain article of food—to wit, butter—a certain article of food which was not of the nature, substance, and quality of the article of food demanded by him, the same containing 18.75 per cent. of water, contrary to the statute and the regulations of the Board of Agriculture in such case made and provided.

Upon the hearing of the information it was admitted by the appellant that the respondent, on the date named in the summons, purchased from him a pound of butter for analysis, and that the respondent had, in connection with such purchase, complied with all the requirements of the Food and Drugs Act of 1875 and 1899 in relation to a purchase for analysis.

Furthermore, the appellant did not dispute the analyst's certificate, showing that the butter contained 18.75 of moisture, being 2.75 in excess of the standard fixed by the Board of Agriculture in the Sale of Butter Regulations 1902, but he relied for his defence upon a warranty under sect. 25 of the Food and Drugs Act 1875, as amended by sect. 20 of the Food and Drugs Act 1899.

Before the defence was opened the respondent took the objection that such defence was not

available to the appellant, inasmuch as his notice of intention to rely upon the warranty did not comply with the requirements of sect. 20 of the Food and Drugs Act 1899, as it was not accompanied by a copy of the invoice or alleged warranty relating to the butter purchased by him.

The following is a copy of the notice of Nov. 2, 1903:

With reference to the summons issued by you on the 26th Oct. against Fred Farthing, of 323, Ainsworth-road, Radcliffe, for selling you adulterated butter on the 5th Oct., and which summons was served upon our client on the 30th Oct., we beg to give you formal notice that our client purchased the same butter with a written warranty from George Little Limited, general provision merchants, of 84, Corporation-street, Manchester. The following is a copy of the warranty in question: "We guarantee all butters sold by us to be absolutely pure; guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act 1887." The defendant sold the butter in question in the same state as purchased, and at the time when he sold it had no reason to believe that it was otherwise. The defendant intends to rely on the foregoing as a defence to this summons.

The following is a copy of the whole invoice or warranty at the time of sale given in respect of the purchase of the butter by the appellant:

84, Corporation-street, Manchester, 4th Aug. 1903.—Messrs. City Tea Company, Radcliffe Bridge.—Bought of George Little Limited, general provision merchants:

3 Bales Stott Plain M. No. 52	56.00	net	6.1.19	64/6	£20 15 3
2½ Sids and Sino	...	...	2.16	8/-	3 6 8
1½ W. Shdrs.	...	...	1.1.6	41/-	2 13 5
2 Eggs and G. L. L. Blue	...	...	24	7/-	8 8 0
1 c/ 2 Crown Red	...	...	12	4/9	2 17 0
4th and 5th 20 Firkins Butter Listowel					

Nos.		Nos.		Nos.	
1	3 10 14	11	3. 5 15	21	3. 5 15
2	3. 3 15	12	2 27 14	22	3. 5 15
3	3. 1 14	13	3. 0 14	23	3. 5 15
4	3. 1 14	14	3. 4 15	24	3. 5 15
5	3. 6 15	15	3. 3 14	25	3. 5 15
6	3. 1 15	16	3. 5 15	26	3. 5 15
7	3. 5 14	17	3. 5 15	27	3. 5 15
8	3. 1 15	18	3. 5 14	28	3. 5 15
9	3. 3 14	19	3. 2 14	29	3. 5 15
10	3. 4 15	20	3. 2 15	30	3. 5 15
7.8. 7		7.8. 2			
1.1. 5		1.1. 6			
6.2. 2		6.1.24		123.36	83 -
				53 17 6	
				£91 17 10	

We guarantee all butters sold by us to be absolutely pure.—GEO. LITTLE LIMITED, GEO. W. LITTLE.

Before giving their decision upon the objection the justices decided to hear the appellant's case.

In support of the defence the following facts were admitted or proved in evidence:

The appellant in due time, as required by the statute by his solicitors, wrote and sent to the respondents and to Messrs. Geo. Little Limited (the wholesale merchants from whom the appellant purchased the butter) the letter, a copy of which is set out above.

The appellant on the 4th Aug. 1903, in the ordinary course of his business, called upon Messrs. Geo. Little Limited at their warehouse in Manchester to buy some Irish butter, and he was shown by Mr. Little certain Irish butter. The appellant cut and tasted the same, and then and there asked Mr. Little whether the firm would give him a warranty with the butter in question. Mr. Little replied that he would give the appellant the fullest warranty, such warranty to be put upon the invoice. The appellant, relying upon this

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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undertaking, thereupon agreed to and did purchase twenty firkins of the butter.

On the same day—namely, the 4th Aug.—in the ordinary course of business, the invoice for the firkins of butter (a copy of which is set out above) was made out and sent to the appellant, together with six of the same twenty firkins of butter.

The appellant, being dissatisfied with the warranty as originally written upon the invoice, upon his next journey into Manchester the following week, but after delivery of the butter described and comprised in the invoice, personally took the original invoice back to Messrs. Little Limited and told them it was not as full as he had expected, and that he should prefer to have it strengthened.

Thereupon Messrs. Geo. Little Limited indorsed upon the original invoice the further words following:

Guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act 1887. In case of samples being taken for analysis, show this warranty to the inspector.—GEO. LITTLE LIMITED.

The remainder of the twenty firkins of butter were delivered to the appellant on the 6th Aug. 1903, prior to the invoice being altered by the addition of these words.

The pound of butter purchased by the respondent was out of the twenty firkins so purchased by the appellant from Messrs. Geo. Little Limited, and was comprised within and covered by the same warranty or warranties upon which the appellant made his purchase, and the appellant had purchased it as the same article in nature, substance, and quality, as that demanded of him by the respondent on the 5th Oct. 1903, and he sold it to the respondent in the same state as purchased by him, and he had no reason to believe at the time when he sold it to the respondent it was otherwise.

On the close of the appellant's case the respondent again contended (a) that the defence of warranty under sect. 25 of the Food and Drugs Act 1875 was not available to the appellant, as the letter of the 2nd Nov. was not a sufficient compliance with the form of sect. 20 of the Food and Drugs Act 1899, inasmuch as it was not accompanied by a copy of the invoice or warranty relating to the purchase; and the respondent also contended (b) that the copy warranty contained in the letter of Nov. 2nd was not a correct copy, because it included words of warranty which were not originally upon the invoice at the time the property in the goods passed or when the same were delivered, and such words having been reduced into writing after the date of the purchase were not available as a warranty under sect. 25 of the Act.

The appellant in reply contended (a) that the general warranty originally upon the invoice was sufficient without regarding the supplemental warranty indorsed afterwards; (b) that the original warranty being a general one, the letter of the 2nd Nov. was a sufficient compliance with the 20th section of the 1899 Act without sending a copy of the invoice as well; (c) that the supplemental warranty indorsed under the circumstances set out above was good and available as a warranty within the meaning of sect. 25 of the Food and Drugs Act 1875 as it was, he contended, not

necessary for a warranty which is in fact contracted for (as in this case) to be reduced into writing at the time of the contract; (d) that if the respondent's objection to the supplemental warranty was good, the fact that the words of it had been included in the letter of the 2nd Nov. did not prevent such letter from being a good notice of the original warranty.

The justices were of opinion that the appellant had proved what would have been a good warranty had it been available as a defence, but being also of opinion that the letter of the 2nd Nov. was not a good notice within the meaning of sect. 20 of the Food and Drugs Act 1899, they considered the appellant was debarred from relying upon it as a defence, and they accordingly convicted the appellant upon the information.

By the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 25:

If the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence.

By the Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), s. 20 (1):

A warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts unless the defendant has within seven days after service of the summons sent to the purchaser a copy of such warranty or invoice, with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person.

Avory, K.C. (Biron with him) for the appellant.

—The letter sent contained the written warranty, and therefore it was a statement of what the warranty was. As the warranty originally stood it was quite sufficient, and it was only *ex abundantia cautela* that the subsequent words were added to make it beyond dispute. All that is required under these sections is that there shall be a notice to the prosecution that you are going to rely on the warranty, and that its terms shall be set out. The real complaint here is that we have given the prosecution too much information; in fact, we have given them more than is necessary. He referred to

Irving v. Callow Park Dairy Company; Bacon v. Same, 87 L. T. Rep. 70.

Gordon Hewart for the respondent.—The words on the invoice originally were not a sufficient warranty. The words, "or invoice," in sect. 20 (1) of the Sale of Food and Drugs Act 1899 refer back to the Margarine Act of 1887, because, under sect. 7 of that Act the invoice is sufficient—that is to say, it is enough under that Act that the commodity should have been bought as butter. There must not only have been a warranty, but there must have been a written warranty contemporaneous with the contract of sale. It is misleading to add words in the notice which are

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added to the warranty afterwards. The statute provides the warranty shall be a written warranty with which the butter was purchased. The cases of *Farmers' Cleveland Dairy Company v. Stevenson* (63 L. T. Rep. 776; 17 Cox C. C. 481), *Laidlaw v. Wilson* (1894) 1 Q. B. 74, and *Elliot v. Pilcher* (85 L. T. Rep. 50; (1901) 2 K. B. 817) are different from this case. The Act provides that what is to be sent by the defendant is a copy of the warranty—that is to say, a copy of the warranty which is a contemporaneous description. If the defendant was going to rely upon a warranty contained upon the invoice he ought to have sent a copy of the whole of the invoice with the warranty upon it. Even if it were not necessary to send a complete copy of the invoice, the notice here was bad, because the later words were added. They were certainly not words of warranty upon which the butter had been purchased.

Avory, K.C. in reply.

LORD ALVERSTONE, C.J.—In my opinion a great many points have been raised in this case that do not arise, and on which I do not intend to express my opinion at all. If, for instance, under sect 20, the person setting up the warranty has thought fit to add words which would alter the character of the warranty, which was truly given, to make them more in his own favour, and has said, "This is my warranty," and the magistrates have before them, or are satisfied that that is added for the purpose of putting something which was not the warranty at the time, I do not say whether or not we ought to allow the defence to be set up. The only point which I decide is that this section is a procedure section amending the original sect. 25, giving certain protection to prosecutors, and giving certain rights to the person who is called in by virtue of the warranty. Sect. 25 says that if the defendant proves to the satisfaction of the justices that he purchased the article as the same in nature and substance, with a written warranty to that effect, and he had no reason to believe it to be otherwise, and that he sold it in the same state, he is discharged, but he shall be liable to pay the costs incurred by the prosecutor, unless he shall have given due notice that he will rely upon that defence. That left it to a certain extent in doubt as to what the prosecutor was to be told. Then came sect. 20, which undoubtedly was partly framed on sect. 7 of the Margarine Act, which had provided that a person should also be allowed to set up a written warranty or invoice. The words, "or invoice," came from that, and there are cases in which the warranty is only to be implied from the invoice. Therefore, when the Legislature came to amend the Act, they had to deal with the first Act, which spoke of a warranty, and the second Act, which spoke of a warranty or invoice. The section says: "A warranty or invoice shall not be available as a defence" unless the defendant has sent to the purchaser a copy of such warranty or invoice, with a written notice stating that he intends to rely upon the warranty or invoice. The reason the words, "or invoice," are added in that section was because in the beginning of the section they said, "warranty or invoice shall not be available," and, to construe the section reasonably, it means that, if you rely on a warranty under sect. 25, you should send a copy of the warranty; if you

rely on an invoice you should send a copy of the invoice. But I can only repeat that which I said in *Bacon v. Callow Park Dairy Company* (87 L. T. Rep. 70), and the argument in this case has not made me think that I went too far—that the section meant a copy of that which entitled the defendant to believe that the article was the same in nature, substance, and quality as that which is to be sent, and *prima facie* it means a copy of the terms of the warranty on which the defendant bought. I have never said anything, to my knowledge, to indicate that I do not think the warranty ought not to be in writing. On the contrary, I pointed out in *Bacon's* case and another case which is referred to there, that under sect. 25, and under all the sections, the warranty must be in writing. The whole point there was, the warranty being "pure milk, with all its cream," which words were put on each churn, and were given in pursuance of a verbal contract, I held that the previous contract to give the warranty need not be in writing, but the warranty itself under which the goods were bought must be in writing. I have heard nothing to-day to the contrary, and I certainly now do not entertain any opinion to the contrary. Now, what happened in this case? I think the defendant may be quite entitled to say: I did buy these goods on the terms of the written warranty, but whether that involved both documents or only one I express no opinion about. I only say he may be entitled to say, when the case comes to be dealt with, that the only warranty may be that on which the goods were bought, and which contained the first words: "We guarantee all butters sold by us to be absolutely pure." At present I have not been able to understand, and I have read the section as carefully as I can, the subsequent part, which contains the words: "Guaranteed pure butter, in accordance with the 3rd and 7th sections of the Margarine Act 1877." I do not understand they add anything at all to the words "absolutely pure." Therefore I view this case as a case at any rate in which, even if you take the two sets of words together, the warranty was exactly the same, and it is not suggested there was any fraud here, or that the defendant did not mean to set up the warranty. What has he said? He has told the prosecutor from whom he bought the butter that he bought it under a warranty. That was this warranty: "We guarantee all butters sold by us to be absolutely pure." And he meant also to rely upon the warranty: "Guaranteed pure butter, in accordance with the 3rd and 7th sections of the Margarine Act 1887." The ground of my decision is that the magistrates ought not as a preliminary objection to decide the point as to what was the warranty under which the goods were sold. They have got to deal with it when they come to the substantive defence under the 25th section of the Act of 1875 and the 20th section of the Act of 1899, where it speaks about the article being the same in nature, substance, and quality. Then there might be a case for the determination by the magistrates. A point was made by Mr. Hewart which I certainly was unable to follow, when he was contending that the invoice ought to have been sent as well. He said the justices should have found the butter was Listowel Roses. I desire to point out not one single word in this case has been proved directly or indirectly as to

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Listowel Roses giving any information for the purposes of a warranty, and I cannot help thinking that is an argument introduced to meet a case that certainly was never made in the court below. I come to the point which was taken, and which certainly seems to me the best argument proceeded upon, a point which developed in the course of the case and which was not the point the prosecutor originally desired to take. Before the case was opened the prosecutor said that the letter of the 2nd Nov. did not comply with the requirements as to sending a copy of such warranty or a copy of such invoices. I pointed out, and I cannot repeat myself, that a "copy of warranty" means copy of warranty, and "a copy of invoice" means "a copy of invoice." Then at the close of the case the prosecutor contended again it was not a proper invoice, because it was not accompanied by a copy of the notice or warranty relating to the purchase, and then that the copy was not a correct copy, because it included words of warranty which were not upon the original invoice at the time the property in the goods passed. If those additional words did not form part of the contract, did not form part of the warranty, or if they added something, then when the magistrates come to deal with this case they will have to say whether the goods were not bought with these additional words, but I cannot think it right, under the 20th section, that a man cannot *bonâ fide* set up the defence under the section on giving a full copy of what he intends to rely upon, or that he is not then entitled to open that defence, especially as sub-sect. 2 of the same section allows the person to come and give evidence. I think, therefore, the magistrates ought to have heard the case on the warranty before they decided it.

WILLS, J.—I have come with some hesitation to the same conclusion, and my concurrence in the judgment which has been delivered is upon the ground that I think sect. 20 of the Act of 1899, which requires a copy of the warranty to be delivered to the complainant, did not mean to say that under all circumstances the warranty must be correctly set out when there is room for the contention as to what the warranty actually was under which the goods were sold. It seems to me that in many cases to say that would deprive the defendant of a perfectly good defence, because he might be wrong in his construction of what the warranty actually was. I think the Act did not mean to deprive him of the power of saying that in his view and intention upon the evidence the warranty was such as he had set out in his copy, although it might prove to be erroneous when the matter came to be contested. Of course I assume for the purpose of anything I am saying that what has been done is *bonâ fide*, if it is not *bonâ fide* then *cadet questio*. Nobody feels more strongly than I do that it would never do to say or do anything which should encourage a person who has bought under a warranty to improve that warranty for the purpose of stopping a prosecution, because it might very well be that if he were at liberty to add terms which he alleged were part of the original warranty, which at the time were not in writing, it might very well be if he had added the words it would stop the prosecution, where if he had simply given a copy of that which was in existence at the time the article was bought it would not have had that

effect. If anything of that kind could possibly be the case, then I should say the Act certainly was not complied with. In this case the added words have really added nothing, and therefore the substance and effect of the warranty is perfectly truly set out in that which is said to be a copy. As long as the added matter really added nothing to the sense, it certainly is not open to any of the objections which I have pointed out, and which I feel fully the force of, and in a proper case would be prepared to give full effect to. Therefore it comes to this, that the case must not be stopped, the magistrates must inquire what the warranty was under which the goods were sold, and whether the man has bought them upon the warranty which he represents. If he has bought them upon a written warranty, which is to all intents and purposes exactly the same, I do not see that any harm has been done by the addition of the words—namely, the addition which is complained of here. It will remain for the magistrates to inquire, under sect. 25, whether the actual written warranty under which the goods were bought is a good and sufficient one; whether it comes up to the terms of sect. 25.

KENNEDY, J.—I think this is a difficult case, and I share my brother Wills' feeling that it is a case which certainly the magistrates, in my view, should not take it that we are deciding any question of law as to the sufficiency either of the document as it stood before the alteration or of the document as it stood after the addition of the words. Mr. Ivory, in the course of the argument, seemed to indicate that he was prepared to contend that it would be sufficient that there was a contract, oral or not, in the original document, in the nature of a warranty after the delivery of the goods, upon which the question arose for prosecution after the sale. As far as I am concerned, I am not bound to consider any of those points, nor is my Lord or my brother Wills, but what I do think is the right view to come to is to take a liberal construction of a statute which is, after all, intended to prescribe a necessary formality, of course to be honestly observed and fairly observed; and that is, that there is to be a copy of the invoice or warranty sent. Here a document was sent which, as it stands, may be alleged (I will say no more, because the matter is still open) to contain that which is a warranty plus something which cannot come, within the fair meaning of the statute, under the title of warranty, something that has been a dead letter. The recipient, therefore, has got a copy of the warranty. He has got something there which is said also to be a part of the warranty, but which may not be, according to the law, a part of the warranty, or to be treated as such. It is clear in some cases that a difficult point may arise, and even with good faith, on a warranty which is sent which may be different from the thing which is proved in court when lawyers come to handle it, and where the recipient, without any authority on the part of the other party, has considered it entirely differently. I can conceive such a case arising on correspondence, and I agree that when the case arises it will have to be considered. I should not feel myself bound by this particular document of to-day. Suppose, for a moment, interlaced with words which a lawyer would find to have been given as a warranty, there were

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words which materially altered, enlarged, or amplified the document, and it was held not to be a copy, because it contained differently the words of warranty, that might lead to a case to be argued. So also with other clauses or words which made the real warranty a very different one to that set out. I think the difficulty is in drawing the line, but here I do not think we should express what ought to be held as a matter of opinion, or something in the nature of an intimation. Therefore I think the case will have to go back. It will be recollected the magistrates put in their case: "We were of opinion that the appellant had proved what would have been a good warranty had it been available as a defence, but being also of opinion that the letter of the 2nd Nov. was not a good notice within the meaning of sect. 20 of the Food and Drugs Act 1899, we considered that the appellant was debarred from relying upon it as a defence, and we accordingly convicted the appellant upon the said information, and fined him as stated." In other words, as my Lord has said, they stopped at the point when they found themselves, as they thought, faced with a good technical objection to the words, "Copy of the invoice or warranty." I think in this particular case there was that which ought here to be considered, but, after all, these things are to be dealt with on the merits, and with as little technicality as possible. I think the justices were wrong, and this case must go back.

Judgment accordingly.

Solicitors: Nicol, Son, and Jones, for Pickstone and Jones, Radcliffe; W. H. Wilson, Preston.

May 5 and 6.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.).

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Poor law—Removal of pauper—Settlement—Married woman—Husband having no settlement—Derivative settlement—Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 35.

A pauper and her husband, who was a foreigner with no settlement, came to reside in the parish of Birmingham in Jan. 1901, and resided there until June 1901, when the husband went to America with no intention of deserting his wife, and with the intention of returning. The wife and her children continued to reside in the parish of Birmingham until March 1902, when they went into the workhouse.

Held, that the pauper and her children, who were all under the age of sixteen years, were irremovable from the parish of Birmingham.

CASE stated by the Recorder of Birmingham on an appeal against an order dated the 3rd Sept. 1902 for the removal from the parish of Birmingham to the parish of Bredon, in the Tewkesbury Union, of Alice Alinquist and her four children.

The pauper Alice Alinquist is the wife of Charles Alinquist, a foreigner with no settlement of his own. They were married on the 6th July 1890,

and the children are the lawful issue of the pauper and Charles Alinquist, and are all of them under the age of sixteen years. Doris was born in Aug. 1892 in America. Rose was born on the 5th Jan. 1898 in the parish of West Bromwich. Herbert was born on the 17th Oct. 1899 in the parish of West Bromwich, and Charles was born on the 26th April 1902 in the workhouse infirmary in the parish of Birmingham.

The pauper Alice and her husband came to reside in the parish of Birmingham in Jan. 1901, and continued so to reside in that parish of Birmingham until the 20th June 1901, when the husband went to America to work for his brother-in-law, intending to send for his wife and children when he got settled.

The pauper Alice heard from him several times, but he said he was not able to get work, and had made up his mind to return to England. He had not returned at the date of the order of removal, but the recorder found as a fact that he did not desert his wife, and that he had the intention of returning.

From the 20th June 1901 the pauper Alice, with her three older children, continued to reside in the parish of Birmingham until the 27th March 1902, when she removed with them to the Birmingham Workhouse, where she was confined of her youngest child on the 26th April 1902. She remained there till the 19th Sept. 1902, when she went out with all her children, and has not returned.

The pauper Alice was born in 1869, and is the lawful daughter of Robert Warner, who, at the time the pauper attained the age of sixteen years, had obtained a settlement by residence in the parish of Bredon, in the Tewkesbury Union.

It was contended for the appellants that the pauper alien was irremovable by reason of her continuous residence in Birmingham for more than one year previously to her becoming chargeable, notwithstanding the temporary absence of her husband, and that the case of *Reg. v. St. George's-in-the-East* (22 L. T. Rep. 440; L. Rep. 5 Q. B. 364) was in point.

It was further contended on behalf of the appellants that by 39 & 40 Vict. c. 61, s. 35, all derivative settlements were abolished, except in the case of a wife from her husband, and of a child under the age of sixteen from its father or widowed mother, as the case may be, and that the husband of the pauper Alice, having no settlement she was irremovable; also that with regard to the children there was no derivative or other settlement which they could take, inasmuch as their father had no settlement and their mother was not a widow.

It was contended for the respondents that there was a break in the residence of the husband when he left for America on the 20th June 1901, and that the period of residence of the pauper Alice with her husband, prior to his departure, could not be added to her residence after his departure, so as to make up the full year of residence necessary for her to have acquired a status of irremovability. It was also contended on behalf of the respondents that by 39 & 40 Vict. c. 61, s. 35, inasmuch as the husband had no settlement, the wife became removable to the place of her maiden settlement in the Tewkesbury Union derived from her father, and that with regard to the children, as there was no settlement

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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which they could derive from their father, they acquired the settlement of their mother, and were also removable with her to the Tewkesbury Union.

The recorder was of opinion that in the circumstances aforesaid the pauper Alice was irremovable from the parish of Birmingham by reason of her continuous residence there for more than one year prior and up to the date of the order of removal, and he adopted the reasoning of the judgment in the case of *Reg. v. St. George's-in-the-East* (22 L. T. Rep. 440; L. Rep. 5 Q. B. 364) as applicable to the present case.

He also considered that 39 & 40 Vict. c. 61, s. 35, was a bar to the setting up of a derivative settlement of the pauper Alice from her father: (see *Reg. v. Guardians of Bridgnorth* (48 L. T. Rep. 600; 11 Q. B. Div. 314).

He accordingly held that neither the alleged settlement of the mother nor of the children had been made out, and he allowed the appeal with costs, and quashed the order of removal.

The questions for the opinion of the court were as follows: (1) was the pauper Alice Alinquivist, at the time the order of removal was made, irremovable from the parish of Birmingham; (2) if not, was the pauper Alice Alinquivist or were any of her children properly removable to the Tewkesbury Union?

By the Poor Removal Act 1846 (9 & 10 Vict. c. 66), s. 1:

Whereas it is expedient that the laws relating to the removal of the poor should be amended: Be it enacted that from and after the passing of this Act no person shall be removed, nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for [one year] next before the application for the warrant; provided always that the time during which such person shall be a prisoner in a prison or shall be serving Her Majesty as a soldier, marine, or sailor, or reside as an in-pensioner in Greenwich or Chelsea Hospitals, or shall be confined in a lunatic asylum, or house duly licensed, or hospital registered for the reception of lunatics, or as a patient in a hospital, or during which any such person shall receive relief from any parish, or shall be wholly or in part maintained by any rate or subscription raised in a parish in which such person does not reside, not being a *bonâ fide* charitable gift, shall, for all purposes, be excluded in the computation of time hereinbefore mentioned, and that the removal of a pauper lunatic to a lunatic asylum under the provisions of any Act relating to the maintenance and care of pauper lunatics shall not be deemed a removal within the meaning of this Act; . . . [here followed a proviso.]

By the Poor Removal Act 1848 (11 & 12 Vict. c. 111), s. 1:

Whereas by an Act passed in the 10th year of the reign of Her Majesty, intituled, &c. (reciting 9 & 10 Vict. c. 66, s. 1), and whereas by reason of the generality of the expressions used in the last proviso, doubts are entertained as to the meaning thereof, and it is desirable to remove such doubts: Be it therefore enacted that the said last proviso be repealed, and that instead thereof the following be enacted: provided always that whenever any person should have a wife or children having no other settlement than his or her own such wife and children should be removable from any parish or place from which he or she would be removable notwithstanding any provision of the said recited Act, and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act.

By the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 35:

No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent, without inquiring into the derivative settlement of such parents, such child or female shall be deemed to be settled in the parish in which he or she was born.

Pritchett (Macmorran, K.C. with him) for the Birmingham Guardians.—The question raised here is whether the pauper Alice was irremovable from the parish of Birmingham, she being a married woman whose husband was a foreigner, and had no settlement, such husband having left her with an intention to return. Since her husband left her the pauper has not resided for a sufficient time to give her a status of irremovability, but the learned recorder has added two periods to give her that status, namely, the time before the husband left and the time after he left until she became chargeable to the union. The learned recorder based his decision on the reasoning in *Reg. v. St. George's-in-the-East* (22 L. T. Rep. 440; L. Rep. 5 Q. B. 364) as applicable to the present case. In that case a pauper, having a maiden settlement in the parish of Limehouse, had resided for more than a year in the parish of St. George, and married a foreign sailor who had no settlement. They resided together in the parish of St. George until the husband left, intending to return, but having made no provision for the pauper's maintenance. She continued to reside in the parish of St. George and became chargeable, but the husband had not resided one year in this parish. It was there held that the pauper was irremovable from St. George's parish by reason of the continuous residence before and during marriage, and that she was not affected by the proviso in the Poor Removal Act 1848 (11 & 12 Vict. c. 111). *Reg. v. St. George's-in-the-East* (sup.) has been overruled by the House of Lords in *Medway Union v. Bedminster Union* (61 L. T. Rep. 733; 14 App. Cas. 465). In that case the husband of a pauper had resided in a parish within the Medway Union for more than three years before his death, and after his death she continued to reside with her children in the same parish for three months. She and her children subsequently became chargeable to the Bedminster Union, and it was there held that the widow and children were rightly removed into the Medway Union, as her husband had at the time of his death a settlement in that union, and that the widow and children took that settlement under sect. 35 of the Divided Parishes and Poor Law Amendment Act 1876, but not on the ground that the widow had acquired an original settlement by residence in that union. The view of Lopes, L.J. as to sect. 34 of the Act of 1876 where he said (61 L. T. Rep., at p. 36; 21 Q. B. Div., at p. 233):

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"The important question is as to the meaning of the words 'any person' in sect. 34. I think they mean persons *sui juris* who are capable of acquiring a settlement or status of irremovability for themselves, and do not include unemancipated women and children under covertures. . . . During his life she cannot do anything to acquire a status of irremovability in her own right or a settlement, but her status and settlement follows and changes with his," is approved by Lord Watson in the House of Lords, who says: "I am of opinion with Lopes, L.J. that the father having at the time of his death acquired a settlement under sect. 34, his widow and children took his settlement under sect. 35." That case in the House of Lords shows that a wife living with her husband who has an original settlement, has not during the subsistence of her derivative settlement from him the capacity to acquire by residence another settlement of the same quality and in the same parish. Break of residence by the husband is also a break of residence by the wife, although the wife remains resident in the union, and the period she has resided as a wife cannot in such a case be added to the residence as a widow:

Reg. v. Llanelly, 17 Q. B. 40;

Reg. v. Manchester Overseers, 45 L. T. Rep. 679; 8 Q. B. Div. 50.

In order for there to be a break of residence there need not be any intention to desert, but where a husband has no settlement, or if he has abandoned his wife or is absent when she becomes chargeable, she may be removed to her maiden settlement. He referred to

Reg. v. St. Mary-le-bone, 16 Q. B. 352.

Here there has been a break of residence, and so the two periods of residence cannot be added together. The wife, therefore, has acquired no status of irremovability, and is thrown back on her maiden settlement. He referred to

Rex v. Ryton, Cald. 39;

Reg. v. St. Mary-le-bone, 16 Q. B. 353;

Poor Removal Act 1846 (9 & 10 Vict. c. 66), s. 1;

Poor Removal Act 1848 (11 & 12 Vict. c. 111), s. 1.

Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 35.

It is true that in *Reg. v. Bridgnorth* (11 Q. B. Div. 314, s.c. *Madeley Union v. Bridgnorth Union* (48 L. T. Rep. 600), it was held that in determining the settlement of a wife or child you could not go beyond the husband or the father of the person to be removed, but that case was treated as overruled by *Reigate Union v. Croydon Union* (61 L. T. Rep. 733; 14 App. Cas. 465), and the law on this point is that laid down in *West Ham Union v. St. Giles-in-the-Fields* (63 L. T. Rep. 496; 25 Q. B. Div. 272). This being so, the order of removal of the pauper and her children was rightly made, as the husband having no settlement the wife was properly removable to her maiden settlement which she got from her father. As the children could not acquire any settlement from their father, they acquired their mother's settlement, and so would have to be removed with her. He also referred to

Dorchester Union v. Poplar Union, 59 L. T. Rep. 687; 21 Q. B. Div. 88;

Milford Union v. Wayland Union, 63 L. T. Rep. 299; 25 Q. B. Div. 164.

B. Cunningham Glen for the Tewkesbury Guardians.—The case here turns on status of irremovability, and not on any question of settlement. Sect. 34 of the Divided Parishes and Poor Law Amendment Act 1876 deals with settlement made up by irremovability. Turning to sect. 35, that section deals with settlement, and not with irremovability at all. Whichever of the two ways this case is looked at, the decision of the learned recorder was right, for if the pauper is within the proviso added by 11 & 12 Vict. c. 111, s. 1, to sect. 1 of the Poor Removal Act 1846, then the case of *Reg. v. St. George's-in-the-East* is in point, and she is irremovable from Birmingham. If she is not within that proviso, she is not removable, because her husband, if he had been living with her, would not have been removable, and she is in the same position as he would have been. It is here found as a fact that the husband did not desert his wife, and he had the intention of returning. That distinguishes this case from *Reg. v. St. Marylebone* (*sup.*) and *Reg. v. Llanelly* (*sup.*). Residence for three years, partly while under the age of sixteen and partly when over that age, has been held to be sufficient to give a settlement in *Highworth and Swindon Union v. Westbury-on-Severn Union* (61 L. T. Rep. 733; 14 App. Cas. 465). This being so, by analogy the two periods of the pauper's residence can be added together, and in fact, there has been no break in the pauper's residence, and she has acquired a status of irremovability. *Reg. v. St. George's-in-the-East* (*sup.*) is precisely in point. He also referred to

Reg. v. Glossop, 12 Q. B. 117;

Reg. v. Elvet, 2 E. & E. 266.

West Ham Union v. Holbeach Union, 89 L. T. Rep. 609; (1903) 2 K. B. 627; (1904) 2 K. B. 121.

Macmorran, K.C. in reply.—He referred to

Reg. v. Much Hoole, 21 L. J. 1, M. C.

West Ham Union v. Bethnal Green Union, 70 L. T. Rep. 818; (1894) A. C. 230.

LORD ALVERSTONE, C.J.—I always, I am afraid, shall feel the same diffidence in expressing an opinion in these cases. I repeat what I said not many months ago, that I cannot imagine anything more likely to impair and destroy any judicial capacities a man may possess than an endeavour to decide these pauper removal cases, and I hope they will not come very frequently to this court. But I am of opinion that the decision is right, and substantially for the grounds that the learned recorder has stated. Now, we heard a most learned and interesting argument from Mr. Pritchett, who invited us to consider the principles on which a number of cases have been decided, and endeavoured very logically and clearly to my mind to show that a good many of these principles had been destroyed, and were inconsistent with not the last case, but with one of the cases in the House of Lords—*Medway Union v. Bedminster Union* (61 L. T. Rep. 733; 14 App. Cas. 465). If it had been necessary to follow Mr. Pritchett through the whole of that argument, and to endeavour to reconcile all the cases, I think the task would have been almost hopeless, but I agree and I think: the result of his argument was to show that he was quite justified in saying that it was extremely difficult to lay down any rule which is consistent with all the cases. I doubt myself

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whether for the purpose of the decision in this case it is necessary to decide whether the period during which a wife is living with her husband can or cannot be counted or considered for any purposes of her acquiring a settlement or status of irremovability in her own right. I do not think any case has gone as far as deciding that that is the state of things. I do not think Lopes, L.J. meant to say that. I think what Lopes, L.J. meant to point out was that the wife was deriving or might have derived a settlement through her husband, and that it was the question whether or not she had derived that settlement through her husband, which was in one sense the important matter or might be the governing fact in that particular case. All I desire to say is whether it be right or wrong, but I take it to be right, because I understand the Court of Appeal (1904) 2 K. B. 121 has affirmed our decision in *West Ham Union v. Holbeach Union* (89 L. T. Rep. 609; (1903) 2 K. B. 627) that to a certain extent that would seem to show that that principle cannot be altogether very strictly applied, and cannot be applied as strictly as Mr. Pritchett contended for. If it be true that the period during which a woman is married has no value whatever except for the purpose of conferring upon her a settlement which is that of her husband, it seems to me it might have been equally well contended that the time during which a child was under sixteen would have no effect for the purpose of the child acquiring a settlement by residence. In the view I take of this case, however, it is not necessary to decide that. All I am prepared to say is that I do not accede to that part of Mr. Pritchett's argument that it is necessary to decide this case upon. The short ground, if I may so call it, upon which I want to decide this case is that in substance I think the learned recorder was right in saying that the principle of the judgment of Blackburn, J. in *Reg. v. St. George's-in-the-East* (22 L. T. Rep. 440; L. Rep. 5 Q. B. 364) applies, and I myself am not able to see that that case is indirectly, certainly not directly, overruled by the House of Lords. It is not referred to in any of the judgments, and I cannot see anything that makes the reasoning upon this part of the case inconsistent with anything which the House of Lords has said. The reasons which he gives, and which I will not repeat, I venture respectfully to adopt as being to my mind conclusive in a case where a husband has left a wife but not deserted her under circumstances which are found as a matter of fact not to amount to desertion. When the husband has left the wife under circumstances which are found as a matter of fact to indicate an intention to return, and when the husband could not be removed—I do not like to even venture on the expression acquiring a status of irremovability, because I am not sure that that might not be used against me hereafter—I think Lord Blackburn points out very good reasons why the wife could not be removed. That seems to me to be part of the reasoning of the case of *Reg. v. St. George's-in-the-East* (*sup.*), which I adopt, and which I respectfully venture to think is sound. Had the husband been here he could not have been removed either before the twelve months or after. Of course, if he had been here for twelve months then Lopes, L.J.'s judgment would have

applied directly. The wife would then have acquired what is called the status of irremovability by virtue of having resided with her husband for a period of twelve months, but it seems to me that we ought to find clear, plain, and distinct language to say that the wife who has in fact resided shall be removable to her maiden settlement in a case in which a husband not having deserted her, and meaning to come back, cannot himself be removed. I think it is pretty plain that the wife does not come within either the original or the amending Act. If it is right that the wife could only be removed when the husband can be removed, then the position is pretty clear. I am very glad to have had the suggestion of what that proviso may mean, but I share a great deal more of the difficulty of Lord Blackburn, even if I had his ability to solve the matter. I think that proviso in the amending Act is one of the most incomprehensible things I have ever had to consider. All I have to decide in this case is this: Here the woman came within the enacting part of the 1st section; she does not come within, in my opinion, the terms of the proviso as I understand it. Therefore it seems to me that unless it is necessary to hold that Mr. Pritchett's proposition must be right—namely, that you cannot consider at all what has been happening to her during the period of coverture when she had been residing with her husband, if it is unnecessary to consider that, inasmuch as the husband could not be removed, I think that those who claim the wife should be removed fail on the principle which Lord Blackburn has laid down. This woman having resided here, there is no state of things which would have made the husband removable if he had been here, and for the present purposes, whether you call it irremovability or not being able to remove him it is a different way of stating that which leads to the same result—namely, that the wife cannot be removed. I therefore come to the conclusion that the order was right, and, as I have said more than once, on the ground that the learned recorder thinks—namely, that the principle of Lord Blackburn's judgment applies. I concur in that view, therefore I think this appeal must be dismissed.

WILLS, J.—I have come with much difficulty to the same conclusion. I need hardly say with much difficulty, because the legislation upon this subject is obscure beyond the power of words to reconcile. Amongst other things, we have to consider a proviso which has been described already in judicial decisions as an example of how language can be used to conceal meaning; and we have also to consider the 34th and 35th sections of the Divided Parishes and Poor Law Amendment Act of 1876, the 35th section of which is a kind of Chinese puzzle, and is beyond measure to interpret. Fortunately, with regard to the interpretation of that there is a kind of paraphrase of it which has been given by Lord Watson, which helps one more than one is helped with regard to many other parts of the enactments upon this difficult subject. Indeed it is admitted, I think, by Mr. Pritchett, with regard to whose argument I wish to indorse all that my Lord has said—so far as my judgment is concerned it has been very able and very interesting and very thorough—that, unless *Reg. v. St. George's-in-the-East* (*sup.*) is overruled, it governs this case.

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Now I understand the reason for supposing it is overruled by the case in the House of Lords of *Medway Union v. Bedminster Union* (*sup.*) is that the reasoning in *Reg. v. St. George's-in-the-East* is founded partly on the case of *Reg. v. Glossop* (12 Q. B. 117) and to some extent follows the same lines, and that *Reg. v. Glossop* has been disapproved of in this case in the House of Lords—that is to say, not the decision of *Reg. v. Glossop*, but the grounds on which it was arrived at. It was *Medway Union v. Bedminster Union* itself in which the decision was approved, but the grounds were disapproved of. If I thought that *Reg. v. St. George's-in-the-East* was really overruled by the case in the House of Lords, of course I should neglect it; but it does not seem to me that the reasoning in the House of Lords goes so far as that. What was said about *Reg. v. Glossop* was that the House disagreed with the view of the majority of the court and agreed with that of Lopes, L.J. Then when we come to see what Lopes, L.J.'s view was, as explained by Lord Watson, it was that where the wife has a derivative settlement from her husband he does not think the wife has the capacity to acquire by residence another settlement in the same parish. That leaves quite untouched the present case, which is not a case where the wife has a subsisting derivative settlement through her husband, and therefore the view entertained by the House of Lords with regard to *Reg. v. Glossop* does not touch the facts of this case, and of course the considerations are also very different where the wife has the settlement by reason of her husband's settlement and where she has none by reason of her husband having no settlement at the time when she is residing in the parish. Under those circumstances we are, as it seems to me, driven to look at the very words of the Act, and the words of the Act are that she shall acquire the status of irremovability if she has been resident for a year before the time she has become chargeable within the parish. It is quite true that in one sense there is a difference between her residence before the husband goes away, and after he goes away, because after he goes away he himself has broken his residence, and therefore she cannot tack on simply as a wife her residence after the break of her husband to that which she had before the residence which was in process of completion before he went away, and she cannot therefore claim to have acquired the status of irremovability because her husband had acquired it. There is no decision, and if there is not a decision, I do not see why we should make one, to prevent her tacking on the residence when she had no settlement by reason of her husband not having a settlement with the residence which she had afterwards after her husband had gone away. It is not at all like the case of the wife and the widow in which case it was held that when the wife had the settlement so long as she was a wife she could not tack on afterwards the residence of her widowhood. The case is not the same, and inasmuch as it seems to me there is no decision which makes it imperative upon us to say that she has not resided, it is better to follow the language of the Act, and say that she has resided for the necessary period. Our late decision in *West Ham Union v. Holbeach Union* (*sup.*) is not entirely

without its bearing upon this matter, because it does show that residence may be completed for the purpose of conferring a status of irremovability where the first portion of it was under a different capacity from the second, and was during the period during which there was a maternal settlement which existed in favour of the child. As it seems to me, there being no express enactment or decision which militates against this view, the residence may be considered as complete within the terms of the statute, and as conferring the privilege of irremovability. Although I follow what my Lord has said about the husband being, I will not say irremovable, but its being impossible to remove the husband on other grounds if he were there, I prefer to put my judgment upon the ground that I have put it—namely, that the two periods may be tacked together—because I do feel that there is a very considerable difficulty between the position of a person who cannot be removed because there is no place to remove him to, and the position of a person who otherwise might be removed and who had a place to which he could otherwise be removed, but who has acquired the protection of irremovability by reason of residence. For these reasons, imperfect as they are—I am very conscious of that—I have come to the conclusion that the learned recorder is right, and that the appeal must be dismissed.

KENNEDY, J.—I am of the same opinion upon the facts which I think are important, and which are found thus: The woman is the wife of a man who has no settlement of his own. The man has left her, not deserted her, and with the intention of returning, and therefore he is in the position really in a sense of being treated as still residing at the place. Under those circumstances, before she becomes chargeable the woman is a married woman with her children who has resided for the statutory period which would confer upon her the status of irremovability if she could be treated as an independent personality. Is she when she becomes chargeable, to be taken away to her maiden settlement, which is the settlement of her father, which she acquired through her father at Tewkesbury, she and her children, or is she to be treated as being chargeable to Birmingham, where she is and where she has resided for the statutory time, and where she is the wife of a man who has not deserted her, who intends to come back to her and her children, and who only for the time is absent? As I understand it, if one may venture to hope one understands the principle on which a great deal of legislation has taken place, there are two important things to be considered—namely, not to separate husband and wife and children and parents—and one may assume that as far as possible the Legislature has not consciously brought about legislation which has affected those governing principles. Now, what has happened here? The husband has no settlement of his own; therefore the wife cannot take a settlement from her husband. She has resided herself as a married woman, it is true, all this time, which would otherwise give her a status of irremovability, and if she is removed to the place of her maiden settlement then there will be a grave question, to say no more, as to whether the children will be able to follow her or will be planted—as I think Mr. Pritchett happily put it—in

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various spots, and certainly she will be separated from her husband because her husband has no settlement where she had. He has no settlement anywhere, in fact, and the whole family would be, as it were, sent floating about to the various points that they might be directed to. Now, if the husband had a settlement there would be no question as I understand it. Her place of settlement would be his place of settlement. But where the husband has no settlement what happens? I have felt as strongly as one can do justifiably, where there is a complicated question of this kind, that no flaw can be found in the judgment of the great judge, Mr. Justice Blackburn, as he was then, in *Reg. v. St. George's-in-the-East*, and Mr. Pritchett to whom I desire to join in tendering my humble tribute of thanks for his argument, frankly admitted that unless the judgment could be treated as overruled, the learned recorder was perfectly right in the judgment he came to, and it could not be upset. But it was said that case was overruled and had been treated as overruled in a number of cases, finally by the judgment of Lord Watson and the reasoning in the *Medway Union v. Bedminster Union*. I confess myself I entirely differ. I see no trace of *Reg. v. St. George's-in-the-East* having been overruled directly or indirectly in any of the cases including the last. On the contrary, I think the point emphasised by Lord Watson in that judgment, where he asserts his affirmance of Lopes, L.J.'s view in the Court of Appeal, pivots on the fact that the husband has a settlement, and where that is so the wife follows that settlement, and you must obey that. That does not exist here. Then can it be said that the Divided Parishes and Poor Law Amendment 1876 has modified either the grounds upon which Lord Blackburn proceeded, or has altered any statement of his as to what he finds the law to be? That really is not suggested. It is again practically admitted, and rightly admitted, that the legislation, so far as the case of wife and husband is concerned, has not affected the statement of law upon which Lord Blackburn gave judgment in that case, the only position which is reasonably consistent, when the husband has no settlement, with the great object of keeping the family together and keeping husband and wife together, subject to this, that if the husband has a settlement of his own, the wife must follow his settlement.

Appeal dismissed.

Solicitors: *Redfern and Hunt*, for *Redfern and Son*, Birmingham; *Surr and Gribble*, for *Brookes and Badham*, Tewkesbury.

May 6 and 9.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

NEW RIVER COMPANY (apps.) v. MAYOR, &C., OF WESTMINSTER (resps.). (a)

Metropolis—Street opened by water company—Reinstatement of street by contractor employed by local authority—Power of local authority to recover expenses of supervising and superintending the works—Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), s. 114.

Where the soil of a street in the metropolis has

been opened up by a water company, the local authority can by virtue of sect. 114 of the Metropolis Management Act 1855 recover the expenses of superintending and supervising the filling in and making good the soil so opened up.

CASE stated on a complaint by the respondents that the appellants did neglect or refuse to pay to the respondents the sum of 89l. 9s. 8d. made up of sums amounting respectively to (a) 81l. 6s. 7d. and (b) 8l. 3s. 1d. alleged to be due to the respondents for expenses incurred in filling in, making good, and maintaining the pavement in the streets within the city of Westminster, where the same had been broken up by the appellants pursuant to the powers contained in the Act of Parliament authorising the company to execute work in the city during the month of Jan. 1903, payment of which sum had been duly demanded of the appellants by the respondents.

At the hearing of the complaint the following facts were admitted or proved:—

In Nov. 1901 the respondents issued to the appellants and the other companies and corporations having statutory powers to open up roads, a "scale of charges for reinstating trenches" to be made by the respondents after the 31st March 1902 in respect of road repairs.

In Oct. 1902 the respondents also issued another "scale of charges for reinstating trenches" to be made by the respondents after the 1st Jan. 1903.

The charges made by the respondents in the first above-mentioned scale were in excess of the actual amounts paid by them to the contractors, and were so made by the respondents to cover so-called incidental expenses (a) alleged to occur during the execution of the works, and (b) which they alleged they were or might be put to by reason of the subsidence or failure of the works during the period of the appellants' liability to maintain the same under sect. 32 of the Waterworks Clauses Act 1847.

The respondents made a subsequent additional increase of 10 per cent. to cover their estimate of the expenses to which they were put for superintending the works during the execution thereof. The second scale of charges did not state the ground on which the additional 10 per cent. was claimed, nor were the appellants informed of the prices in fact paid by the respondents to the contractors until the statement and evidence in relation thereto were made and given in court.

The respondents did in fact exercise some superintendence and supervision over the works.

The works in question were executed for the respondents by certain road contractors under contracts based upon a fixed scale of charges.

It was contended on behalf of the appellants (a) that it was just (within the meaning of sect. 226 of the Metropolis Management Act 1855) that the respondents should be repaid only the amounts actually paid by them to the contractors in respect of the expenses of filling in the ground and making good the pavement or soil, and that no amount ought to be paid for incidental expenses by way of insurance against future possible repairs or otherwise, but that future repairs must be dealt with as and when they became necessary; and (b) that on the true con-

(a) Reported by W. DE B. HENBERT, Esq., Barrister-at-Law.

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struction of sect. 114 of the Metropolis Management Act 1885 the respondents were not entitled to make any charge for supervision or superintendence, although such supervision or superintendence was in fact given, and that the same formed part of the general administrative duties of the respondents.

On behalf of the respondents it was contended that by virtue of sect. 23 of the General Paving (Metropolis) Act 1817; the Waterworks Clauses Act 1847, ss. 31, 32, and 34; the Metropolis Local Management Act 1855, s. 114; and the Metropolis Local Management Act 1862, sect. 82, the respondents were entitled to be fully indemnified in respect of all the work which they had to do in respect of filling in trenches and restoring the streets to a state fit for traffic and that the employment of officers to superintend and supervise such work was an ordinary and necessary expense incurred by the corporation in carrying out the work of reinstatement.

The magistrate was of opinion (a) that it was just that the respondents should be repaid only the amounts actually paid by them to the contractors, and no appeal was brought from that part of his decision; and (b) that in law the respondents were entitled to recover a sum for expenses incurred in respect of the supervision or superintendence of the works.

The learned magistrate delivered the following judgment, which was annexed to the case:

I do not propose to deal with the Waterworks Clauses Act further except in so far as it extends the period to twelve months. In my view the principal Act is the Metropolis Local Management Act 1855, s. 114. There is power for the vestry to break up the roads and to reinstate the pavements. The practice here between the parties is for the water companies to break up the ground and fill in the soil, but for the city, the representative of the vestry under the old Act, to reinstate the pavement. They can either reinstate the pavement personally—do it themselves—or do it by contract, or they can do it part by contract and part by themselves. Here what they charge for is the contract price plus a sum which they say represents the average reasonable sum for keeping it in repair. I think that the sum that they have made a contract to pay is a fair charge whether they pay more or less than other boroughs. I do not stop to consider that now. I will take it that they are reasonable sums, but they are only entitled to charge for the expenses they have actually incurred. They cannot charge on a question of average what might be a reasonable and probable sum. They must charge the sums they have actually spent. They might also by arrangement between the parties charge the contract sum plus 20 per cent. or 25 per cent. if they like to agree, but it is for them to prove there is such an agreement, which up to the present I have had no such proof of. An agreement between corporations is a very formal matter and must be proved in solemn form. I have had no evidence that there is such an agreement. Then the question of the 10 per cent. is now the only point I have to consider. The question is really as to whether that is part of the expenses in making good the pavement. If two persons were to arrange that one was to dig a trench and another was to repair the pavement—private individuals—it would be important that they should have somebody, such as a surveyor, to see the work was properly done; it is to the benefit of both parties that the work should be properly done. The charge of 10 per cent. for supervision I take it includes also surveyor's expenses, which as between individuals would be charged like a surveyor's or architect's expenses. Whether 10 per cent. is a reasonable sum I have not yet decided, but I think

they are entitled to charge a sum for supervision. If 10 per cent. is agreed on as a reasonable sum I think they may properly charge that. I propose to leave open really the question of quantum with regard to the balance. I think I have expressed my view of the law. The matter is important to both parties, and most likely the parties would like to have a case stated in order that they might have a decision of the court on that point.

After hearing the case the magistrate made an order against the appellants for the recovery (1) of the sum of 73*l.* 11*s.* 11*d.* in respect of claim (a) of the respondents, and (2) of a sum (to be hereafter assessed by him if necessary) in respect of claim (b) of the respondents.

By 57 Geo. 3, c. xxix (the General Paving (Metropolis) Act 1817, s. 23, it is (*inter alia*) enacted as follows:

That when and as often as any payment of any streets or public places in any parochial or other districts within the jurisdiction of this Act shall be broken or taken up by any water or gaslight company, or by any commissioners of sewers, or by any person or persons acting by or under their respective orders or authorities, or by any other person or persons by the directions of this Act or by and with or without the consent of the commissioners or trustees or other persons having the control of the pavements in any parochial or other district wherein any street or public place shall be situate the pavement whereof or any part whereof shall be broken or taken up, then all such part or parts of the pavements of any such street or public place which from time to time and at all times shall be broken and taken up as aforesaid and the pavement contiguous thereto as far as may be rendered necessary in the judgment of a surveyor of pavements to such commissioners, or trustees, or other persons having the control of pavements in such parochial or other districts, and after the ground opened shall be refilled and rammed down pursuant to the directions of this Act, shall be with all convenient speed completely and substantially repaved with all necessary stones, ballast, gravel, and other materials, and shall be kept in complete repair by the pavior or mason then contracting with or employed by such commissioners or trustees, or other persons, or by such person or persons, as they may from time to time appoint for that purpose under the inspection and direction and to the satisfaction of the said surveyor of pavements to the said commissioners or trustees or other persons for the periods following (that is to say), all such part or parts of the pavements of any such street or public place which from time to time and at all times shall be so broken or taken up as aforesaid, and the pavement contiguous thereto as aforesaid which shall be so broken or taken up for the purpose of making and laying down any main or mains of pipes, or of substituting iron for wooden pipes, or of making any sewer, vault, or drain for twelve calendar months next ensuing the breaking and taking up of the same pavements, and all such part or parts of the pavements of any such street or public place which from time to time and at all times shall be so broken or taken up as aforesaid, and the pavement contiguous thereto as aforesaid which shall be so broken or taken up for the purpose of altering the position of or of repairing any pipes, stop-cocks, or plugs, or of repairing, cleansing, or altering any sewer, vault, or drain for three calendar months next ensuing the breaking and taking up the same pavements, and that the costs, charges, and expenses of taking out any ground and filling in hard rubbish or other good materials, and of repairing and keeping in necessary repair for the periods aforesaid all or any such pavement in manner aforesaid, and all the expenses of cartage and all other charges and expenses attending the same, as well as all costs and charges which may be incurred pursuant to the directions of this Act by any surveyor of pavements

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in and about executing and performing any works or matters neglected to be executed and performed by any company or commissioners of sewers as hereinbefore directed, shall be ascertained and fixed from time to time by the surveyor of pavements to such commissioners or trustees, or other persons within whose parochial or other districts such works and other matters shall have been performed and executed, or such pavements shall have been broken up and repaved.

By sect. 28 of 10 & 11 Vict. c. 17 (the Waterworks Clauses Act 1847), which Act, with the exception of certain sections not affecting this case, is incorporated in the New River Company's Act of 1852 (15 & 16 Vict. c. clx.), power is given to the undertakers (namely, the appellants) to break up streets, &c., under the superintendence of the persons having the control or management thereof (namely, the respondents) or of their officer. By sect. 31 of the Act it is provided that streets are not to be broken up except under the superintendence of such persons as aforesaid, but if they fail to superintend the undertakers may perform the work without them, and by sect. 32 of the Act it is provided that the streets, &c., broken up by the undertakers are to be reinstated by them without delay. By sect. 34 of the Act it is provided that in case of delay by the undertakers other parties (namely, the respondents) may cause the work so delayed or omitted to be executed, and the expense of executing the same shall be repaid to such persons by the undertakers.

By 18 & 19 Vict. c. 120 (the Metropolis Local Management Act 1855), s. 114, it is enacted as follows:

Provided also that whenever the permanent surface or soil of any street is broken up or opened it shall be lawful for the vestry or district board of the parish or district in which the same is situate, in case they think it expedient so to do, to fill in the ground and to make good the pavement or surface or soil so broken up or opened, and to carry away the rubbish occasioned thereby instead of permitting such work to be done by the company or person by whom such surface or soil is broken up or opened, and the expenses of filling in such ground and of making good the pavement or soil so broken up or opened shall be repaid on demand to the vestry or board by such company or person.

By sect. 225 of the last-mentioned Act it is enacted as follows:

In every case where the amount of any damage, costs, or expenses is by this Act directed to be ascertained or recovered in a summary manner, or the amount of any damage, costs, or expenses is by this Act directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for such amount shall in case of dispute be ascertained and determined by and shall be recovered before two justices.

By virtue of the Metropolitan Police Courts Act 1839, s. 14, and the Summary Jurisdiction Act 1848, s. 33, the proceedings may be taken in the metropolis before a single metropolitan police magistrate.

By 25 & 26 Vict. c. 102 (the Metropolis Management Amendment Act 1862), s. 82, it is enacted as follows:

In every case in which any company or person shall be liable under the firstly recited Act (the Metropolis Local Management Act 1855) to reinstate the pavement, surface, or soil of any street under the control of any vestry or district board which may have been broken

up or opened, or to repay to such vestry or board the expenses of reinstating the pavement, surface, or soil of any street every such company or person shall be liable to reinstate the pavement, surface, or soil, or to pay the expenses of reinstating the pavement, surface, or soil, of such parts of the street as shall have been so broken up or opened, as well as of the part or parts contiguous thereto which may be affected by the works of such company or person to the reasonable satisfaction of the surveyor for the time being of the vestry or district having control over the pavements in such parish or district.

E. A. Jelf (Courthope-Munroe with him) for the appellants.—The question here is whether the respondents are entitled to charge the cost of superintending the work in addition to what they pay to their contractors. That depends on sect. 114 of the Metropolis Management Act 1855 which says that "the expenses of filling in such ground and of making good the pavement or soil so broken up or opened shall be repaid on demand to the vestry or board by such company or person." [Lord ALVERSTONE, C.J.—Why does not that include the proper cost of supervision?] The local authority have to see generally to the supervision of all the various works under their control. That is part of their general duties, and all we have to pay is the expense of filling and making good. In the Private Streets Works Act, 1892, which deals with a similar matter this question is dealt with in terms, for it says that the expenses of superintendence may be recovered. That is provided for by sect. 9, sub-sect. 2, of that statute, and that, I submit is an indication that the Legislature, if they wish to include expenses of superintendence enact it in so many words. If the contractor had been employed by the undertakers, as at one time he would have been, the local authority, though they were bound to supervise, had no power to charge for the superintendence. Outside the London area by the Waterworks Clauses Act, the undertakers would have had to make good. He referred to the Waterworks Clauses Act 1847, ss. 28, 29, 30, 31, 32, and 34. Those sections form a scheme, and I contend under that that the superintendence could not be charged against the water company. He referred to

Vestry of St. Luke v. North Metropolitan Tramways Company, 35 L. T. Rep. 329; 1 Q. B. Div. 760;

General Paving (Metropolis) Act 1817 (Michael Angelo Taylor's Act) (57 Geo. 3, c. xxix.), s. 23; *Walthamstow Local Board v. Staines*, 65 L. T. Rep. 430; (1891) 2 Ch. 606.

Morton Smith for the respondents.—The appellants, by referring to certain statutes which do not apply to the metropolis are trying to cut down the rights of local authorities within the metropolis. Up to 1865 the position was this, that so far as regards the metropolis (namely, the parishes to which Michael Angelo Taylor's Act applies) the water company had no right whatever to do this work themselves. Under Michael Angelo Taylor's Act the local authority were bound to do the work and employ a contractor, and they were entitled to recover the expenses they had paid the contractor and all other expenses they were put to. The other side contend that because the Waterworks Clauses Act was passed in between the earlier statute and the

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Metropolis Local Management Act 1855, when you come to read the word "expenses" in the later statute that word is to be cut down and the rights of the local authority are to be reduced, and the local authority is to have a liability put upon it which did not exist at the time of the passing of the Metropolis Local Management Act in 1855. The respondents contend that they are entitled to charge against the appellants as expenses under sect. 114 of the Act of 1855 all the special expenses which they are put to. [He was stopped.]

LORD ALVERSTONE, C.J.—This case depends almost on the question of fact. It depends upon the construction of sect. 114 of the Metropolis Local Management Act 1855. I think there is no doubt that under Michael Angelo Taylor's Act the vestry were entitled to get all the charges and expenses attending the same. That would cover the expenses of their men's time and proper superintendence. The Waterworks Clauses Act does not apply to the metropolis—I mean for this purpose—because it does not exempt for this purpose the companies whatever they are from being liable under the Act already existing, that would be Michael Angelo Taylor's Act before the Metropolis Local Management Act of 1855, and sect. 114 afterwards. Therefore, at the time the Waterworks Clauses Act was passed, in the year 1847, Michael Angelo Taylor's Act was in force. Now, when the Act of 18 & 19 Vict. comes, the language is that of sect. 114. Mr. Jelf has argued very fairly and strenuously that the words "the expenses of filling in such ground and of making good the pavement or soil so broken up or opened shall be repaid on demand to the vestry or board by such company or person" mean the work actually done, and do not mean the superintendence of the work. It seems to me that it really is a question of fact, and if the magistrate is of opinion, as he is in this case, that this is really part of the expenses of doing the work, it is that which the local authority are entitled to recover. Now, the magistrate has put it in this way: "The question is really as to whether that"—that is, the 10 per cent. which, of course, he has not given them, but the quantum has to be ascertained—"is part of the expenses in making good the pavement. If two persons were to arrange that one was to dig a trench and another was to repair the pavement—private individuals—it would be important that they should have somebody such as a surveyor to see that the work is properly done. It is to the benefit of both parties that the work should be properly done. The charge of 10 per cent. for supervision, I take it, includes also surveyors' expenses which as between individuals would be charged like a surveyor's or architect's expenses. Whether 10 per cent. is a reasonable sum, I have not yet decided, but I think they are entitled to charge a sum for supervision." It seems to me that dealing with this matter in this section in a practical way, and assuming they were, as I think they were entitled, to this charge under Michael Angelo Taylor's Act, what the Metropolis Local Management Act has said is that the expenses of filling in the ground and making it good shall be allowed. I agree with the view taken by the learned magistrate—that it was a fair and reasonable charge for seeing that the work was properly done either by the contractor by whom

it is done or by their own men, if they choose to employ their own men. This is a charge which comes within the words "expenses of filling in such ground and making it good." I think the learned magistrate was right upon the question which was left to him to be ascertained as to it being a proper charge, and therefore this appeal must be dismissed.

WILLS, J.—I am of the same opinion. I suppose the reason why the city of Westminster employ contractors to do this work is that they think it will be more cheaply and better done by persons whose regular business it is than by their own workmen. Then, if that be so, I should have thought that it follows almost as a matter of course that, according to the general principles of human nature and of experiences in matters of this kind, nobody in his senses, if he was having the work done for himself, would think of giving a contractor a free hand and allowing him to do the work without any counteracting influence or supervision to see that it was properly done. If a man builds a house and employs a contractor to do it he is sure to employ a clerk of the works also to act as a kind of watch-dog over the contractor; and when he comes to ask himself how much his house has cost him and what has been the expense of building the house, he certainly would throw in the wages of the person employed to check the contractor and see that the work was properly done. On those grounds it seems to me it is a reasonable thing to say that the expense of such necessary and reasonable superintendence is part of the cost or expense of filling in the ground and making good the pavement.

KENNEDY, J.—I am of the same opinion. It seems to me that one must look at it as a reasonable question as to whether this should be included under the head of expenses. Now, expenses cannot really mean the expenses of merely filling in the ground and the expenses of making good the pavement or soil merely as manual acts. It includes surely a degree of supervision, and skilled supervision, which, looking at the nature of the work, the work requires; and, if it has been honestly expended, the payment so made, and which is now sought to be charged by way of supervision, seems to me to be a thing which is reasonable, and the learned magistrate has expressed it to be so looking at the particular work.

Appeal dismissed.

Solicitors: *Thompson and Debenhams; Allen and Son.*

Friday, May 13.

(Before CHANNELL, J.)

MANCHESTER CARRIAGE AND TRAMWAYS COMPANY LIMITED v. SWINTON AND PENDLEBURY URBAN DISTRICT COUNCIL. (a)

Tramway—Purchase by local authority—Depot outside district of local authority—"Used with and suitable to" the undertaking—Liability of local authority to pay for—Tramways Act 1870 (33 & 34 Vict. c. 78), s. 43.

By sect. 43 of the Tramways Act 1870 it is provided: "Where the promoters of a tramway

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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in a district are not the local authority, the local authority . . . may" (within certain specified times) " . . . by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value . . . of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district."

The tramway company was the owner of a large depot situated some distance outside the boundary of the district council, but found by an arbitrator to be "used with and suitable to" the undertaking of the tramway company within the council's district.

The district council having given notice to the tramway company that they were required to sell to the council under the conditions and in the manner provided by sect. 43 of the Tramways Act 1870 so much of their works and undertaking as were within the council's district.

Held, that the council were bound to pay for this depot.

Held, further, that the words "within such district" applied to the "undertaking," and not to "all lands, buildings, works, materials, and plant of the promoters."

AWARD stated in the form of a special case pursuant to sect. 7 of the Arbitration Act 1889.

By the Manchester Suburban Tramways Act 1879 it was enacted (so far as material) as follows:

2. The following Acts and parts of Acts (except where expressly varied by this Act) are incorporated with and form part of this Act—that is to say, Part 2 (Construction of Tramways) and Part 3 (General Provisions) of the Tramways Act 1870.

4. Subject to the provisions of this Act the company (meaning thereby the Manchester Suburban Tramways Company) may make, form, lay down, work, use, and maintain the tramways hereinafter described in the lines and according to the levels shown on the deposited plans and sections, and in all respects in accordance with those plans and sections, with all proper rails, plates, works, and conveniences connected therewith.

The tramways hereinafter referred to and authorised by this Act are: The Swinton lines, 1 mile 3 furlongs 7 chains and 3 yards in length, the whole of which is double line, except two chains at the termination thereof to be wholly situate in the townships of Pendlebury and Swinton, in the parish of Eccles, in the county of Lancaster, and consisting of the tramways numbered on the deposited plans as follows—that is to say, tramways numbers 1 and 1A, commencing respectively in Manchester-road by junctions with the tramways authorised by the Salford Improvement Act 1875 at their termination at the boundary of the township of Pendleton at points eighteen yards or fifteen yards or thereabouts respectively south of the public lamp-post at the corner of the Manchester-road and the Bolton-road, and passing thence in a north-westerly direction along Manchester-road and Chorley-road, and terminating at a point in Chorley-road eighteen yards or thereabouts north of the north-westerly corner of Partington-lane, being the corner of Swinton Parish Churchyard.

34. For the protection of the mayor, aldermen, and burgesses of the borough of Salford (in this section referred to as the corporation) the following provisions shall have effect (that is to say). . . (8) Nothing in this Act shall authorise the company to use or in any

way interfere with any tramway not being a tramway of the company which now is or hereafter shall be laid in the borough of Salford.

35. In the making, working, and using of the tramways in this Act, called the Swinton Lines, the following provisions for the protection of the Local Board for the District of Swinton and Pendlebury, shall be observed and have effect. . . (3) Every tram-car and carriage travelling upon the Swinton lines which shall belong to or be used by the company, their lessees, licensees, or assigns, shall travel without delays (except necessary stoppages for taking up or setting down passengers, and in cases of emergency) from Swinton to Manchester and from Manchester to Swinton, and so that passengers shall not be required to change carriages at Pendleton or elsewhere. (4) The fares from Manchester to Swinton, or from Manchester to Pendlebury, and from Swinton to Manchester, or from Pendlebury to Manchester, shall not, unless with the consent of the said local board, exceed 4d. each inside and 3d. each outside.

By the Manchester Carriage and Tramways Company Act 1880, the Manchester Suburban Tramway Company was dissolved, and all the rights, powers, and privileges which, by the said Act of 1879 (lastly hereinbefore recited), were conferred upon the company were by the Act transferred to and vested in a company by the Act incorporated by the name of "The Manchester Carriage and Tramways Company" (hereinbefore called the tramways company), who were by the Act authorised to exercise all those rights, powers, privileges, and authorities (except only the powers of raising money, which powers and the provisions of the Act of 1879 relating thereto, were thereby repealed) as fully in all respects as the Manchester Suburban Tramways Company might have exercised the same if the Act now in recital had not been passed.

By the Manchester Carriage and Tramways Company's Order 1897, confirmed by the Tramways Order Confirmation (No. 1) Act 1897, it was enacted (so far as is material) as follows—that is to say:

2. The provisions of . . . the Tramways Act 1870 are hereby incorporated with this order, except where the same are inconsistent with or expressly varied by this order. . . .

5. The tramways by this order authorised shall be deemed to form part of the undertaking authorised by . . . the Act of 1879 (meaning thereby the Manchester Suburban Tramways Act 1879. . . .

8. The promoters (meaning thereby the tramways company) may construct and maintain, subject to the provisions of this order and in accordance with the plans and sections deposited at the office of the Board of Trade for the purposes of this order, as the same have been amended previous to the passing of the Act confirming this order . . . the tramways hereinafter described, with all proper rails, plates, curves, points, offices, weigh-bridges, carriage-houses, engine-sheds, warehouses, works, and conveniences connected therewith, or for the purposes thereof, and may work and use the same.

The tramways authorised by this order are: Tramways No. 1, 2 miles 1 furlong and 0.20 chain in length, of which 4 furlongs and 5.20 chains is double line, and 1 mile 4 furlongs and 5 chains is single line, commencing in Chorley-road by a junction with the existing line authorised by the Act of 1879 in that road, at a point thirty yards from the south-easterly corner of the southerly end of Station-road, and passing thence along Station-road and the road leading from Manchester to

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Bolton, called Bolton-road, and terminating at Irlams-o'-th'-Height by a junction with the existing lines, authorised by the Act of 1879, at the boundary of the borough of Salford.

49. The powers of purchase given by sect. 43 of the Tramways Act 1870 shall, as regards the following portions of the undertaking, be exercisable by the respective local authorities of the respective districts hereinafter referred to as follows: (a) As regards tramway No. 1 (within the urban district of Swinton and Pendlebury), as if the construction of that tramway had been authorised by the Act of 1879.

53. Where, under the provisions of the Tramways Act 1870 and this order, any matter in difference is referred to the arbitration of any person nominated by the Board of Trade, the provisions of the Arbitration Act 1889 shall, except where otherwise specially provided, apply to every such arbitration, and the decision of the arbitrator shall be final and conclusive, and binding on all parties.

The tramways authorised by the Manchester Suburban Tramways Act 1879 were completed and opened for traffic in the year 1880, and the tramways authorised by the Manchester Carriage and Tramways Company's Order 1897 were also completed and opened for traffic. These tramways are hereinafter collectively referred to as "the Swinton lines."

In the year 1877, before the passing of the Act and order hereinbefore recited, the Manchester Suburban Tramways Company or their predecessors in title became lessees of another tramways undertaking belonging to the Corporation of Salford, extending from the boundary of the City of Manchester to the boundaries of the Swinton and Pendlebury urban district in one direction and the parish of Eccles in another direction. These lines are hereinafter collectively referred to as "the Salford lines." After the incorporation of the Tramways Company that term became vested in them for the residue then unexpired thereof.

The tramways company are the owners of two large depots situate respectively in Ford-lane and Church-street, Pendleton, Salford, some distance outside the boundary of the Swinton and Pendlebury district. These depots were originally constructed or adapted by the predecessors in title of the tramways company in 1875 to serve as depots for a large omnibus, cab, and fly business that they carried on before the tramways were made. They were modified to some extent in anticipation of the opening of the tramways, and have been also to some extent rearranged or added to since, but they now cover the same area and are substantially the same depots as they were in 1877.

Between the years 1877 and 1880 the two depots were used by the predecessors in title of the tramways company as depots in connection with the Salford lines, of which they were lessees, though the omnibus, cab, and fly business was still carried on there. Upon the opening of the Swinton lines in 1880 they were also used as depots in connection with those lines, a certain proportion of the cab horses and stock being removed to make room for the additional horses and cars required for the Swinton lines. The depots were the only depots used for the Swinton and Salford lines.

All the cars for both the Swinton and Salford lines were kept at the Church-street depot, as there was no physical means of access for cars to Vol. XC., 2336.

the Ford-lane depot, there being no tram lines thereto or therein. As regards the Church-street depot the means of access for cars from the Swinton line is by running over the Salford lines and then over a small spur of line laid down by the tramways company. The cars so kept at the Church-street depot were thirty-eight in number, of which fourteen were exclusively used for the through route over the Swinton lines to Manchester and back, four were exclusively used on the Eccles branch, and twenty were used on the rest of the Salford lines.

Of the total number of horses kept at the two depots sixty-four were used exclusively on the Eccles branch, 168 on the rest of the Salford lines, 200 for the omnibus, cab, and fly business, and 160 exclusively for the through traffic between Swinton and Manchester. The horses for the Swinton traffic proper were all kept in the Church-street depot. At holiday-time and at other times of great pressure upon the Swinton lines both cars and horses, which were usually set apart for the other routes, and also the omnibus, cab, and fly horses, were to some extent requisitioned for the Swinton to Manchester traffic.

At the Ford-lane depot the fodder for all the horses in the Ford-lane and Church-street depots, and also in another depot (not the subject of the present inquiry) was kept and prepared, and there was an infirmary for such horses from both the Swinton and the Salford lines.

Since the date of the opening of the Swinton lines those lines have been worked as a part of a common undertaking with the Salford lines. The tramcars have been run through and with through fares from Swinton to Manchester and back over the Salford lines, and obviously, as a matter of ordinarily prudent management, the Swinton and Salford lines would always continue to be worked together as a part of one system.

On the 22nd Jan. 1901 the Swinton and Pendlebury Urban District Council duly gave notice to the tramways company that they were required to sell to the council, under the conditions and in the manner provided by sect. 43 of the Tramways Act 1870, so much of the tramways works and undertaking of the tramways company as are within the urban district of Swinton and Pendlebury.

On the 27th April 1901 the lease to the tramways company of the Salford line expired.

On the 26th April 1901 the tramways company agreed to sell, and the Corporation of Salford agreed to purchase the whole of the tramcars and horses belonging to the company, theretofore used upon the Salford and Swinton lines, such agreement being subject and without prejudice to the right and claims of any local authority under sect. 43 of the Tramways Act 1870. The price of the same was, by a further agreement in writing, dated the 1st May 1901, fixed at 42,500*l.*, and the same were transferred to the Corporation of Salford accordingly. The company, by the agreement of the 26th April 1901, further agreed to grant to the corporation, as from the 2nd May 1901, a lease of certain premises, including the Church-street and Ford-lane depots, and such agreement was carried into effect by an indenture dated the 9th Oct. 1901, and made between the tramways company of the one part and the Corporation of Salford of the other part, whereby the

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company demised unto the corporation the two depots (less certain excepted portions) for the term of two years from the 28th April 1901, subject to a proviso that the lease was subject and without prejudice to the rights and claims of any authority under sect. 43 of the Tramways Act 1870, or any statutory modification or re-enactment thereof.

On the same 28th April 1901 an agreement in writing was entered into between the tramways company and the District Council of Swinton and Pendlebury, whereby it was agreed as follows, that is to say:

1. The council shall take possession of the tramways so constructed as aforesaid, in pursuance of the Manchester Suburban Tramways Act 1879 and the Manchester Carriage and Tramways Company's Order 1897 respectively, on the 28th of April instant.

2. The council, in addition to the value to be paid by them for such tramways, in pursuance of sect. 43 of the Tramways Act 1870, and contemporaneously with the payment of such value, shall pay to the company interest at the rate of 4l. 10s. per centum per annum, calculated from the 28th April inst. to the date of payment, upon the sum which the referee to be appointed by the Board of Trade shall determine as the value of such tramways, possession whereof is agreed to be given by clause 1 hereof.

3. The council shall not interfere with (except for the purpose of necessary repairs) or reconstruct any of the said tramways before arbitration under the said sect. 43 of the Tramways Act shall have taken place.

4. Nothing herein contained shall be deemed to prejudice or affect the question as to what lands, buildings, works, materials, and plant (if any) of the company are suitable to and used by the company for the purposes of their undertaking within the district of the council within the meaning of the said sect. 43 of the Tramways Act 1870.

Since the 28th April 1901 the Corporation of Salford have worked both the Salford and Swinton lines as a common undertaking in pursuance of an agreement made by them in that behalf with the Swinton and Pendlebury District Council, dated the 13th July 1899 (which is scheduled to the Salford Corporation Act 1899) whereby it was agreed that forthwith, after the purchase of the Swinton lines by the urban district council, the council should grant to the corporation a lease thereof for the term of twenty-one years, that during the interval between the time when the council should have obtained possession of the Swinton lines and the date of the lease the corporation should maintain a service of tramcars thereon, and that the lease should contain a covenant by the corporation binding them during the term of the lease to provide and maintain a service of tramcars on the tramways not less frequent or less efficient or at greater fares than the existing service of the tramways company.

On the 29th Aug. 1902 the Board of Trade, by writing under the hand of an assistant secretary thereof in exercise of the powers conferred upon them by the Tramways Act 1870 on the joint application of the urban district council of Swinton and Pendlebury, and of the Manchester Carriage and Tramways Company Limited, appointed Sir Frederick Bramwell, Bart., F.R.S. as referee, to determine the value (exclusive of any allowance for past or future profits of the undertaking or any compensation for compulsory sale or other consideration whatsoever) of the tramways constructed within the urban district

of Swinton and Pendlebury under the authority of the Manchester Suburban Tramways Act 1879 and the Manchester Carriage and Tramways Company's Order 1897, and of all lands, buildings, works, material, and plant of the Manchester Carriage and Tramways Company suitable to and used by them for the purposes of the undertaking within such urban district authorised by the Act of 1879 and order of 1897.

At the hearing of the reference on the 27th March 1903 it was agreed between the parties that Mr. James More, junior, on behalf of the company and Mr. J. D. Wallis on behalf of the district council should (without prejudice to the question referred to hereafter as to whether the district council is compellable to buy the two depots or either of them) value the fixtures, fittings, and utensils in and upon the two depots, and that the amount of their valuation subject to a reference to the referee in case they should differ should be included in his award.

At the hearing of the reference, counsel for the Swinton and Pendlebury Urban District Council admitted that the council were bound to purchase and pay for the actual tramways within their district authorised by the Act of 1879 and the order of 1897 hereinbefore set forth, but they contended that under sect. 43 of the Tramways Act 1870 they were not compellable to purchase either the Ford-lane or the Church-street depot on the ground that even if such depots or either of them were suitable to and used by the tramways company for the purposes of the tramways they were both of them situated geographically without the district of the council, and that the section only made it obligatory upon the local authority to purchase that which was within their district.

Counsel for the tramways company contended that if such depots were in fact suitable to and used with their undertaking within the council's district the council were under the section compellable to purchase them, although the depots themselves were outside the district.

The referee having inspected the tramways and depots, and, having heard the parties, their counsel, and witnesses, found as a fact that the Ford-lane depot, although in a limited sense used with the undertaking of the tramways company within the district of the council, is not suitable to such undertaking, and he further found as a fact that the Church-street depot was used with and is suitable to the undertaking.

He therefore awarded that the value, exclusive of any allowance for past or future profits of the undertaking or any compensation for compulsory sale or other consideration whatsoever) of the tramways constructed within the urban district of Swinton and Pendlebury under the authority of the Manchester Suburban Tramways Act 1879 and the Manchester Carriage and Tramways Company's Order 1897, and of all land, buildings, works, materials, and plant of the Manchester Carriage and Tramways Company suitable to and used by them for the purposes of the undertaking within such urban district authorised by the Act of 1879 and order of 1897 is as follows: (a) The value of the tramway lines, including an agreed sum of 1250l., 24,689l.; (b) the value of the land and buildings constituting the Church-street depot and the tramway lines therein and the tramway line in Church-street leading into the depot, 24,009l.; (c) the

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value of the fixtures and fittings in and upon the Church-street depot (as per the valuation of Messrs. More and Wallis hereinbefore referred to), 308*l.*; or a total of 49,006*l.*

Should the court be of opinion that the council are not compellable to purchase or pay for the Church-street depot then the items (b) 24,009*l.* and (c) 308*l.* must be deducted from the above total, and in such event he awarded the value to be the sum of 24,689*l.*; and he further awarded that the expenses of the reference and award be borne and paid by the Swinton and Pendlebury Urban District Council.

Fletcher Moulton, K.C. (Eldridge and E. F. Sanders with him) for the tramway company.—On the true construction of sect. 43 of the Tramways Act 1870 the local authority must take all the undertaking within the district, together with all the lands, buildings, works, materials, and plant suitable to and used for the purpose of such undertaking. The arbitrator has found here that this depot was used with and is suitable to the undertaking within the district of the council, and they are bound to pay for it even although it may be physically situated outside their district.

Balfour Browne, K.C. (George Rhodes with him) for the district council.—The council cannot be compelled to pay for this depot, for they only have power under sect. 43 of the Tramways Act 1870 to buy the undertaking with the suitable lands, buildings, works, materials, and plant used with the undertaking and situated within their district. This depot, which the arbitrator has found to be used with and suitable to the undertaking, besides being situated outside the council's district, was used for other purposes than the tramway undertaking. It is not, therefore, suitable within the section. He referred to

North Metropolitan Tramways Company v. London County Council, 72 L. T. Rep. 586.

CHANNELL, J.—I am afraid I feel bound by the binding of this special case. I think if Sir Frederick Bramwell had been alive I should have been inclined to send it back to him. I think there is a substantial difficulty about the entirety of this building being found to be suitable to and used for the purposes of this undertaking when there are facts set out in considerable detail which show that it was only partly used for the purposes of this part of the undertaking, and a much greater use of it was made for the purposes of the other part of the undertaking. There really is very great difficulty in understanding exactly how it was that the arbitrator came to that conclusion. I do see that a similar question arises, not to a large extent, but to some extent, with regard to the other buildings, and that may, to some extent, account for this. The point that is clearly submitted to me is this: In the case of a building which is outside the district of the local board, assuming as a matter of fact that the building was at the time of the undertaking being taken over—"then" is the word used (I do not know whether it is at the beginning of the notice, or at the expiration of the notice, and it does not signify)—assuming it was then suitable to, and used by them for, the purposes of their undertaking, the point is, whether the purchasers are bound to pay for that building. I think it is quite clear that they are. They are bound to pay for the building: there might be a doubt whether

they are bound to purchase it, but, if they are bound, as they clearly are in my view, upon the terms, to pay for it, I think one would read the two consistently by saying, therefore, in that case it must be included in the purchase, and must be deemed to be part of the undertaking within the district for the purpose of this purchase. But the other part I am really quite clear about. The reason why, grammatically, "within such district" must refer to the undertaking is not merely because it is the last thing, but because, when you look at some of the other things, some of them are movable things. With reference to the plant, "suitable for the purposes of the undertaking" does not mean the plant within the district suitable to the purposes of the undertaking, but it means plant suitable to the undertaking within the district. Therefore, if it means that there, it means it in reference to the building also, it seems to me. So that, upon that point, which the arbitrator has clearly referred to me, I have a strong opinion in favour of the view, I understand, he himself took. Therefore that point I must decide for the company. Then there comes the question of how to deal with the other matter. Any findings of fact that the arbitrator has made are binding upon me. Even if he wished to refer them to me under the Arbitration Act, he could not do so. He has only power to state cases upon questions of law. Consequently, even if he wished to do it, I do not see that he could refer it to me. The only way in which it can be done is this, and sometimes it is done. Sometimes the court assumes a jurisdiction which must be very near the border line of dealing as a question of law with the question of whether there is any evidence upon which he could so find. The only way, as it seems to me, in which I could deal with this point as a question of law is by saying that there was no evidence upon which the arbitrator could find that this was suitable to the undertaking. Now, I should have a little difficulty about that. If it clearly means that the entirety of this big building was both used for, and suitable to, I think there is a little difficulty. But I do not think I can say there is no evidence. It is always such a troublesome question. Upon the evidence that he has stated, I frankly say I do not see how he arrived at the conclusion that he did about the entirety. I think that he must have had some reasons which I do not fully appreciate. That is why, if it were possible, I should have liked to clear it up, but, as it is, it does seem to me that the only possible doubt as to whether he has or has not found this as a question of fact arises from the use of the word "with" in the case. There he says: "I find as a fact that the Church-street depot was used with, and is suitable to, the undertaking." "With" is a shorter word than "for the purposes of," and I think that the arbitrator has done something besides that in variation of the words. He has varied the order in which they come. In the Act of Parliament it is: "Suitable to, and used by them for, the purposes of." Then, in varying the order, he has, perhaps not unnaturally, substituted the word "with" for the words, "for the purposes of." Otherwise it would come in a little awkward. If I could think that he meant to avoid finding that it was used for the purposes of, possibly I should say that I could not act upon

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the finding, but, when you compare it with what he has found in the next clause, he goes back and uses the words in the order in which they appear in the Act of Parliament, and says: "Suitable to and used by them for the purposes of the undertaking," and I think that he therefore shows on the face of this award that, when he used the word "with," he meant it to be the same thing as "for the purposes of the undertaking." Therefore, though with some reluctance—a reluctance that I only feel, as I said just now, in cases where one has not power to review the facts, but has to review a portion of the matter, and one feels that perhaps one is not doing complete justice in the matter—I feel bound to say, upon the point of law, which is clearly referred to me, I must come to the decision which I have already mentioned, and that I somewhat reluctantly decide that nothing else is open to me. The result is, I think I must support the award for the larger figure.

Judgment accordingly.

Solicitors: *Ayrton, Biscoe, and Barclay*, for *Brett, Hamilton, and Turbolton*, Manchester; *Trass and Taylor*, for *L. C. Evans*, Town Clerk, Salford.

Supreme Court of Judicature.

COURT OF APPEAL.

May 31 and June 1.

(Before VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.)

Re STRAND WOOD COMPANY LIMITED. (a)
APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up—Summons taken out by liquidator for alleged misfeasance by directors—Security for costs of application—Practice.

The court has no jurisdiction to require the liquidator of a company which is in course of being wound-up to give security for the costs of an application against directors of the company for misfeasance under sect. 10 of the Companies (Winding-up) Act 1890. But an order for payment of costs by the liquidator personally will be made in a proper case.

The principle established by Cowell v. Taylor (53 L. T. Rep. 483; 31 Ch. Div. 34) considered and applied.

SPECIAL resolutions were passed and confirmed at extraordinary general meetings of the above-named company, held respectively on the 21st Jan. 1902 and the 6th Feb. 1902, for the voluntary winding-up of the company and appointing a liquidator.

On the 19th April 1904 a summons was taken out by the liquidator, under sect. 10 of the Companies (Winding-up) Act 1890, against some of the directors of the company, seeking to make them liable for moneys of the company alleged to have been misapplied by them.

On the 28th April 1904 two of those directors took out a summons asking that the company and the liquidator might be ordered to give security for the costs of his application upon the ground

that the company had no assets—the whole of its property having been transferred on reconstruction to a new company formed for that purpose—and that the liquidator was, as the applicants were informed and believed, a man of no financial position.

In opposition to that application the liquidator stated that he retained control of the greater part of the assets of the company pending the discharge of outstanding liabilities, which assets would be available for costs; that the new company had sanctioned the issue of the summons by the liquidator; and that it was not true that he was a man without property.

The registrar before whom the summons came on to be heard refused to make any order upon it; but he gave leave to appeal.

The applicants now appealed accordingly.

A. H. Jessel for the appellants.—The registrar refused to order the liquidator and the company to give security for costs in this case on the authority of

Re W. Powell and Sons Limited, 74 L. T. Rep. 220; (1896) 1 Ch. 681.

It was there held by *Romer, L.J.* (then *Romer, J.*) that the court having jurisdiction at the hearing of a misfeasance summons to order a liquidator to pay the cost of the proceedings personally, will, in an ordinary case, refuse to order him to give security for costs. The question is whether that case is of general authority, or whether the fact of a liquidator and company being insolvent is sufficient ground for ordering security for costs. Sect. 69 of the Companies Act 1862 provides that: "Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that, if the defendant be successful in his defence, the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all such proceedings until such security is given." The present case is analagous to one arising under that section. I submit that in a proper case the court has jurisdiction to order a liquidator to give security for the costs of a misfeasance summons. In *Palmer's Company Precedents* (9th edit., part 2, pp. 632, 633), an unreported decision of *Pearson, J.* to that effect in *Re Wedgwood Company* (29th May 1884) is cited. [*ROMER, L.J.* referred to the observations of *Baggallay* and *Bowen, L.JJ.* in *Cowell v. Taylor* (53 L. T. Rep. 483; 31 Ch. Div. 34).] In *Re W. Powell and Sons Limited* (*ubi sup.*) the case of *Re Wedgwood Company* (*ubi sup.*) and also the decision of *Bacon V.C.* in *Re Seventh East Central Building Society* (51 L. T. Rep. 109) were referred to in the course of the arguments. Upon that case, and also upon the decision of *Pearson, J.*, the statement as to the practice contained in *Palmer's Company Precedents* (*ubi sup.*) was no doubt founded. In *Re W. Powell and Sons Limited* (*ubi sup.*) *Romer, J.* seems to have assumed that, in a case like the present, the court had jurisdiction to make an order for security for costs; and, although the learned judge declined to order it in that case, yet he did so on the ground that the court at the trial might order the liquidator to pay the costs personally; and he also thought that, in considering whether

(a) Reported by E. A. SORATCHLEY, Esq., Barrister-at-Law.

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the liquidator ought to be ordered to pay the costs personally, the court would have regard to the fact that the liquidator had opposed an application for security. That has since been followed by Stirling, J. in *Re Western Counties Steam Bakeries and Milling Company* (4th May 1896), cited in Palmer's Company Precedents (9th edit., part 2, pp. 622, 623). [ROMER, L.J.—The principle of *Cowell v. Taylor* (*ubi sup.*) is against the appellants.] In *Re W. Powell and Sons Limited* (*ubi sup.*) it was argued that the court had no jurisdiction to order a liquidator to give security, but it was not so held. [ROMER, L.J.—It appears to me now, though it did not occur to me at the time, that I might have based my decision upon want of jurisdiction.] In this case the liquidator is a mere shadow, and the company will get no benefit by its action, as it has sold its undertaking to another company. That brings this case within the exception stated by Bowen, L.J. in *Cowell v. Taylor* (*ubi sup.*). [COZENS-HARDY, L.J.—Yours is, in effect, an argument that every impecunious litigant in the High Court should be compelled to give security for costs.] Without going so far as that, I submit that there will be a very serious injustice done to the appellants here if no security is ordered.

Mark Romer for the respondent, the liquidator, was not called upon to argue.

VAUGHAN WILLIAMS, L.J.—I am afraid that the practice is against the appellants, and that the appeal fails. I wish to say for myself that if this were a new matter, inasmuch as I personally while acting as the judge in company matters saw many instances of the abuse of the present law, I should not have been sorry if there had been a power to require security to be given in a case of this kind where the circumstances were such as to lead the court to think that it ought to be ordered. The cases, however, are too strong for me, and we must be content with the practice as it stands.

ROMER, L.J.—I think that the appeal fails and must be dismissed. I rely upon the principle on which *Cowell v. Taylor* (53 L. T. Rep. 483; 31 Ch. Div. 34) was decided. The liquidator comes here under the Act of Parliament, and in the performance of his statutory duties, and in a case like that, where it is not suggested that the application is frivolous or made improperly by the liquidator, it is not in accordance with the practice of this court that he should be required to give security for costs.

COZENS-HARDY, L.J.—I agree. It is clear that this case does not come within sect. 69 of the Companies Act 1862. Here the company are not the plaintiffs, but it is argued that by analogy, where the liquidator comes under the express provisions of sect. 10 of the Companies (Winding-up) Act 1890 we ought to treat him as being in the same position as a plaintiff company. I cannot follow that. As a general rule the practice as to security for costs is settled by *Cowell v. Taylor* (53 L. T. Rep. 483; 31 Ch. Div. 34) and other cases. It seems to me that we should be going beyond that authority if we required the liquidator here to give security for costs. I wish to emphasise what was said by Romer, J. in *Re W. P. Powell and Sons Limited* (74 L. T. Rep. 220; (1896) 1 Ch. 681) that the court on a misfeasance summons will not have

the least hesitation in making a personal order for payment of costs by the liquidator in a proper case.

Appeal dismissed.

Solicitor for the appellants, Arthur J. Benjamin.
Solicitors for the respondent, Bisgood and Marshall.

May 31 and June 1.

(Before VAUGHAN WILLIAMS, ROMER and COZENS-HARDY, L.JJ.)

Re LONGBOTHAM AND SONS. (a)

APPEAL FROM THE CHANCERY DIVISION.

Solicitor and client—Costs—Taxation—"Third party liable"—Taxation of mortgagee's solicitors' bill by mortgagor—Practice—Solicitors Act 1843 (6 & 7 Vict. c. 73), s. 38.

A mortgagor is entitled, under sect. 38 of the Solicitors Act 1843, to have taxation of the bill of costs of the solicitor acting for the mortgagee limited to the items of costs incurred by the mortgagee strictly in that capacity and not in his personal capacity.

Re Negus (71 L. T. Rep. 716; (1895) 1 Ch. 73) and *Re Gray* (84 L. T. Rep. 24; (1901) 1 Ch. 239) considered and approved.

Decision of Kekewich, J. affirmed.

SOLICITORS who had acted for a mortgagee carried in their bill of costs for taxation at the instance of the mortgagor.

From the bill more than one-sixth was taxed off.

On the solicitors raising objections the master answered that he had taxed the bill upon the principle laid down in *Re Gray* (84 L. T. Rep. 24; (1901) 1 Ch. 239), by taking off all the items which could not be charged as between the mortgagee and mortgagor; stating, further, that the bill was made out on a wrong principle, the old practice being relied on by the solicitors.

The items disallowed were in the nature of charges as between solicitor and client, such as attendances by solicitors to take steps necessary for the protection of the mortgagee without consultation with the mortgagor, and in respect of unnecessary letters.

Thereupon an application was made by the solicitors to review the certificate of the taxing master.

The applicants admitted that their application was made in order to obtain a reversal of the ruling of the learned judge in the case of *Re Gray* (*ubi sup.*), in which it was submitted that Cozens-Hardy, J. while referring to the earlier decision of *Re Negus* (71 L. T. Rep. 716; (1895) 1 Ch. 73), which in turn referred to *Re Brown* (16 L. T. Rep. 729; L. Rep. 4 Eq. 464), had in effect altered the previous practice in such matters.

Kekewich, J., before whom the application came on to be heard, required a certificate from the taxing master, which was as follows:

Your Lordship having desired a certificate from the masters of the Supreme Court (Taxing Office) of the practice generally in cases between the mortgagor and the solicitor of the mortgagee, I beg respectfully to report to your Lordship: That the practice followed by the masters in taxations under sect. 38 of 6 & 7 Vict. c. 73 (the Solicitors Act) up to within recent years was

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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to tax as between the solicitor and the client (the party chargeable in the first instance), and not as between the solicitor and the party liable to pay, effect, however, being given, as far as possible, to the cases of *Re Negus* (*ubi sup.*) and *Re Abbott* (4 L. T. Rep. 576), and the observations of Cotton, L.J. in *Re Morecroft* (29 Sol. Jo. 471 C. A.) The principles, however, laid down by these cases were, in the opinion of the masters, considerably extended by the case of *Re Gray* (*ubi sup.*), and since that case the practice in the taxing office in taxations under this section has been to tax, apart from the order, as between the solicitor and the party, or estate liable to pay.

Kekewich, J. read the above certificate, and, without further argument, refused the application; but his Lordship gave leave to appeal.

The applicants now appealed accordingly.

George Lawrence for the appellants.—It is clearly laid down by the authorities that taxation, when ordered under sect. 38 of the Solicitors Act 1843, must proceed as between the solicitor and his client the mortgagee:

Cordery on Solicitors, 3rd edit., p. 326;
Re Wells, 8 Beav. 416;
Re Jones, 8 Beav. 479;
Re Pyson, 9 Beav. 117;
Re Bignold, 9 Beav. 269;
Re Barrow, 17 Beav. 517;
Re Taylor, 18 Beav. 165;
Re Baker, 32 Beav. 526;
Re Masey, 34 Beav. 463; 34 L. J. 492, Ch.;
Re Abbott, 4 L. T. Rep. 576;
Re Newman, 17 L. T. Rep. 128; L. Rep. 2 Ch. App. 707;
Re Morecroft, 29 Sol. Jour. 471;
Re Holliday and Godlee, 58 L. T. Rep. 301.

Those are the various reported cases which support the contention of the appellants in the present case. The question is whether the decision of Cozens-Hardy, J. in *Re Gray* (84 L. T. Rep. 24; (1901) 1 Ch. 239) was intended to revolutionise the third party taxation under sect. 38 of the Solicitors Act 1843. I submit that that decision has not overruled the earlier cases, and that the taxation ought to proceed according to the rules which would govern a taxation of the same bill of costs at the instance of the mortgagee. The sole question is, What is the bill? My submission is that the bill is the bill which would be delivered by the solicitor acting for the mortgagee. If the court is against me upon the cases to which I have referred, I do not know that it will be necessary to cite all the cases of which *Re Gray* (*ubi sup.*) is an example, and which are against the appellants here. [COZENS-HARDY, L.J.—As, for instance, *Re Brown* (16 L. T. Rep. 729; L. Rep. 4 Eq. 464).] That case is inconsistent with the other decisions, and notably with:

Re Dickson, 8 De G. M. & G. 655.

The case of *Re Brown* (*ubi sup.*) has been explained, and, as I submit, satisfactorily so, by Kay, J. in

Brown v. Burdett, 59 L. T. Rep. 388; 40 Ch. Div. 244.

Those were the authorities governing the practice until the decisions in *Re Negus* (71 L. T. Rep. 716; (1895) 1 Ch. 73) and *Re Gray* (*ubi sup.*). The former is only founded on *Re Brown* (*ubi sup.*), and, as I say, upon a misapprehension of *Re Brown* (*ubi sup.*); and it is, moreover, inconsistent with *Re Newman* (*ubi sup.*). The practice

appears to be stated substantially the same in every text-book of authority:

Cordery on Solicitors, 3rd edit., p. 326;
Daniel's Chancery Practice, 7th edit., p. 1728;
Fisher on Mortgages, 5th edit., p. 911;
Morgan and Wartzburg on Costs, 2nd edit., p. 461.

T. L. Wilkinson, for the respondent, was not called upon to argue.

Cur. adv. vult.

June 1.—The following judgments were delivered:—

ROMER, L.J., at the request of Vaughan Williams, L.J., first read his judgment.—I will first deal with this case on principle. When a third party taxes a bill under sect. 38 of the Solicitors Act of 1843 it is clear, both from the wording of the section itself and the authorities, that the taxation must be on the footing of a taxation between the solicitor and the client. But the third party is not, for all purposes in connection with the taxation, to be treated as if he were himself the client. For instance, where the client has paid the bill and might not be able to show special circumstances sufficient to entitle him to have the bill taxed, it does not follow that of necessity the third party is thereby precluded from obtaining taxation. The proviso at the end of sect. 38 shows that. And, in my opinion, that proviso is important and useful; and a court will doubtless act upon it in cases where justice requires that the third party should not be bound by what has taken place between the solicitor and the client. Again, the solicitor may have acted for the client in more than one completed matter, and the client may not be entitled, as against the solicitor, to obtain delivery of a bill and taxation, except on the footing of having all the matters included and taxed. But if the third party be only interested in, and liable to pay the costs of, one matter, it is clear, in my opinion, as a matter of principle, that, under sect. 38, he can obtain taxation of the bill so far as concerns that one matter only, and on the footing of being liable to pay only the taxed costs of that matter, and that principle really decides this case, and shows that the appeal should fail. For in the present case the third party is a mortgagor, and he is only interested in the relations between the solicitor and his client so far as they concern the position of the client strictly in his character of mortgagee. The mortgagor, therefore, is entitled, under sect. 38, to have taxation of the solicitor's bill limited to the items of costs incurred by the client strictly in his position of mortgagee, and it is on that principle that the taxing master has proceeded. It may well be that the client, as between himself and the solicitor, is liable for costs incurred in relation to the mortgaged property with which the mortgagor is not concerned, and for which the mortgagor is not liable. Those will be costs incurred by the mortgagee in his personal capacity so far as concerns the mortgagor, and not costs incurred by him in the capacity of mortgagee strictly and properly considered, and accordingly would not have to be taxed or considered by the taxing master in a taxation by the mortgagor as third party. And I may add, though it may not be necessary to do so for the purposes of the present case, that, if the mortgagee chose to sanction a charge by his solicitor beyond what he and the solicitor knew,

or must be taken to have known, could be properly charged, as against the mortgagor, though the mortgagee might be bound for the excess by reason of his sanction, the mortgagor would not be bound, for the sanction by the mortgagee would be held as given by him in his personal capacity, and not in his capacity of mortgagee. With regard to the authorities, they are so numerous that I do not pretend to say that all the observations by the various judges who decided them can be reconciled. But the principle on which this judgment is based is not, in my opinion, contrary to any express decision that has been cited, and that principle has been recognised, and, I think, rightly so, in the cases of *Re Brown* (16 L. T. Rep. 729; L. Rep. 4 Eq. 464); *Re Morecroft* (29 Sol. Jour. 471), (and in particular the judgment of Lindley, L.J. in that case); *Re Negus* (71 L. T. Rep. 716; (1895) 1 Ch. 73); and *Re Gray* (84 L. T. Rep. 24; (1901) 1 Ch. 239); and by the observations of Turner, L.J. in *Re Dickson* (8 De G. M. & G. 655); and I do not think it will serve any useful purpose to go through the cases cited seriatim. The appeal will accordingly be dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I concur. I wish to add one or two observations. In the first place, I assent entirely to every word read by Romer, L.J., in so far as it deals with questions regarding all such matters as do not strictly concern the mortgagor, and which involve costs incurred by the mortgagee otherwise than in his capacity of mortgagee. Such costs are outside the costs which the mortgagor is liable to satisfy. So far as I am concerned, I do not wish to go beyond that. It seems to me that when we go that length we are affirming the judgment of Chitty, J. in *Re Negus* (71 L. T. Rep. 716; (1895) 1 Ch. 73), and the judgment of Cozens-Hardy, J. in *Re Gray* (84 L. T. Rep. 24; (1901) 1 Ch. 239). In each of those cases there were costs incurred in respect of matters which did not concern the mortgagor, and which were not costs incurred by the mortgagee as mortgagee, but in his personal capacity. All that it is necessary for us to do in our present judgment is to affirm the principle of those two decisions, which, as Romer, L.J. has pointed out, are really decisions that were anticipated by Romilly, M.R., in *Re Brown* (16 L. T. Rep. 729; L. Rep. 3 Eq. 465). There is one passage in the judgment of Cozens-Hardy, J. in *Re Gray* (*ubi sup.*), which expresses all that it is necessary to say in the present case. At p. 248 of (1901) 1 Ch. I find these words: "The governing idea of Chitty, J.'s judgment"—that is to say, the judgment in *Re Negus* (*ubi sup.*)—"is that even a third party taxation the court is bound to look at the nature of the items and to consider whether, apart from the order, the applicant is under any liability to pay them. In other words, although the solicitor may put in one bill as against his own client a series of items, some of which may go beyond the liability of the third party, the third party does not, by obtaining an order to tax, render himself liable to the whole bill. With respect to matters falling within his liability under a contract express or implied, he cannot dispute the amount properly payable as between the solicitor and his own client; but in other respects his liability is not increased by obtaining a third party order to tax." I wish further to add that I do not think that in

any of the cases referred to it has been forgotten that what is authorised in favour of a third party by the 38th section of the Solicitors Act 1843 is a taxation obtained by a third party against the solicitor. What I mean is that the proceeding which is sanctioned by the section is a wholly different proceeding from that which is described by Romilly, M.R. in the case of *Re Massey* (34 Beav. 463; 34 L. J. 492, Ch.). He says in that case (at p. 495 of 34 L. J., Ch.) when refusing to grant an order for taxation at the instance of Mr. Waters, a third party: "In other words, in my opinion a bill from Mr. Massey"—that was the solicitor—"would have to be submitted to be moderated by the taxing master, and the amount at which the taxing master would fix it would be all that Mr. Waters would be required to pay the directors." That proceeding or moderation is a proceeding which is not intended to be included by the 38th section of the Solicitors Act 1843. The appeal will be dismissed with costs.

COZENS-HARDY, L.J.—As this case is in substance, although not in form, an appeal from my decision in the case of *Re Gray* (*ubi sup.*), I will content myself with saying that I agree with the judgments which have been delivered by Romer, L.J. and my Lord. *Appeal dismissed.*

Solicitors for the appellants, Bower, Cotton, and Bower, agents for Longbotham and Sons, Halifax.
Solicitors for the respondent, Indermaur and Brown, agents for W. Pearce, Todmorden.

March 23, 24, and 25.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

HAMBRO AND SON v. BURNAND AND OTHERS. (a)
APPEAL FROM THE KING'S BENCH DIVISION.

Principal and agent—Underwriter—Authority of underwriter to write names—Ordinary business at Lloyd's—Guarantee policy—Policy underwritten for private purposes and benefit of agent—Liability of principal.

When an agent, having express authority to make a particular kind of contract on behalf of his principal, makes such a contract in the name of his principal with a person who deals in good faith, the principal is liable although the agent in fact makes the contract for his own purposes and in his own interests, and not in the interests of his principal.

APPEAL of the plaintiffs from the judgment of Bigham, J. at the trial of the action without a jury; and a cross-appeal of the defendants.

The plaintiffs brought this action to recover the sum of 200l. from each of the defendants upon a policy of guarantee subscribed by the defendant Burnand in his own name and in the names of the other four defendants.

The policy was in a printed form, and was as follows:

To Messrs. C. J. Hambro and Son.—In consideration of your accepting at our request the drafts of Henry Gaze and Sons (hereinafter called the drawers) to such an amount as you may think proper, such drafts to be drawn and accepted within one year from the 1st

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

Oct. 1902, and in consideration of the premium of 12. per cent. paid to us by the drawers on the execution hereof (the receipt whereof we hereby acknowledge), we, the underwriters, agree that, if the drawers do not at or before maturity of any such drafts put you in funds to meet the same, we will within thirty days of receipt of notice from you of such default on the part of the drawers pay to you in cash the amount of such drafts, and will further indemnify and hold you harmless against all moneys, loss, costs, charges, and expenses, which you may have to pay or to which you may be put by reason of having accepted such drafts or by reason of any claims made by any company or person in respect of the transactions above mentioned, provided that our liability hereunder shall not exceed the amount of our respective subscriptions hereto with interest thereon at the rate of 5 per cent. per annum from the time of payment being demanded.

The policy was subscribed with the names of the five defendants, the names of the last four defendants being subscribed by Burnand by procuration.

On the 9th Oct. 1902 the plaintiffs accepted a draft of Gaze and Sons Limited at ninety days' sight for 1000l.

The bill fell due on the 10th Jan. 1903, and Gaze and Sons Limited made default in finding money to meet it.

Burnand and the other four defendants were all members of Lloyd's. The other four defendants employed the defendant Burnand to do business for them at Lloyd's.

In each case the terms of the employment were contained in a written document, all the documents being substantially to the same effect.

The agreement, so far as is material, was as follows:

Burnand shall act as the agent of . . . for the purpose of underwriting policies of insurance at Lloyd's and carrying on the ordinary business of an underwriter at Lloyd's in the name and on behalf of . . . in accordance with the usual custom of Lloyd's.

In 1900, 1901, and 1902 the plaintiffs accepted many drafts of Gaze and Sons Limited, and at the end of 1902 the sum of 7500l. was due to the plaintiffs in respect of drafts which had not been met by Gaze and Sons. All these drafts were guaranteed by policies similar to the one sued upon in this action.

Before June 1902 these policies were subscribed by other underwriters as well as the defendants. After that time they were subscribed by the defendants only, and the plaintiffs insisted on Gaze and Sons obtaining "solvency policies" also, by which the solvency of the underwriters was guaranteed.

The plaintiffs never saw Burnand, all the business being conducted with them by Parry, the managing director of Gaze and Sons Limited; and they never made any inquiries in the matter.

During the three years Burnand was a director of Gaze and Sons Limited, and it was very much to his interest to keep the business of Gaze and Sons going. In underwriting these policies he was, as found by the learned judge at the trial, acting for himself and in furtherance of his own interests, and not for or in the interests of the other four defendants.

Burnand never obtained any premiums for the policies, for Gaze and Sons never paid any. The

policies were not entered in Burnand's business books.

The other four defendants contended that the underwriting of these policies was not within the ordinary business of an underwriter at Lloyd's.

The learned judge at the trial, after hearing evidence, found that the underwriting of these policies was within the ordinary business of an underwriter at Lloyd's.

The other four defendants further contended that, even if the authority given to Burnand authorised him to sign guarantee policies, yet, as this policy was not subscribed for and on their behalf, but for Burnand's benefit only, it did not bind them.

The defendant Mordan set up the further defence that he had revoked the authority of Burnand.

The action was tried before Bigham, J. without a jury; the learned judge gave judgment against Burnand, but he gave judgment in favour of the other four defendants upon the ground that the policies were not subscribed on their behalf, but for the benefit of Burnand only (89 L. T. Rep. 180).

The plaintiffs appealed; and the defendants, other than Burnand, gave notice of a cross-appeal.

Asquith, K.C., Scrutton, K.C., and F. D. Mackinnon for the plaintiffs.—There was ample evidence to justify the finding of Bigham, J. that the underwriting of this guarantee policy was within the ordinary business of an underwriter at Lloyd's, and his finding upon that question cannot be reviewed. Burnand, therefore, had express authority to subscribe this policy with the names of the other defendants. The learned judge, however, held that, as Burnand was in fact, in subscribing the policy, acting for himself and in the furtherance of his own interests, and not in the interests of his principals, the principals were not bound. That fact is, however, immaterial, and does not in any way affect the rights of a third party who enters into a contract with the agent which is within the terms of his express authority:

Keighley, Martin, and Co. v. Durant, 84 L. T. Rep. 777; (1901) A. C. 240.

When an agent has professed to contract for principals and has their authority, his state of mind or intention cannot be inquired into in order to show that he was not really making the contract for his principals, but for his own purposes. A person contracting with an agent is in no way bound to inquire whether the agent is in fact really acting in the interests of his principal or is merely acting in his own interests and for his own purposes. The learned judge was very much guided by the judgment of Nelson, J. in the American case of *North River Bank v. Aymar* (3 Hill, 262). The point was, however, subsequently dealt with in other American cases, and the question has there been now settled contrary to the opinion of Nelson, J.:

Exchange Bank v. Monteath, 26 N. Y. (12 Smith) 505;

New York and Newhaven Railroad Company v. Schuyler, 34 N. Y. (7 Tiff.) 30;

President, &c., of Westfield Bank v. Cornen, 37 N. Y. (10 Tiff.) 320.

There is also the authority of cases in this country

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in favour of the plaintiffs. In *Bank of Bengal v. Fagan* (7 Moo. P. C. 61) Lord Brougham said: "But it is said that the power was given to do the acts in question on the donor's behalf. This is really only saying that what the agent is to do, he is to do as representing the principal; as doing it on behalf of, or in the place and in the right of, the principal. But it is further said that, even if the expression be read as only amounting to this, the indorsement is only to be made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the indorsement, and not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and, though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power." And in *Bryant, Powis, and Bryant v. Quebec Bank* (68 L. T. Rep. 546; (1893) A. C. 170) Lord Macnaghten, in delivering the judgment of the Privy Council, approved of the law as laid down in *President, &c., of Westfield Bank v. Cornen* (*ubi sup.*). A principal who has authorised an agent to make a contract is bound by the contract made by his agent, whatever may be the intention and object of the agent in making that contract:

Summers v. Solomon, 7 E. & B. 879;

Montaignac v. Shitta, 15 App. Cas. 357;

Re Tiedemann and Ledermann Frères, 81 L. T. Rep. 191; (1899) 2 Q. B. 66.

Montague Lush, K.C. and *A. J. Ashton* (*Rufus Isaacs*, K.C. and *Maurice Hill* with them) for the respondents. — The finding of the learned judge, that the underwriting of this policy was within the ordinary business of an underwriter at Lloyd's, was not justified by the evidence, and ought to be set aside. The decision of the learned judge that the respondents were not bound by the act of Burnand in subscribing their names to this policy was right, and ought to be upheld. It cannot be said that the respondents in any way held out Burnand to the plaintiffs as having authority to make this contract, and therefore there is no estoppel. The respondents are not bound by the act of Burnand, because he was not in fact acting for them, but for himself only. The authority which they gave him was to make contracts on their behalf, and, when he made a contract for his own purposes and not in their interests, he was not acting in the exercise of that authority at all, although he professed to act as their agent. The question is, when one person professes to act as agent on behalf of another, whether he is acting within the scope of his authority, and, when he acts for his own purposes only, he is not acting within the scope of his authority, and does not bind his principal:

Grant v. Norway, 10 C. B. 665;

George Whitechurch Limited v. Cavanagh, 85 L. T. Rep. 349; (1902) A. C. 117;

British Mutual Banking Company v. Charnwood Forest Railway Company, 57 L. T. Rep. 833; 18 Q. B. Div. 714;

Houldsworth v. City of Glasgow Bank, 42 L. T. Rep. 194; 5 App. Cas. 317;

Coleman v. Riches, 16 C. B. 104;

Barwick v. English Joint Stock Bank, 16 L. T. Rep. 461; L. Rep. 2 Ex. 259;

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Salomons v. Pender, 12 L. T. Rep. 267; 3 H. & C. 639;

Story on Agency, sect. 133.

The two cases in the Privy Council, *Bank of Bengal v. Fagan* (*ubi sup.*) and *Bryant, Powis, and Bryant v. Quebec Bank* (*ubi sup.*) related to negotiable instruments, and were decided upon the rules relating to the position of a *bonâ fide* holder for value of a negotiable instrument. The plaintiffs ought to have made inquiry as to the authority of Burnand and as to the purpose for which this guarantee policy was being given. Therefore they are affected with notice that Burnand was not acting *bonâ fide* on behalf of his principals.

Scrutton, K.C. replied.

COLLINS, M.R.—This, no doubt, is a very important point, but when we have had the assistance which we have had from the learned counsel in argument, and the authorities cited before us which were not cited before Bigham, J., I think there can be no reasonable doubt upon the matter, and that we should gain nothing by taking time to consider our judgment. The action in this case is brought by bankers, Messrs. Hambro and Son, who arranged with Messrs. Gaze to accept drafts drawn by them on the terms that those drafts should be secured by what has been called in this case a guarantee policy. The policy in question was given on the 1st Oct. 1902. It was underwritten by Mr. Burnand, with four other names, which have been called in this case his names, these gentlemen having given an authority in very wide terms, to which I will refer in a moment, to Mr. Burnand to underwrite risks for them at Lloyd's. The policy in question is the last of a series which began as far back as 1900, but which were from time to time renewed until the 1st Oct. 1902, which is the date of the policy sued on. It is in these terms, and addressed to Messrs. Hambro and Son, the plaintiffs: "In consideration of your accepting at our request the drafts of Henry Gaze and Sons (hereinafter called the drawers) to such an amount as you may think proper, such drafts to be drawn and accepted within one year from the first day of October, one thousand nine hundred and two, and in consideration of the premium of one pound per cent. paid to us by the drawers on the execution hereof (the receipt whereof we hereby acknowledge), we the underwriters agree that, if the drawers do not at or before maturity of any such drafts put you in funds to meet the same, we will within thirty days of receipt of notice from you of such default on the part of the drawers pay to you in cash the amount of such drafts, and will further indemnify and hold you harmless against all moneys, loss, costs, charges, and expenses, which you may have to pay or to which you may be put by reason of your having accepted such drafts or by reason of any claims made by any company or person in respect of the transactions above mentioned, provided that our liability hereunder shall not exceed the amount of our respective subscriptions hereto, with interest thereon at the rate of 5 per cent. per annum from the time of payment being demanded. In witness whereof we, the assurers, have subscribed our names, and assured in London this first day of October, one thousand nine hundred and two." Then followed the

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names of Burnand, Draffen, Read, Mordan, and Elwell, the last four of whom are the respondents in this case. As I have said, that was the last of a long series which I need not go through; they are all connected, and they were all given as renewals from time to time in respect of the original transaction in 1900. Now, the authority which was given to Mr. Burnand by Mr. Read, who is one of the names—and I read it because it is the one which has been most referred to, but there is no distinction between it and the other authorities, although there are verbal differences—under which this policy was underwritten is in these terms. I will only read the material parts of it. The said Burnand “shall act for a period of three years certain, commencing as from the 19th day of August 1891 and terminating on the 31st December 1894, and thereafter from year to year, subject to six months’ notice in writing by either party, such notice to terminate on the 31st Dec. in any year, as the agent of the said Robert Arthur Read for the purpose of underwriting policies of insurance at Lloyd’s, and carrying on the ordinary business of an underwriter at Lloyd’s (hereinafter called ‘the business’) in the name and on behalf of the said Robert Arthur Read, in accordance with the usual custom of Lloyd’s, and upon the terms and conditions hereinafter contained.” And then clause 2: The said Burnand “shall during the said period have the sole management of the business, and all risks shall be taken and all losses, averages, and returns shall be settled by him in the name and on the account of the said Robert Arthur Read, and the risks to be taken and the claims to be settled shall be left to the discretion of the said Percy George Calvert Burnand, who shall devote sufficient time and attention to the business for the proper management and transaction of the business.” Now, there is no doubt that the indebtedness of Messrs. Gaze became very large, and the liabilities undertaken in the aggregate by Burnand on their behalf became very large also, I think amounting to something like 100,000*l*. Ultimately this action was brought on this policy, and the defendants set up in answer two things. They say that the guarantee does not apply at all, in the first instance, because the authority is limited in the terms that I have read for the purpose of underwriting policies of insurance at Lloyd’s and carrying on the business of an underwriter at Lloyd’s. That is their first point. That raises a question of fact. Secondly, they contend that, as a matter of law, having regard to the finding and inferences of Bigham, J. as to the motives which prompted Mr. Burnand to underwrite these policies, and having regard to his relations with Messrs. Gaze, it must be held that these policies were underwritten without the authority of the respondents. Now, I will deal with the first point, which is a question of fact—namely, whether this class of policies is underwriting of policies of insurance at Lloyd’s, or carrying on the ordinary business of an underwriter at Lloyd’s. That is the first point. Now, Bigham, J. heard a great many witnesses and had the opportunity of hearing a great many more, but he was satisfied with the overwhelming weight of evidence of those he had heard, and he did not insist upon, in fact he dismissed, the assistance of a large number of other witnesses who were there prepared to give evidence, and he

came to the conclusion, on the balance of evidence, having heard evidence from the other side also, that he was clearly satisfied that this particular class of business was within the ordinary business of an underwriter at Lloyd’s. Now, it had to be admitted by the respondents themselves that the making of what are called solvency policies in this case is part of the ordinary business of underwriters at Lloyd’s. Solvency policies differ from these, it appears to me, and in fact Mr. Lush so put it, only in this respect. The solvency policy is a policy whereby the underwriter undertakes to pay on the insolvency of the debtor. The insolvency of the debtor is the event which creates his liability to pay, and that is a common form of policy at Lloyd’s. But Mr. Lush contended that, though the event insured against is insolvency, and that is a common policy, a policy where the event insured against is not the insolvency of the debtor, but the nonpayment by the debtor, is extraordinary; a policy against insolvency being ordinary, a policy against the event of a particular debtor not paying a particular sum at the time is extraordinary, and therefore entirely outside the limits of this authority. It seems to me that this was a question of fact, and the learned judge accepted what seems to me to be the clear preponderance of evidence in favour of there being no such distinction. Even if there were a distinction, there was evidence that policies of this kind were entered into against the event of nonpayment by a particular person at a particular date. Therefore it seems to me that Bigham, J., sitting as a judge of fact, was abundantly justified in coming to the conclusion at which he has arrived, and in which I cordially concur, on the evidence, that this particular class of insurance was properly, or could be properly described as falling, within the ordinary business of an underwriter at Lloyd’s. So much for the facts. There is another question of fact which is raised with respect to one of the respondents, Mr. Mordan. I do not propose to deal with that until the end of the case, so I will deal with the case broadly as covering all the respondents, and I will deal with any exceptional facts relating to Mr. Mordan afterwards. I now come to the question of law, which is that which has been most debated before us. That point is whether, where there is an express written authority given to an agent authorising in terms the very thing which that agent has done, it is open for the principal to say that, although what the agent has done is within the express words of his authority, yet if, on inquiring into his state of mind at the time he did it, the principal finds that he intended to misuse his opportunity, and, acting within the letter of the authority, to apply the power to purposes which the principal would not have sanctioned had he known it—that is, to apply to his own benefit a power which was conceded to him to be exercised for the benefit of his principal—that therefore the principal is free from liability, however much the person the agent has dealt with may have been misled into thinking he had the principal’s authority; that if, on looking into the agent’s authority, the principal comes to the conclusion that the agent was influenced by improper motives in doing what he did, the principal stands free from the obligation which might seem to be imposed on him if the

actual words are looked at of the authority which was given, and within which unquestionably the act done by the agent comes. Now, I am bound to say it did seem to me, unenlightened by authority, that that was a contention which could not hold water in any court, and I have been surprised to find that at one time it was thought to be a possible answer in one of the American courts. I can therefore, although at first I did not understand it, perfectly well now understand how Bigham, J. came to take the other view. I should naturally give the greatest weight to any opinion formed by Bigham, J., particularly on a commercial question such as this is. But I begin now to see how it was that the learned judge was led to adopt the opinion which he did adopt, because it does seem that an authority from one of the courts in America was cited to him where there had been a difference of opinion between certain judges upon this very question. One judge had adopted the view that, although the authority in terms authorised the work done, it was competent to look into the authority of the agent and see whether he was misusing it or not, and if he was, and was going to misapply the proceeds which he derived from the exercise of the authority for his own benefit, the matter might be looked into, and it might be said that this was not an act by which the principal could be bound. One judge took that view; two others did not agree with it. Bigham, J., examining the reasons given, thought the reasons of the dissenting judge, the judge who was in the minority, the stronger of the two. No doubt in that case, I think, there were grounds for saying that, read in a certain way, the authority was limited so as not to cover the particular thing done. How far that was the real basis of the decision, I do not stop to inquire; at all events, Bigham, J., not being apprised—certainly not fully apprised—of the condition of the American authorities, came to the conclusion that that was the proper view. Since the case in which the judgment was given on which Bigham, J. relied, the matter has been mooted several times again in America, and ultimately the American courts have come out with a perfectly clear and authoritative judgment, adopting the principle, which I should certainly have thought was the true principle—namely, that where the written authority expressly covers the actual thing done, one cannot inquire into the motives that actuated the agent when he acted. It seems to me that it would be quite impossible for the business of a mercantile community to be carried on if one were obliged to go behind the actual authority of the agent in each case and endeavour to subject his mind to a process of scrutiny, and try to ascertain whether his motives, when fully understood, did or did not invoke an application of an authority given him for the benefit of the principal to purposes of his own private use. However it does not stand there on principle, because, since this case was argued before Bigham, J., the learned counsel for the appellants have had an opportunity of searching the authorities more fully, with the result that they have found this long concatenation of American authorities which have ultimately come out, as I have said, clearly in favour of their view. Not only have they found that, but they have found that it was both anticipated and finally adopted

in England. It was anticipated in a very remarkable passage, which puts with very great clearness, it seems to me, the exact and the true view of this matter, by Lord Brougham in a judgment given in the Privy Council as far back as 1849, in the case of *Bank of Bengal v. Fagan* (7 Moo. P. C. 61, 74). He says this: "But it is said that the power was given to do the acts in question on the donor's behalf. This is really only saying that what the agent is to do, he is to do as representing the principal, as doing it on behalf of, or in the place and in the right of, the principal. But it is further said that, even if the expression be read as only amounting to this, the indorsement is to be only made for the benefit of the principal, and not for the purposes of the agent." That is precisely the argument that has been put so forcibly before us by Mr. Lush to-day. "We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the indorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and, though the indorsee's title must depend upon the authority of the indorsee, it cannot be made to depend upon the purposes for which the indorser performs his act under the power." That by anticipation deals with the very point which was the one salient point of the judgment of Bigham, J. and of the argument before us to-day. Now, it does not stand there alone, because—and none of these cases were cited to Bigham, J.—in the year 1893 there is a decision of the Privy Council (*Bryant, Powis, and Bryant v. Quebec Bank*, 68 L. T. Rep. 546; (1893) A. C. 710). I will first read a passage from the judgment, and then refer to the facts which bear upon it: "In the discussion at the Bar it was conceded by the learned counsel for the appellant that the banks were *bonâ fide* holders for value; and the argument, as in the previous case, was substantially confined to the question of Davies' authority. The authority of Davies, as the agent and attorney of the company, was derived from the power of attorney of the 25th Nov. 1885, which has been fully stated already. That instrument in terms authorises the attorney to indorse bills of exchange"—that is the authority in this case. "Their Lordships agree with Andrews, J. that the fact that Davies abused his authority and betrayed his trust cannot affect *bonâ fide* holders for value of negotiable instruments indorsed by him apparently in accordance with his authority. The law appears to their Lordships to be very well stated in the Court of Appeal of the State of New York, in *President, &c., of the Westfield Bank v. Cornen* (*ubi sup.*), cited by Andrews, J. in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows: 'Whenever the very act of the agent is authorised by the terms of the power—that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used—such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority.' " Now that, as has been pointed out by Mr. Scrutton, though cited and adopted in the last decision of the Court of Appeal in New York, is taken from the language used by the majority in the first case cited

by Bigham, J. So that after this long series of cases in which the matter has been discussed, that was the final view of the court in America, and that is the view which has been taken by the Privy Council at home. Mr. Lush says that he accepts the authority of that case at once, but that it is the case of a negotiable instrument, and of *bonâ fide* holders for value, and therefore it is not in point. But when Romer, L.J. came to criticise that argument, he pointed out that by the statement in the case it appears that the agent, who indorsed, indorsed *per pro*—that is, on the face of the bill he showed and vouched the fact that he was an agent acting only within the limits of the specified authority. Therefore, everyone who took that bill took it with full notice of the limited rights of the person who gave it, and therefore it is not *ad rem* at all to say it is a question of a negotiable instrument. The measure of the rights of the person who takes is measured by the rights of the agent. Therefore we have a clear decision that the secret purposes of the agent, in misapplying for his own uses the authority which covers the act done, does not affect its validity against the principal. It seems to me, therefore, that the law is clearly established both on principle and on authority, and that the main ground of the judgment of Bigham, J. fails. I should say that Mr. Lush urged certain specific points in support of the same view. I regard those points as really going to emphasise the fact that in point of fact what Burnand did he must be taken to have done for his own benefit, and not for the benefit of the principal, and I am assuming he has established that in dealing with the law of the case. I am therefore not bound to go into the particular points which Mr. Lush urged as showing that Burnand could not have been *bonâ fide*, particularly the point about the premiums. On the face of this policy it appears to be perfectly correct. The plaintiffs were not called upon to inquire into what was done about the premiums. They were not the persons to pay the premium, and, on the face of the policy, it appears in the ordinary way that the premium has been dealt with. For all I know, it was dealt with. It was suggested that by some arrangement between Gaze, who had to pay it, and Burnand, who acted as broker in the matter, the premium had been set off. It may be, I do not know; but in any view it does not in the slightest degree in my judgment affect the right of the plaintiffs to put in suit this instrument, made with the authority of the defendants, against them. That disposes of the case on its broad aspects, but it is said by Mr. Mordan's counsel that he stands upon a separate footing, because it is asserted for him that after the original policy in 1900, of which the present one now sued upon is only a renewal, he revoked his authority before the date at which the policy now sued upon was executed—that is, before the 1st Oct. 1902. That, again, is a question of fact, and I find no support in the judgment of Bigham, J. for any such view. It seems to me that if Bigham, J. had accepted that view of the case, he would most certainly have referred to it in his judgment. He does not do anything of the sort; in fact, he treats Mr. Mordan exactly on the same footing as all the other defendants; and when I come to examine the evidence which it is suggested

proves revocation by Mr. Mordan, in my judgment it does not support it. He has to admit that all he did was in 1901. He does appear to have had his attention called to the fact, and it would be material on another view, that this class of insurance was going on, that Mr. Burnand had been underwriting in his name this very particular class of insurance, and he also became aware that losses had to be paid upon it, and he said that he did not approve of that class of business, and thought that it ought not to be pursued; that he spoke to Burnand, who agreed with his views and expressed his intention of not going on with it, and went so far, Mr. Mordan says, that he sought to revoke his authority. However, he admits that at the end of 1901 he changed his mind, and, having taken an assurance from Mr. Burnand—I am perhaps putting it too high when I say an assurance—an intention expressed by Mr. Burnand of not embarking in that class of thing further, he withdrew his withdrawal and renunciation of authority, and left the document of authority with Mr. Burnand. So that in point of fact, after that change of mind on the part of Mr. Mordan, things remained as they were before—namely, he had given the authority to Burnand, and he had not countermanded it. Then he follows that up by giving a formal letter withdrawing his authority on six months' notice, according to the terms of the original bargain, and that six months' notice would not expire until the end of 1902. But, in the meantime, and while the power was unwithdrawn, this policy was made. But it does not stand there, because he had to admit on cross-examination that, notwithstanding that he was contending he had effectually revoked his authority, he found his name had been used in underwriting a similar policy for another banker, and he found that involved a liability on him, and he had never repudiated his obligation, and he could not explain why he had not done it. It seems to me that Bigham, J. must have arrived at the conclusion that he could not place any confidence in this gentleman's assertion that he had withdrawn the authority; he does not distinguish his case from that of the other defendants; and in my judgment on the evidence he has not shown, and I think the onus is on him of showing, that, having given the authority, he had revoked it. Therefore it seems to me he stands in the same position as the other defendants. This appeal must be allowed.

ROMER, L.J.—I am of the same opinion. The first questions we have to consider are as to matters of fact. On the questions of fact I come to the same conclusion as that arrived at by Bigham, J. First, with regard to the written agreements which conferred authority on Mr. Burnand to underwrite on behalf of his co-defendants. Now, it must be remembered in the first instance, in construing those documents, that they are entered into by men of business, who must be presumed to know the practice of carrying on business at Lloyd's. They are commercial documents entered into by commercial men and ought to be construed accordingly, and when I look at the evidence in this case, taken as a whole, as to what, at the date when these agreements were entered into, was the practice of underwriters at Lloyd's, and when I look in particular at the result of the cross-examination of

Mr. Sydney Bolton and the other expert witnesses called on behalf of the defendants, I can only say, without going through the evidence in detail, that I am satisfied that it was within the authority conferred by his co-defendants on Mr. Burnand that he should have power to underwrite such policies of guarantee as we have to consider in the case now before us. I will now say a word or two in regard to the special case sought to be made by Mr. Mordan as distinguishing his case from that of his co-defendants. His case is that the written authority had been revoked by him, at any rate before the document which is sued on in the present case was underwritten. Now, in the first place, I am bound to say that when I look at Mr. Mordan's evidence as a whole, it is not, on the point I am now considering, satisfactory to me, considering what he had to prove to sustain his contention that the written authority had been revoked; but I will for this purpose accept his own statement as given in evidence, and see what it amounts to. He says that he gave a verbal notice to Mr. Burnand purporting to revoke the written authority at a future period, which, at the time of the interview I am now considering, had not expired. Then he has a conversation with Mr. Burnand as to what Mr. Burnand contemplated doing in the future, and Mr. Burnand said: "That as the marine business was profitable and he intended to do no more guarantee business, it would be worth my while to continue." Mr. Mordan then withdrew his verbal notice. What does that mean? It means that he did not revoke the written authority. It means that he left the written authority unrevoked on the statement of Burnand that he did not intend to underwrite any future policies of guarantee. He says that he relied upon that intention as expressed by Mr. Burnand; but, even if that be admitted, he left the authority, though he may have expected it would not be acted on, so far as concerns policies of guarantee at any rate, without his being informed by Mr. Burnand of Mr. Burnand's change of intention; but, as a matter of law, the written authority remained unrevoked, and on the evidence as a whole of Mr. Mordan I unhesitatingly come to the conclusion that he has not established that he revoked that written authority. That reduces the case before us to a question of law. Now, let me first say a few words on that question as a matter of principle. Here is an authority given by underwriters to an agent to underwrite for them—a written authority expressly stating what are the powers conferred upon the agent. If the agent acts within the scope of the written authority and underwrites, it appears to me on principle that, so far as concerns persons taking in good faith for valuable consideration policies underwritten by the agent by virtue of that written authority, those policies are binding on the principals who had given the authority to the agent, and that the principals cannot escape merely because the agent may have abused his authority or betrayed his trust. Consider what would have happened if the plaintiffs in this case, who accepted the policies of guarantee, had not relied merely on the representation that Mr. Burnand made to them when he purported to sign on behalf of the four co-defendants. The utmost, it appears to me, that the plaintiffs need have done as between them and the prin-

cipals of the agent would have been to ask the agent for the production of the written authority he had. Had they done that in the present case, they would have seen these written authorities. It appears to me that, if they had done that, it would have been hopeless for the principals of the agent afterwards to say that they were not bound by the written authority so inspected in a case where the agent acted, so far as they were concerned, in bad faith, he acting within the scope of the written authority. That appears to me on principle to be so clear that I shall not further pause to consider the point. Does it make any difference that as a matter of fact in the present case the plaintiffs did not inspect the written authority? In my opinion it does not, and for these reasons. By not inquiring for those documents they run, no doubt, a certain risk; but let me see what that risk is. The agent comes forward to them and represents that he has authority. He does that because he signs on behalf of the co-insurers. Now, if they do not ask for the authority, what are they relying upon when they avoid asking to see, or do not ask to see, the written authority? They rely—and that is the risk only that they take upon themselves—on his representation that, if called upon, he had that authority and can establish it. How can they then be held not entitled to hold the principals liable on these policies when it turns out that, to the extent to which they trusted the agent, they were justified in trusting him; that, to the extent to which he made a representation to them as to his authority, he was justified in making that representation? The plaintiffs are to my mind in the same position, and in no worse position, as if they had asked to see the written authority and these written authorities had been produced to them. It may be suggested that if Mr. Burnand in this case must be treated as having been guilty of fraud or misconduct, he might equally have been guilty of representing that he had authority, even if there was no written authority. But that is entirely fallacious. I should say there are few things that a man would more shrink from than writing other men's names down to documents such as these without authority, and for the very good reason that in writing such names, if he did so without authority, to say the least of it, he would run very great risk of being charged with forgery. A man might well shrink from that, even though he might not shrink from fraud or misconduct, and in the present case can anyone doubt, who knows the facts, that why Mr. Burnand did sign the documents in question here—namely, the policies of guarantee—was because he had at his back, and he relied upon, the written authorities given him by his co-defendants? It appears to me, therefore, on these grounds, that on principle the point of law ought to be decided in favour of the appellants. On the authorities, after what the Master of the Rolls has said, I desire to say but a very few words. With regard to the cases which were cited and relied upon on behalf of the respondents concerning the relations of master and servant, they appear to me to be wholly beside the case we have to decide, and for this short reason. The question in those cases is simply as to what is the implied authority conferred on a servant by his master. That has

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nothing to do with a case like the present, where the authority is conferred on the agent by his principal expressly in writing; and, further, I agree with the Master of the Rolls, for the reasons he has pointed out, that this precise point has really been decided in the English courts, if not before at any rate by that case in the Privy Council of *Bryant, Powis, and Bryant v. Quebec Bank (sup.)* to which he has referred. It appears to me therefore, both on principle and authority, that the point of law decided by Bigham, J. ought to be decided adversely to his view, and that the appeal ought to succeed. Let me add in conclusion that, of course, although the document relied upon by the plaintiffs—the policy of guarantee—was within the scope of the authority of the agent, if the plaintiffs had taken the policy with knowledge of the fraud of the agent, they would not be entitled to hold the policies as against the persons defrauded. To my mind the respondents here utterly fail to establish any such case. All that they can say was known to the plaintiffs with regard to the peculiar position of Mr. Burnand was that he was, at the time the document sued on in this case was executed, a director of Gaze's, who were so much concerned in the transaction. But did that affect them with notice that Mr. Burnand was therefore in a position which rendered it impossible for him to act as agent in signing these policies on behalf of his principals? I should certainly think not. It certainly cannot be said, to my mind, on the evidence that there was anything in the nature of knowledge on the part of the plaintiffs, direct or indirect, of any misconduct on Mr. Burnand's part, nor that they were, as it is said on behalf of the respondents, in any way put on further inquiry in reference to the transactions in question. Therefore any attempted answer, as against the point of law, on behalf of the respondents fails. Therefore I am also of opinion with the Master of the Rolls that this appeal ought to succeed.

MATHEW, L.J.—I am of the same opinion. The very full judgments which have been delivered relieve me of the necessity of doing more than expressing briefly my reasons for concurring in the judgments which have been given. Now, the first important question is a question of fact, whether or not this policy is one that in the ordinary course of business would be obtainable and would be effected at Lloyd's. In my opinion it is hardly too much to say that the whole of the evidence on the part of the plaintiffs and defendants pointed one way—to the conclusion at which the learned judge arrived, that this policy was one which could be readily obtained at Lloyd's, and which in the ordinary course of business would be effected merely upon consideration of the amount of premium by underwriters at Lloyd's. Attention was called on the part of the plaintiffs to the fact, which was admitted on the part of the defendants, that a great change had taken place in the way business was carried on at Lloyd's, and that now there was a vast variety of subjects of insurance. Indeed, I think Mr. Lush was prepared to admit that anything might be insured except the risk in question. He stoutly contended that the risk in question was not within the ordinary scope of the business of an under-

writer at Lloyd's. Attention was called to the fact that solvency policies were well known at Lloyd's, and certainly they appear to be policies of the same character as the one in question. Further, this very form of policy had been in use at Lloyd's from the year 1890. All that had to be admitted. It was said on the part of the plaintiffs that the evidence they offered was complete and perfectly satisfactory to show that a policy like this could be got to-morrow at Lloyd's, and that there would be no difficulty in inducing any underwriter, on his being properly remunerated, to take the risk on himself. Now, what was the evidence offered on the part of the defendants—evidence which was elicited in an exceedingly dexterous manner? The ground taken by the defendants was difficult to occupy, but at any rate it was occupied for a very considerable time with an appearance of plausibility. The witnesses who were called, who were brokers of great experience, had their attention called to this particular policy on which this action was brought. They were asked if they were familiar with that form. They said that they were not; and they went further and said they had never seen that form. This was the evidence offered to show that no such insurance could be obtained at Lloyd's. It carried the defendants a very little way indeed, because it was quite possible these experienced brokers may not have seen a policy in this form. The market was described as a limited one, and they might call any number of underwriters to show they had not seen this form of policy, without proving that no such policy would be effected at Lloyd's. It carried them a very little way indeed. Then it was said that the fact that this form of policy is not generally known by brokers shows that it is exceptional in principle as well as in form; but the witnesses called for the defendants had to admit that the solvency policy was all well enough, but said that this policy was a different thing. How different? They were pressed a good deal in cross-examination, and one could see how every moment the grasp of the witnesses on the position in which the defendants wished to place them was loosened, and many of them readily drifted into an admission that they could not see any reason whatever why, if a solvency policy could be obtained, the policy in question should not also be obtainable at Lloyd's. What was the difference in principle? In the one case, in the case of a solvency policy, there is an insurance against a default, due to the bankruptcy or insolvency of the debtor. In the other case there is an insurance against a default on the part of the debtor in finding a sum of money at a particular date. In principle, to my mind, there is not the slightest difference between the two cases; and the learned judge, having heard a great deal of the evidence offered for the defendants, saw in the end how hopeless the contention was, and intimated his opinion, without hearing any further evidence, that he came to a conclusion upon this question of fact against the contention of the defendants. I should, perhaps, advert to the argument of Mr. Lush, that this was not insurance at all; that this particular contract was not a contract of insurance, but of suretyship; that it was a promise to answer the debt of another, but was not insurance. Unfortunately he was committed to the admission that the

solvency policy was a policy of insurance, and, if so, what was the use of saying that this was only a policy to back a bill, and therefore ought not to be treated as an insurance. Passing from that point, I come to the point of law, and really I have nothing to add to what has been said by the Master of the Rolls and Romer, L.J. upon that point. This I would repeat, that to my mind it would be fatal to the transaction of mercantile business if there were to be put upon a person dealing with a broker an inquiry into the motives with which the broker was entering into the contract. Those who employ brokers in the city of London, those who employ persons in the position of Mr. Burnand at the time when his authority was given to him, would know perfectly well that he would state to those with whom he was dealing that he had the authority to write a certain number of lines. Those who instructed him would know well that his word would be acted on, and that, upon his statement to Messrs. Hambro that he had the authority to represent those lines, they would not put searching inquiries to him and require him to produce the documents. There the documents were if they were called for, and on an inquiry the position is the same as against the defendants as if Messrs. Hambro had asked for the documents that they might inspect them and had then seen what the authority was. Burnand having that authority, is it to be suggested that Messrs. Hambro were to enter on an inquiry as to what motives the broker had in carrying the transaction through as he had done in this case? How could the inquiry be made? Any inquiry even approaching that would be regarded as an insult, and would be fatal to the transaction of business. No reasonable man would say that the plaintiffs were not bound to give credit to the statements of Burnand, but that they must first insist on seeing the documents and then enter into an inquiry as to his relations with Gaze and Co., and as to the possibility of his having some personal interest and therefore some indirect motive in the insurance being effected. There is no authority for saying any such inquiry has ever been required amongst English underwriters and English brokers. I can see at the same time how Bigham, J. was misled. There was a mass of authority on the subject in the early days of legal study in the United States, and for a time there appears to have been some error of judgment amongst the courts there; but they ultimately cleared themselves of the suggestion that the motives of the broker could ever be looked into. It is enough for us to say that the English law has established abundant authority that business may be carried on, in the future as in the past, with brokers with proper authority, without any inquiry as to the motives with which the particular contract was entered into. The passages which have been read by my Lord from the judgment of Lord Brougham in *Bank of Bengal v. Fagan* (sup.), the passage read from Story, sect. 73, and the case in the Privy Council of *Bryant, Powis, and Bryant v. Quebec Bank* (sup.), all appear to me to establish the law on the subject, and we do not need the very weighty authority which has been based upon it to show there is no such doctrine as the doctrine we are asked for the first time to lay down in this case. I agree, therefore, with the judgments which have

been pronounced, and that the appeal must be allowed and cross-appeal dismissed.

Appeal allowed. Cross-appeal dismissed.

Solicitors for the appellants, *Parker, Garrett, Holman, and Howden.*

Solicitors for the respondents, *Ward, Bowie, and Co.; Church, Rendell, and Co., for J. B. Clarke and Co., Birmingham; Merriman, Pike, and Merriman; R. A. Read, jun.*

April 14 and 26.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

OWENS v. P. AND A. CAMPBELL LIMITED. (a)
APPEAL UNDER THE WORKMEN'S COMPENSATION ACT, 1897.

Employer and workman—Injury by accident—Compensation—Employment—On, in, or about a wharf—Fireman on steamer moored to wharf—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), s. 7.

A passenger steamer was made fast to a landing pontoon outside a dock, and gangways were out connecting the vessel with the pontoon in order to enable passengers to go on board. A seaman employed as a fireman on the steamer was injured by an explosion while he was attending to the boilers.

Held (allowing the appeal, Mathew, L.J. dissenting), that the workman was not employed on, in, or about the wharf, inasmuch as his employment had no connection with the purposes for which the wharf was being used by his employers, and that therefore he was not entitled to compensation under the Workmen's Compensation Act 1897.

APPEAL of the defendants from the award of the County Court judge at Cardiff, in proceedings for compensation under the Workmen's Compensation Act 1897.

The plaintiff alleged he was injured by accident arising out of and in the course of his employment by the defendants, and he claimed compensation under the Workmen's Compensation Act 1897.

The plaintiff was a fireman employed on the *Cambria*, a steamer belonging to the defendants. He was a seaman on the ship's articles, and was engaged on his duties as a fireman when a boiler burst and he was injured.

The *Cambria* was a passenger steamer, which made trips to Ilfracombe and other places from Cardiff.

The *Cambria* came into Cardiff on the evening of 20th Aug. 1903, and was made fast to the landing pontoon, which is at the head of the Cardiff Drain, and outside the entrance to the docks. The pontoon is a wooden landing stage, which rises and falls with the tide, by means of which the passengers embark on and land from vessels.

The *Cambria* remained afloat from the time that she came in until about 8.30 p.m., when she was left dry on the mud. She was made fast to the pontoon by ropes, and she continued to be made fast by the same fastenings until she left the pontoon.

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The engine fires in the vessel were left in all night, and the plaintiff, early on the morning of the accident, went on board the vessel to perform his usual duties as a fireman.

The vessel was afloat about 1.30 a.m. on the morning of the day of the accident, and was timed to leave Cardiff for Ilfracombe at 8.15 a.m.

At 8.17 a.m., whilst the plaintiff was attending to the boilers, a tube in one of the boilers burst, and he was severely scalded on the face and arms.

The gangways from the vessel to the pontoon had been out—that is, connecting the pontoon with the vessel—for some time before the accident happened, and at that time practically all the passengers were on board the vessel.

The main and auxiliary engines of the vessel had been worked before the accident happened.

The passengers on board the vessel were, after the accident, transferred to the steamer *Ravenwood*, which left Cardiff about 8.30 a.m.

The accident happened whilst the *Cambria* was moored to the pontoon for the embarkation of passengers.

The County Court judge held, upon the authority of *Griffin v. Houlder Line* (90 L. T. Rep. 142; (1904) 1 K. B. 510), that the plaintiff was employed in an employment within the Act, and he made an award in his favour.

The defendants appealed.

J. A. Simon for the appellants.—The learned County Court judge was wrong in holding that this case came within the Act. The vessel upon which the plaintiff was employed was not at the time of the accident a "factory" within the meaning of the Act. If the pontoon was a "wharf" and therefore a "factory" within the meaning of the Act, yet the vessel was not within that factory, and the plaintiff was not employed on, in, or about that factory:

Griffin v. Houlder Line Limited, 90 L. T. Rep. 142; (1904) 1 K. B. 510.

The plaintiff was not employed upon any work connected with the business of the wharf or the purposes for which his employers were occupying the wharf. There was no connection between the work upon which he was employed and the business of the wharf; and therefore he was not employed on, in, or about the wharf:

Powell v. Brown, 79 L. T. Rep. 631; (1899) 1 Q. B. 157;

Raine v. Jobson, 85 L. T. Rep. 141; (1901) A. C. 404.

H. Gatehouse (with him *Albert Parsons*) for the respondent.—The County Court judge rightly held that the plaintiff was entitled to compensation under the Act. The defendants had the use of the wharf and were the occupiers thereof within the meaning of the Act, and were therefore "undertakers." The wharf was occupied by the vessel upon which the plaintiff was employed, and he was therefore employed on, in, or about the factory"; that is, the wharf:

Merrill v. Wilson, Sons, and Co., 83 L. T. Rep. 490; (1901) 1 K. B. 35.

The fact that he was a seaman employed upon a ship does not prevent him from being entitled to compensation under the Act:

Griffin v. Houlder Line Limited, 90 L. T. Rep. 142; (1904) 1 K. B. 510.

J. A. Simon replied.

Cur. adv. vult.

April 26.—*COLLINS, M.R.*—This is an appeal from the decision of the County Court judge at Cardiff, who held that the workman was entitled to compensation under the Workmen's Compensation Act 1897. The applicant was a workman who was employed as a fireman on a passenger steamer which made daily trips from Cardiff to Ilfracombe and other places. Upon the occasion in question the vessel had been lying during the night at a wharf, which was outside the docks at Cardiff, and was due to start on the following morning at 8.15 from Cardiff with passengers. As stated in the judge's notes, the plaintiff was a seaman on the ship's articles and engaged on his duties as a seaman at the time of the accident. What the plaintiff was doing at the time of the accident is also stated in the notes: "The engine fires in the vessel were left in all night, and the applicant early on the morning of the accident went on board the vessel to perform his usual duties as a fireman. The vessel was afloat about 1.30 a.m. on the morning of the day of the accident, and was timed to leave Cardiff for Ilfracombe at 8.15 a.m. At 8.17 a.m., whilst the applicant was attending to the boilers, a tube in one of the boilers burst, and he was severely scalded on the face and arms." The man, therefore, had signed on as a seaman and was employed as a seaman at the time of the accident, and the accident arose out of his employment while he was attending to the boilers. It was contended on behalf of the employers before the County Court Judge that they were not liable to pay compensation under the Act, as *prima facie* a seaman employed in a ship was not within the Act, because a ship was not a factory, and the owners were not the undertakers in respect thereof. The County Court judge held that a recent decision of the Court of Appeal settled the question. In *Griffin v. Houlder Line* (90 L. T. Rep. 142; (1904) 1 K. B. 510) the ship was in a dock, and a seaman was employed in cleaning out a hold for the reception of cargo when he met with an accident. This court there held that, as the ship was in a dock, and as the dock was a factory, the principle of *Raine v. Jobson and Co.* (85 L. T. Rep. 141; (1901) A. C. 404) applied, and that the seaman was at the time of the accident employed in a factory, and therefore, notwithstanding that he was a seaman, he came within the Act. The fact that he was a seaman did not exclude his rights under the Act, the ship being in a dock and therefore in a factory. There was no doubt in that case of the physical fact that the ship was in a dock, and that the dock was a factory. The question is whether that decision governs the present case. In the present case neither the ship nor the man was in a dock. No doubt the ship was lying alongside and using a wharf, and at the time of the accident it had not completely ceased to use the wharf; and the wharf was a factory within the Act. So far as the employers were using the wharf for the purposes for which a wharf was designed for use they were "undertakers" in respect thereof within the meaning of the Act, having the actual use or occupation thereof. How far does that entitle the applicant to relief under the Act? That depends upon sect. 7 of the Workmen's Compensation Act 1897. That section provides that "this Act shall apply only to employment by the undertakers as hereinafter defined on or in or

about a factory." A wharf is for this purpose a factory. Therefore the workman has to show that he was employed by the undertakers on in or about a wharf. That seems to me to be the only material question in this case. Upon the facts here, could it be said that this fireman, in discharging his ordinary duties as a fireman, was employed on or in or about a factory? Clearly he was not employed on or in a factory. Was he employed about a factory? This court has frequently laid it down, and it is well settled, that the word "about," as used in sect. 7, has in it the meaning of physical proximity. This workman was certainly employed near the factory. It also involves the idea of employment upon the business of the factory. If and so far as the workman was employed in relation to the purposes for which the employers had the use of the wharf he could be said to be employed by the undertakers about the wharf. But in dealing with these cases it must not be forgotten that one is dealing with what may be called constructive factories, and it is necessary to keep clearly before one's mind the nature of the factory in respect of which the employers were the undertakers and the purposes for which that factory was used, and to see whether the workman was employed about that factory. The mere fact that a man was employed by the occupier of a factory in juxtaposition to the factory would not constitute employment "on, in, or about" a factory within the meaning of sect. 7. Take a simple illustration. The occupier of a factory is being driven home from the factory by his coachman, and at a distance of, say, fifty yards from the factory the coachman meets with an accident. The coachman would be, no doubt, employed by the occupier of the factory, and therefore by the undertaker, and at the time of the accident would be employed near the factory; but he would not be employed on or in or about the factory within the meaning of sect. 7, because his employment did not concern the factory at all. It was a mere accident that he was injured near the factory. No doubt some cases come near the line, but a line, however fine, must exist, and a case must lie on one side or other of the line. The injured man in the present case was a seaman engaged at the time of the accident in discharging his ordinary duties in attending to the boilers of the ship; he was employed physically near the factory, but his work had no connection with the purposes for which the wharf was occupied. The County Court judge held that the case came within the decision in *Griffin v. Houlder Line* (*ubi sup.*), and that the Act applied. Upon the facts here the ship was clearly not in a dock, and, in my opinion, the employment was not on or in or about a wharf. The case, therefore, does not come within the Act, and the appeal must be allowed.

ROMER, L.J. read the following judgment:—I am of the same opinion. It is admitted that the landing stage is a "factory," within the Act. But by the steamer being moored alongside and using the stage for the purposes of passengers and goods being taken into and from the ship, it did not become part of the wharf, or become itself as a whole a "factory." Nor, in my opinion, did every man upon and employed in the service of the ship become by the circumstances above referred to at once and of necessity employed on, in, or about a factory. No doubt a man ordi-

narily employed in the ship may, by the particular work he has to do while the ship is moored, be employed on, in, or about the landing stage, and so come within the Act. But whether he is so employed must depend on the special circumstances of his employment. I can only say that in the circumstances of the present case, which the Master of the Rolls has stated and are not in dispute, I come to the conclusion that the man was not employed on, in, or about the landing stage, and so is not within the Act. I gather that the point on which we are deciding this case was not sufficiently brought to the attention of the learned County Court judge, but the point is open to the appellants, and I think, therefore, that the appeal succeeds.

MATHEW, L.J. read the following judgment:—I regret to be unable to agree with the opinions of the Master of the Rolls and Romer, L.J., but it seems to me that the grounds upon which we are asked to allow the appeal are less satisfactory than the reasons for its dismissal. If the accident had occurred while the applicant was employed on a vessel moored to a wharf in a dock, he would be entitled to the protection of the Workmen's Compensation Act 1897, for the dock would be a factory within the meaning of the Workmen's Compensation Act 1897 and the Factory and Workshop Act 1901, and the applicant in the course of his employment would be "on or in or about" the factory: (see *Raine v. Jobson and Co.*, 85 L. T. Rep. 141; (1901) A. C. 404, and *Griffin v. Houlder Line Limited*, 90 L. T. Rep. 142; (1904) 1 K. B. 510.) But, because the *Cambria* was moored to a wharf outside a dock, it was argued that the employment of the workman was one to which the Act did not apply. The wharf, it was agreed, was a factory, but it was said that, though he might be protected while passing near to and over the wharf to the steamer, he lost the benefit of the Act when he reached the deck of the steamer. From that time, it was argued, he could not be said to be working in or on the wharf, and was therefore outside the Act. It would follow that a workman going to the ship by the only approach to the wharf to do some necessary repairs and sustaining an injury when close to the wharf on the shore side would have no claim for compensation. It appears from the evidence that the applicant's employers had, for the purposes of their business as owners of the *Cambria*, the actual use and occupation of the wharf within the meaning of the Act of 1901, sect. 104. The vessel made daily trips from Cardiff to places on the neighbouring coast and back. On arriving at Cardiff she was brought under steam to the wharf and placed in her berth. She was fastened by ropes to the wharf, and remained fastened until her next voyage. Passengers coming on board and leaving passed over the wharf. Early in the morning of the accident the applicant came on board to attend to his ordinary duties as fireman. Steam was got up and the main and auxiliary engines were worked. At 8.17 the passengers were all on board and the steamer was on the point of departure. The applicant was standing by the boilers when a tube burst and he was badly scalded. In my view the evidence shows that the appellants could not have made the wharf available for their business without the assistance of such a

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workman as the applicant. He was on the steamer for a purpose directly connected with their use of the wharf, and I have come to the conclusion that in the course of his employment he was at the time of the accident "about" the wharf within the meaning of sect. 7 of the Act of 1897. If, as was assumed upon the argument of this point, the employment of the fireman was one to which the Act applied, the general intention of the Legislature must be admitted to be that there should be a right to compensation. The language of sect. 7 seems to me to permit effect to be given to the intention in the case of the applicant. I find nothing in the Act to suggest that the Legislature meant to distinguish between the rights of workmen of the same class or to show that while workman A was within the Act, workman B, under similar, if not the same, circumstances, was intended to be left unprotected. I therefore come to the conclusion that the appeal on this point fails.

Appeal allowed.

Solicitors for the appellants, *Steadman, Van Praagh, and Gaylor*, for *W. H. Brown*, Bristol.

Solicitors for the respondent, *Smith, Rundell and Dods*, for *Meyrick and Davies*, Cardiff.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

June 9 and 10.

(Before KEKEWICH, J.)

EDMUNDSON v. RENDER. (a)

Solicitor—Covenant in articles of clerkship not to practise within certain radius—Breach—Work usually done by solicitors.

The defendant had bound himself to a solicitor practising at M. by articles for a term, and covenanted that he would not at any time do any work or act for or on behalf of any persons usually done by solicitors within a radius of fifteen miles from M. without written permission. The defendant took proceedings to obtain probate of the will of a person within the prohibited radius, and corresponded from H. with a witness within the prohibited radius with a view to obtaining his evidence in order to enable probate to be obtained. He signed the praecipe directing a plaint note to be issued for a County Court summons at a court in the prohibited area on behalf of a plaintiff residing therein, and conducted the proceedings until receipt of the amount paid into court. He prepared the will of a testatrix residing within the area on instructions received outside the area, and received a small fee therefor, but was present when she executed it within the area; and, lastly, he advertised in a paper circulating within but published outside the area a farm for letting within the prohibited district.

Held, in an action to restrain the defendant from practising within the prohibited limit, that the covenant might be broken although the defendant or his clerks did not go professionally within such limit. That therefore the proceedings in connection with the collection of the debt through

the County Court infringed the covenant. Also the acts done in relation to the execution of the will, which must be held to have been done by defendant in his character of a solicitor, constituted a breach of such covenant, but that those as to advertising the farm did not break it. *Quære*, as to applying for the proof of evidence infringing the covenant.

By articles of agreement dated in 1893, and made between the plaintiff, Charles Francis Peter Edmundson, a solicitor, of the one part and the defendant, John William Render, of the other part, the defendant bound himself as articulated clerk with plaintiff in the profession of a solicitor for three years. The agreement contained the following proviso and covenant:

Provided always and the said John W. Render doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said Charles F. P. Edmundson, his executors, administrators, and assigns, that he the said John W. Render shall not at any time hereafter, either on his own behalf or as a clerk or partner, or otherwise on behalf of any other person or persons who practise, or who may practise or carry on, the business or profession of a solicitor, do any work or act for or on behalf of any person or persons usually done by solicitors within a radius of fifteen miles from Masham Market Cross without the written permission of the said Charles F. P. Edmundson, or of the said firm, or the successor or successors of the said firm. And the said John W. Render will, in case of any infringement of this covenant on his part, submit to an injunction and abide by the decision of any court of law or equity as to damages and costs.

The plaintiff is and was at the time of the execution of the articles a member of the firm of Edmundson and Gowland, solicitors, practising at Masham and other places.

The defendant served the plaintiff as clerk until the 31st Aug. 1899, was admitted a solicitor in Aug. 1901, and thereupon commenced practising, opening an office at Harrogate, a short distance outside the prohibited area under the covenant. He resided at a place about a mile and a half from Masham Market Cross.

The plaintiff asserted that the defendant had committed divers breaches of the covenant in his articles of clerkship, and set out particulars of four of such breaches in par. 4 of his statement of claim. As to these alleged breaches, the evidence was as follows:—

In Oct. 1901 the defendant was given instructions to obtain probate of the will of James Baine Metcalfe, deceased, late of Swinton, near Masham, within the prohibited radius. He corresponded with a witness within that radius, and asked him, to send to Harrogate a proof of his evidence, which the witness ultimately declined to do.

Defendant was instructed by one Jackson, of Fearby, to sue a person named Wilkinson, of Fearby Cross, near Masham, for a debt in the County Court at Ripon. Fearby, Fearby Cross, and Ripon are within fifteen miles of Masham Market Cross. Defendant signed the praecipe upon which the registrar entered the plaint, the particulars, and notices to admit and produce, at his office at Harrogate. He described himself as the solicitor for the plaintiff, and stated he would accept service of all proceedings on his behalf. He served notice to admit and produce, and signed a receipt, which he sent to the registrar, for the

(a) Reported by W. P. PAIR, Esq., Barrister-at-Law.

amount paid into court in satisfaction of the cause of action.

On the 21st May 1903 he sent a telegram to the defendant in the County Court action, which he handed in at Masham, stating that the plaintiff in that action accepted the amount paid in. Defendant had not seen the plaintiff in that action at Masham in the matter.

In 1902 and 1903 he acted as solicitor for one Susannah Topham, of Pateley Bridge, within the prohibited radius.

Plaintiff had made a codicil to the will of Susannah Topham. Subsequently he found that defendant had been instructed to remake the will and codicil, and had gone to Pateley Bridge in order to get it executed. It was admitted that the whole will, including the date and attestation clause, were in the defendant's handwriting.

He was also present at the execution of the will on the 5th Sept. 1902. He stated that written instructions for the preparation of the will were given to him at Harrogate.

He was in September staying with a mutual friend, who asked him to go and see her sign her will, saying defendant need not make a business matter of it. He declined, but eventually went to her house, and the will was executed in his presence, but he did not witness the testatrix's signature. A charge of 10s. 6d. had been previously paid to defendant.

In April and May 1903 defendant caused advertisements to be inserted in a newspaper published at Harrogate offering to let a farm within the prohibited area, stating that application might be made to him at Harrogate. The newspaper circulates within the prohibited district.

The plaintiff brought this action claiming an injunction restraining the defendant from doing work as a solicitor in breach of his covenant, and also asking for damages.

Stewart-Smith, K.C. and F. H. Maughan, for the plaintiff, stated the above facts.—The defendant claims the right to do what he has done. He says he is within his right in doing professional work within the district provided he does not go within it. The issuing the plaint at the Ripon County Court was a breach of the covenant:

May v. O'Neill, 44 L. J. 660, Ch.

There is no such thing as being a solicitor of a particular County Court. The solicitor must sign the particulars before he demands his fee, and whether he enters the plaint by post or by clerk the effect is the same. Defendant on the particulars describes himself as the plaintiff's solicitor:

County Court Rules 1903, Order VI., r. 9.

He selected the Post Office as his agent for entering the plaint at Ripon within the prohibited area, but it was none the less his act, which also applies to the notice to admit. As the plaintiff's solicitor on the 21st May 1903 he signed the receipt for the amount paid into court. The writing to the witnesses as to the Metcalfe probate to come to him from Masham to Harrogate was an evasion of the covenant. It makes no difference whether defendant goes there himself or invites a witness within the prohibited area to send him a proof. [KEKEWICH, J. expressed the view that the extent of the prohibited radius could not be considered unreasonable.] If the defendant's contention that

while he remains in his office at Harrogate he cannot infringe the covenant is correct, he might issue County Court summonses against undefended debtors and collect debts within the prohibited area. Defendant was the solicitor on the record. With regard to Miss Topham's will, he forwarded the ordinary form of directions as to its execution.

P. Ogden Lawrence, K.C. and Owen Thompson for the defendant.—Mr. Render has done no work usually done by solicitors within the prohibited radius. He does not claim the right to appear in the County Court. Before he can do that he must sign the roll:

County Court Rules 1903, Order LIV., r. 7.

Plaints may be entered by letter:

Order V., r. 12.

The work was done at defendant's office outside the prohibited radius, nor have his clerks or agents served any documents within it.

KEKEWICH, J.—In dealing with the questions in this case I am dealing with pure questions of law. No question of conduct arises, and I have endeavoured with some if not with quite a full measure of success to exclude from discussion in the case any question of that kind. I take it that Mr. Render has honestly endeavoured to observe the covenant into which he has entered, and by which he is bound; and if, unfortunately, he has transgressed the covenant, there is not the least ground for finding fault with him as having been guilty of intentional misconduct. Mr. Render has, in my judgment, committed an error. He has made a mistake, not only in doing that which is wrong, which has led to the present dispute, but also he has made the mistake, which is a very serious one, of advising himself on a difficult question. I conclude that what he has done was based on a desire to keep within the limits of this covenant, but he has construed it erroneously. He wished to fulfil his obligations under it, but he has construed them erroneously. The cases in which he is said to have broken the covenant are set forth in the statement of claim. I take the first—the obtaining probate of the will of James R. Metcalfe. There was no question as to his obeying the instructions in what he had done in that respect. He did work usually done by a solicitor. In the course of doing that work he had occasion to obtain the proof of a witness residing within the prohibited limit. He corresponded with that witness, and asked him to send to Harrogate a proof of his evidence. It is said that that is a breach of the covenant. Without professing to give a definite opinion upon it, because the matter has not been thrashed out, and I am disposing of the case upon other grounds, I may express my view of this matter. It is extremely difficult to come to a conclusion on such a matter as that. I think some liberality must be exercised in construing a covenant of this kind. Take the case of a man engaged as an articled clerk at Bristol, who has entered into a covenant similar to that in the present case, and has then set up business at Harrogate, and, in proving the will of a man who dies at Harrogate, he finds it necessary to obtain evidence at Bristol to support the application for probate, I should be extremely unwilling to say that he committed a breach of covenant not to do work at Bristol by writing for the proof

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[K.B. DIV.]

of a witness there, but I have no occasion now to consider this question, and I say no more about it. Then I pass over the two breaches next charged in the statement of claim, and I take the last. Mr. Render was instructed to let a farm at Felbeck, near Pateley Bridge. I cannot see how it can possibly come within the covenant. For his work he would have been entitled to charge under the scale. He advertised in a paper circulating at Pateley Bridge, and intended the advertisement should be read there. The paper was published at Harrogate. So far as Mr. Render was concerned, nothing was done outside Harrogate. There was no transgression of the covenant. Now I turn to the other cases. Mr. Render was instructed to sue a person in the Ripon County Court, that being within the limit, and he accordingly took proceedings. A plaint was issued, and a copy served with the summons. Notice was given that the money sued for was paid into court. It was accepted in discharge and paid out of court. All that was done by Mr. Render without his leaving his office. He paid the necessary fee, and sent his notice that the registrar was to accept the money paid in in discharge of the claim. He dated the address for service at Harrogate. When the time came and the money was paid into court, he took it out and gave the registrar a receipt, and he now says that there was not a transgression of the covenant in the articles of clerkship because there was no doing of work usually done by a solicitor. To my mind that is an erroneous view. Mr. Render considered that so long as he or his clerk was not within the limit he could do all this. It seems to me that there are two possible answers to that. The first is that the Postmaster-General was the agent for Mr. Render for doing what was done. That seems to be, perhaps, an absurd contention, and I pass that over, because I think that in issuing and entering the plaint the registrar was the agent of Mr. Render. The rule says that where a person wishes to enter a plaint he may, instead of attending, transmit a præcipe free of cost to the registrar. The words of the rule point to the entry being made by the person, plaintiff, or his solicitor, notwithstanding it is done by means of the post. The rule is in the following terms: "Where a person desires to enter a plaint in a court within the district of which he does not reside, he may, instead of attending at the court, transmit free of cost to the registrar (1) a præcipe . . . and upon receipt of the above the registrar shall enter the plaint." He still enters the plaint. The act is done by him. It seems to me that it is impossible to say that Mr. Render did not enter that plaint, notwithstanding the fact that he never left his office or went to Ripon. The same consideration applies to taking the money out and the other proceedings in the case. Finding as I do on this point, it would be unnecessary to say anything about the other, but the case is of great importance to the parties, and I propose to deal with that also. Mr. Render, on the instructions of relatives prepared a will for Susannah Topham, and he sent that will to relatives for her execution. He had written instructions for the preparation of that will. He saw a gentleman in Harrogate through whom he had instructions, and he prepared and engrossed the will, and sent it for execution. So far, although it was usual work

done by a solicitor, it cannot be said to have been work done within the limit. He did not make a detailed charge for his services, but he charged for them half a guinea, which was sent in in the regular way as his bill, and paid as his bill. I assume that friendly reasons intervened as to the smallness of the amount, but I must take it as a regular solicitor's charge. He was on a visit to this Mr. Verity at Pateley Bridge, and he was asked to attend the execution, and he very properly said he could not. His good nature prevailed, and he did go. Two other witnesses were procured, who attested the testatrix's signature, and he did not witness the will. Why did he attend if it was not to see that the will was properly executed, that the date was filled in, and, I must infer, for the purpose of showing the testatrix and witnesses where they were to sign? He must have done this in his character of a solicitor. I desire, however, to guard myself against holding that a man may not do an act of this kind for charity without making himself liable for breach of such a covenant as the present. That depends on circumstances. If this had been a friendly act throughout, I should not have thought it an infraction of the covenant. If solicitors, from a feeling of good nature, do friendly acts for their friends, not really in the character of solicitors, they are amply secured. I cannot say that it was so here. He drew the will. He admitted it was a matter of business as a solicitor, and I think his attendance must be referred to the character he bore before in the transaction. I think that Mr. Render transgressed the covenant. Therefore on these two matters I think the covenant was broken. I can quite understand that it is important to Mr. Edmundson that the covenant should be observed, although I do not think Mr. Render has wilfully failed to observe it, and I think that he will be well advised to observe it more strictly in the future. There is no reason why anything can be said against the defendant, and there is no reason why he, a gentleman occupying a professional capacity, should be put under the injunction asked for, but he must pay the costs of the action, and 1*l.* nominal damages.

Solicitor for the plaintiff, *Arthur Toovey.*Solicitors for the defendant, *Edgar Robins and Clark.*

KING'S BENCH DIVISION.

Monday, March 7.

(Before CHANNELL, J.)

ATTORNEY-GENERAL v. VISCOUNT COBHAM AND OTHERS. (a)

Revenue—Estate Duty—Gift inter vivos—Death of donor within twelve months—Release of donor from prior covenant for payment of gift after death—Liability of gift to estate duty—Finance Act 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1 (c)—Customs and Inland Revenue Act 1881 (44 & 45 Vict. c. 12), s. 38, sub-s. 2 (a)—Customs and Inland Revenue Act 1889 (52 & 53 Vict. c. 7), s. 11, sub-s. 1.

*In 1892 a person covenanted with trustees that within three months after her death her executors should pay the sum of 5000*l.*, free of all duties and deductions, to the trustees upon trust for a*

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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certain charity. Some eight years afterwards the donor, with the object of giving the sum in her lifetime, executed another deed by which she covenanted to pay the 5000*l.* at once, and by this deed she, her executors and estate, were relieved from payment of the 5000*l.* under the former deed. The 5000*l.* was paid over, and the donor died within twelve months from the execution of the deed and the payment. Upon her death the Crown claimed estate duty upon this sum of 5000*l.*

Held, that the payment of the 5000*l.* was "an immediate gift inter vivos," within the meaning of sect. 38, sub-sect. 2 (a), of the Customs and Inland Revenue Act 1881; that it was none the less a gift because there was a release of the donor and her estate from the obligation under the prior deed, and that, as the donor died within twelve months from the making of the gift, estate duty was payable under sect. 2, sub-sect. 1 (c), of the Finance Act 1894.

INFORMATION by the Attorney-General claiming estate duty.

1. By an indenture dated the 1st June 1892, and made between Eliza Warrington of the one part and the defendant Viscount Cobham, Lord Kinnauld, Sir Harry Vernon, and G. W. Child of the other part, after reciting an indenture dated the 11th July 1889, whereby certain trust funds were settled upon the trusts therein particularly appearing, as and by way of endowment for the college of the blind sons of gentlemen, established at Powyke in the county of Worcester (now called "College for the Higher Education of the Blind"), and reciting that Eliza Warrington was desirous of adding to and increasing the endowments to the extent and at the time thereafter mentioned.

It was witnessed that Eliza Warrington thereby covenanted with Viscount Cobham, Baron Kinnauld, Sir Harry Foley Vernon, and G. W. Child that the executors or administrators of Eliza Warrington would, within three calendar months after her death, pay to Viscount Cobham, Baron Kinnauld, Sir Harry Foley Vernon, and G. W. Child or the survivors or survivor of them or the executors or administrators of such survivor or other the trustees or trustee for the time being of the now stating indenture the sum of 5000*l.* free of all duties, charges, or deductions whatsoever, to be held and applied by them or him upon the trust thereafter mentioned, and Eliza Warrington thereby directed and Viscount Cobham, Baron Kinnauld, Sir Harry Foley Vernon, and G. W. Child thereby declared that they or the survivors or survivor of them or the executors or administrators of such survivor or other the trustees or trustee for the time being of the now stating indenture, to whom the aforesaid sum of 5000*l.* should become payable should and would recover and receive payment thereof, and stand possessed thereof upon trust to pay and transfer the same to the persons or person who should then be the trustees or trustee of the recited indenture of trust, to be held by such last mentioned trustees or trustee upon the like trusts, as and by way of addition to and augmentation of the moneys comprised in and settled by such last mentioned indenture, provided always and it was thereby declared that the trustees or trustee of the now stating indenture might either them-

selves receive the sum of 5000*l.* and pay the same to the trustees or trustee for the time being of the recited indenture of trust, or might direct or cause the same to be so paid by the executors or administrators of Eliza Warrington without themselves receiving the same or any part thereof, and that all obligations and responsibility of the trustees or trustee thereof should cease and determine as soon as they should have paid or caused to be paid the aforesaid sum to the persons or person who should for the time being appear to be the trustees or trustee for the time being of the recited indenture of trust, and that notwithstanding any irregularity or informality in the appointment of such last mentioned trustees or any of them; and it was thereby declared that Eliza Warrington during her life should have the statutory power of appointing a new trustee or trustees of the now stating indenture.

2. By an indenture (indorsed on the lastly-stated indenture) dated the 3rd Nov. 1900 and made between Viscount Cobham, Baron Kinnauld, and Sir Harry Foley Vernon of the one part and Eliza Warrington of the other part. After reciting the death of G. W. Child and reciting that Eliza Warrington had agreed to pay the therein within mentioned sum of 5000*l.* to Viscount Cobham, Baron Kinnauld, and Sir Harry Foley Vernon as surviving trustees of the therein within written indenture upon the trusts therein within declared concerning the same upon having such release from the covenant on her part in the therein within written indenture as was therein-after contained. It was witnessed that in consideration of the premises and of the payment of the sum of 5000*l.* to Viscount Cobham, Baron Kinnauld, and Sir Harry Foley Vernon (the receipt whereof they did thereby acknowledge), they, Viscount Cobham, Baron Kinnauld, and Sir Harry Foley Vernon, as surviving trustees of the therein within written indenture, did thereby release Eliza Warrington, her executors and administrators, estate and effects from all actions, claims, and demands whatsoever for or in respect or on account of the therein within mentioned sum of 5000*l.* and the covenant on the part of Eliza Warrington relating thereto in the therein within written indenture contained.

3. Eliza Warrington upon the execution of the lastly-stated indenture paid the sum of 5000*l.* to the trustees of the indenture of the 1st June 1892, who duly paid that sum to the trustees of the college. The defendants were the trustees of the college, and the sum of 5000*l.* was vested in them as such trustees.

4. Eliza Warrington died within twelve months from the date of the lastly-stated indenture, and from the date of payment of the sum of 5000*l.*—namely, on the 19th May 1901.

5. Under the circumstances aforesaid it was contended on behalf of the Crown that estate duty under the provisions of the Finance Act 1894, and succession duty under the provisions of the Succession Duty Act 1853, became payable by the defendants in respect of the sum of 5000*l.*, as to the estate duty on the death of Eliza Warrington, and as to succession duty on the payment of the sum of 5000*l.*, or upon the death of Eliza Warrington.

6. The Commissioners of Inland Revenue caused application to be made to the defendants to

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deliver proper accounts in respect of the sum of 5000*l.* and to pay the duties which ought to be paid in respect thereof as aforesaid, but they refused to deliver such accounts and to pay such duties and contended that no such duties were payable.

The informant prayed as follows: That it might be declared that upon the death of Eliza Warrington estate duty under the provisions of the Finance Act 1894 became payable in respect of the sum of 5000*l.*, and that upon the payment of that sum or (alternatively) on the death of Eliza Warrington succession duty under the provisions of the Succession Duty Act 1853 became payable in respect of the sum of 5000*l.* That an account might be directed to ascertain the amount of the duties so payable together with interest at 3 per cent. per annum from the time when the same became payable respectively.

The claim for succession duty was abandoned by the Attorney-General during the course of the argument.

Sect. 1 of the Finance Act 1894 (57 & 58 Vict. c. 30) imposes "estate duty" to be levied and paid upon the principal value of all property, real or personal, settled or not settled, "which passes on the death" of every person dying after the commencement of the Act.

Sect. 2 (1) provides:

Property passing on the death of the deceased shall be deemed to include the property following (that is to say): (c) Property which would be required on the death of the deceased to be included in an account under sect. 38 of the Customs and Inland Revenue Act 1881, as amended by sect. 11 of the Customs and Inland Revenue Act 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily," and a reference to a "volunteer" were omitted therefrom.

The Customs and Inland Revenue Act 1881 (44 & 45 Vict. c. 12) provides:

Sect. 38 (1). Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or movable property to be included therein, according to the value thereof. (2) The personal or movable property to be included in an account shall be property of the following descriptions—namely: (a) Any property taken as a *donatio mortis causæ* made by any person dying on or after the first day of June 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made three months before the death of the deceased.

This section was amended by sect. 11 of the Customs and Inland Revenue Act 1889 (52 & 53 Vict. c. 7), as follows:

Sect. 11 (1). Sub-sect. 2 of sect. 38 of the Customs and Inland Revenue Act 1881 is hereby amended as follows: The description of property marked (a) shall be read as if the word "twelve" were substituted for the word "three" therein, and the said description of property shall include property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

The Attorney-General (Sir Robert B. Finlay, K.C.) and Vaughan Hawkins for the Crown.

—The Crown do not now claim succession duty, but it is submitted that estate duty is payable. The question arises under sect. 2, sub-sect. 1 (c), of the Finance Act 1894, and sect. 38, sub-sect. 2 (a), of the Customs and Inland Revenue Act 1881, as amended by sect. 11 of the Customs and Inland Revenue Act 1889. The effect of these sections is to impose estate duty upon any property, real or personal, taken under a "disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise," "which shall not have been *bona fide* made twelve months before the death of the deceased." The point is an extremely short one, but it does not seem to be covered by any authority, although the principle has been laid down over and over again that, to determine whether there is a gift or not, you have to look at the particular circumstances of each case. It is contended that the payment of the 5000*l.* by the deceased, under and in pursuance of the indenture of the 3rd Nov. 1900, was a gift. The covenant in the indenture of the 1st June 1892 was a covenant to make a gift of the 5000*l.* to the trustees, and, if the deceased had died without having altered the arrangement, and without having paid over the 5000*l.* in her lifetime, and if things had taken their natural course, then estate duty would have been payable on that sum of 5000*l.* The estate duty is none the less payable because the deceased had given the money in her lifetime. Here we have a gift, followed by performance in paying over the money; it was a gift made *inter vivos* by the deceased, and it was made within twelve months of the death of the deceased, and therefore we have all the conditions necessary to bring the case within the words of the section: "purporting to operate as an immediate gift *inter vivos*," and made within twelve months of the death of the deceased; and it is none the less a gift because it was made in consideration of the release of the prior covenant. [The case of *Crossman v. The Queen*, 55 L. T. Rep. 848, 18 Q. B. Div. 256, was referred to.]

Asquith, K. C. and *C. H. Sargent* for the defendants.—The whole point is as to what is the meaning of the words in sect. 38 of the Customs and Inland Revenue Act 1881, a disposition taking effect "as an immediate gift *inter vivos*"; and the question is, did this instrument of the 3rd Nov. 1900, coupled with an immediate payment of the money, constitute a gift within the meaning of the section. There is no authority upon the point, but it is submitted that the payment of the 5000*l.* in pursuance of the deed of Nov. 1900, was not a gift. If there was any gift at all in the case, the true gift was when the deceased brought herself under the obligation of 1892 to have this money paid out of her estate. Assuming that there was a gift made in 1892, then it was made more than twelve months before the death of the deceased. By the payment of the 5000*l.* in her lifetime she, under the deed of 1900, got a release from all obligations under the deed of 1892, so that by that payment she purchased a release of her obligation under the former deed. That prevents it from being a gift.

The Attorney-General in reply.

CHANNELL, J.—I agree that the substance of this matter is that it is a gift. There are words

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which it is a little difficult to follow in the section of the Act of Parliament upon which the question turns, as altered by the insertion of the provisions of the two prior Acts, especially the words "purporting to operate as an immediate gift *inter vivos*," but I think that both the "purporting to operate" and "immediate" are to come in, because those words follow upon a provision as to *donatio mortis causa*: "Any property taken as a *donatio mortis causa* made by any person dying after" such a date, or taking it, as it was originally, "under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos*." I think that is an extension of the provision as to *donatio mortis causa*, which does not operate immediately, but as from the death, to other gifts, which has caused those words to come in in the way in which they do. The substance of the matter is that if gifts are made they count, for the purpose of this duty, as part of the estate of the deceased, unless they were made more than twelve months before the death, with some exceptions, which I need not deal with because they do not affect this particular case. Here there was a promise put in a binding form, because it was under seal, some eight or more years before the deceased died, to make a gift to a charity. Then some eight years after that the gift in point of fact was made and at the same time a deed was executed to show that the gift was not to be made over again by the executors after the lady had died, she having, in point of fact, made it in her lifetime. There would, I suppose, have been a good deal of doubt as to whether if that had not been expressed it would have had that effect. In my opinion it was still a gift when it was made in the year 1900, and it did not become anything else but a gift because there had been a binding promise beforehand to make that gift, and I do not think that the real substance of the transaction was the buying back for good consideration of the liability to have that gift made after the lady died. It is quite true that if she had lived twelve months from the time when she handed over the 5000*l.* there would have been a saving to the extent of the duty upon this sum, which in that event would have been saved, as it would have had to be paid by the estate if the gift had not been made in her lifetime. But that cannot possibly, as it seems to me, affect the question. In a very great many cases where gifts are made by people in their lifetime, they are made for the very express purpose of evading the payment of duty, and that certainly does not entitle them to any consideration or advantage. That is, of course, one of the reasons why this legislation was passed affecting sums given away during lifetime. I think on the whole it is quite clear that the transaction here was in substance a gift, and that it was made less than twelve months before the death of the deceased, and therefore the Crown are entitled to what they claim in this case.

Judgment for the Crown in respect of the estate duty, the claim for succession duty having been abandoned.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendants, *Ranger, Burton, and Frost.*

Feb. 29 and March 28.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

GRAND JUNCTION WATERWORKS COMPANY
(apps.) v. RODOCANACHI (resp.). (a)

Water company—Supply of water—Communication pipe belonging to occupier—Defect in—Leakage and waste of water—Non-repair by occupier—Right to cut off water—Right of occupier to demand supply—Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), s. 43—Metropolis Water Act 1871 (34 & 35 Vict. c. 113), ss. 28, 29, 32.

An owner or occupier of premises in the metropolis, whose attention is called by the waterworks company, who are bound to supply him with water, to a defect under the street in the communication pipe belonging to him and connecting his premises with the company's main, and who has the opportunity of repairing the defect without opening the roadway, but does not choose to repair it, is not a person entitled to demand a supply of water under sect. 43 of the Waterworks Clauses Act 1847.

A leak having been discovered under the roadway opposite certain premises in the metropolis, the waterworks company opened the street and found that the communication pipe connecting the premises with the company's main was defective and leaking, thereby causing a waste of water. The communication pipe was the property of the occupier, and the company at once gave him notice of the defect, stating that if it were not remedied forthwith the company would disconnect the pipe from their main, and would not allow it to be reconnected until the pipe was repaired. The occupier took no steps to repair his pipe, and it was disconnected from the main and the water cut off. The occupier could at the time have repaired the pipe without opening the street, as the street was then open.

Held, that the duty of repairing the defect in the pipe was by sect. 28 of the Metropolis Water Act 1871 cast upon the owner or occupier, and that the owner or occupier who, after notice that the communication pipe belonging to him was out of repair, permitted the pipe to remain in its defective state in which it would cause waste of water, has wrongfully failed to do something for the prevention of the waste within the meaning of sect. 32, and that under the circumstances the company were entitled to cut off the water, and to cease to give a supply to the occupier so long as the pipe remained unrepaired.

CASE stated on an information and complaint preferred by the respondent against the appellants under sect. 43 of the Waterworks Clauses Act 1847, for that the appellants on the 6th June 1903, at No. 113, Eastbourne-mews, did refuse to furnish to the respondent a supply of water to No. 113, Eastbourne-mews aforesaid.

The information was heard and determined by the magistrate, and upon such hearing he convicted the appellants, and imposed a penalty of 6*l.* being 40*s.* a day for three days, and he awarded to the respondent 12*l.* 12*s.* costs—subject to this case.

The appellants were a company incorporated by 51 Geo. 3, c. clxix. authorised to supply water

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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throughout a district mentioned in the Act, which has been from time to time extended within the limits of which district Eastbourne-mews is situated. The powers of the company are contained in the Act and within other Acts passed in the years 1819, 1826, 1835, 1844, 1852, 1855, 1856, 1861, 1868, 1873, and 1878, and the Acts incorporated with those Acts, and in the public Acts relating to the supply of water in the metropolis and the regulations made thereunder (all of which Acts and regulations were to be taken to be part of the case).

The respondent was the lessee of No. 113, Eastbourne-mews under a lease by the terms of which the lessor was liable for all external repairs.

No 113, Eastbourne-mews was a stable with a dwelling-house above, and the dwelling-house was inhabited by two grooms in the service of the complainant. Eastbourne-mews was a public street repairable by the local authority.

No. 113, Eastbourne-mews was within the district of the appellants. The supply to the premises in question was a supply for domestic purposes, and was a constant supply under the provisions of the Metropolis Water Acts 1852 and 1871. The notices under sect. 27 of the Act of 1871 were duly served, and the prescribed fittings were duly provided.

The water rate for the period from the 6th to the 10th June 1903 was to be taken to have been paid.

Prior to the 6th June 1903 there were indications in the roadway opposite No. 113, Eastbourne-mews of the existence of a small leak. Upon that day it became evident from the subsidence of the cobble stones in the roadway (which was thereby rendered dangerous to vehicles) that the leak was serious, and on an investigation being made by a ganger in the employment of the appellants it was discovered that there was a leak in the communication pipe (which was the property of the respondent) supplying No. 113, Eastbourne-mews, close to the junction of the pipe with the appellants' main under the roadway. The leak was at the rate of about 1500 gallons in twenty-four hours.

The ganger who opened the ground thereupon on the 6th June 1903 served upon the coachman of the respondent who was on the premises a notice requiring the repair of the communication pipe to be forthwith undertaken by the respondent and intimating that otherwise the water would be cut off.

The notice was signed by the appellants' district superintendent, and was as follows:—

Notice of Leakage.—To the occupier of No. 113, Eastbourne-mews.—Sir,—Upon opening the ground opposite No. 113, Eastbourne-mews a leakage of water was found to exist from the defective state of your communication pipe, and unless you forthwith repair the same it will be the duty of the company to disconnect such pipe from their main. Immediately after the repair, rendered easy by the ground being now open, the company will re-connect the pipe with their works, and will undertake to fill in and make good the ground upon payment of the expenses incurred thereby amounting to 15s.

The coachman took the notice immediately to the respondent's house, but found he had left for the City, and would not return for some hours. The coachman then returned and ex-

plained this fact to the ganger, and in answer to a suggestion by the ganger that he should request the plumber usually employed by the respondent to do the necessary work of repair stated that he had no authority to order any repairs to be executed to the pipe. Beyond communicating with his landlady the respondent at no time took any step to have the communication pipe repaired or the waste stopped. The water was thereupon cut off by the company, and it remained cut off until the 10th June, when the repairs were executed by order of the respondent's landlady, and the water was thereupon restored.

The soil removed was too wet to be replaced, but the ground was refilled with dry earth by the company by 11.30 on the morning of the 6th June, and it remained filled in until the 10th June, when at the request of the respondent's landlady the roadway was again broken up by the appellants, and the repairs were executed by her order. The time occupied in executing such repairs was stated to be about two hours. It would be necessary to disconnect the supply during the repairs.

On the afternoon of the 6th June the respondent wrote complaining of the cutting off of the water as follows:

The Secretary Grand Junction Water Company.—Dear Sir,—113, Eastbourne-mews.—I am informed that your men have cut the water off at these stables without notice. As this is illegal if the water is not on at 10 a.m. on Monday morning my solicitor will take proceedings. I am also writing to the borough authorities. These stables I may add belong to 113, Westbourne-terrace, and the owner of that house keeps them in repair.

This letter was duly received by the appellants on the 8th June, and their secretary replied on the same day as follows:

In reply to your letter of the 6th inst. I have to inform you that the company's men opened up a leakage in the above mews opposite No. 113, and found that the 1½ in. lead pipe supplying those premises was broken. The defective pipe was shown to your coachman, and a notice was also handed to him stating that the company would have no alternative but to disconnect the pipe from their main unless the repair was taken in hand forthwith. This was not done, and accordingly the pipe was disconnected from the company's main. The company cannot permit the pipe to be reconnected to their main until the necessary repairs have been carried out by your plumber.

It was contended by the appellants (1) that the appellants ought not to be convicted because the respondent was not entitled to a supply of water at the time of the alleged refusal of the appellants to give a supply; (2) that upon the true construction of the Acts of Parliament governing the matter the appellants were entitled to cut off the supply, and were under no obligation to supply water after the communication pipe had been severed until the same had been restored; (3) that the appellants were entitled to disconnect the defective communication pipe from their main and prevent the waste of water, the respondent having wrongfully failed to keep the pipe in proper repair, and to do what ought to have been done to prevent waste; (4) that the appellants did not on the 6th June 1903, or on any other day refuse to furnish a supply of water within the meaning of the 43rd section of the

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Waterworks Clauses Act 1847; (5) that even if they did refuse they were within the exemptions mentioned or referred to in sects. 42 and 43 of the Waterworks Clauses Act 1847, in that the supply was not given only during necessary repairs; (6) that even assuming the appellants could be properly convicted the maximum penalty which could be imposed was not 6*l.* but was only 4*l.*, being at the rate of 40*s.* for the two days which elapsed between the receipt of the respondent's letter of the 6th June 1903, demanding a supply and the time when the supply was restored.

It was contended on behalf of the respondent (1) that there was neglect or refusal on the part of the appellants to furnish a supply of water to No. 113, Eastbourne-mews, within the meaning of sect. 43 of the Waterworks Clauses Act 1847; (2) That the severing of the pipes was a wrongful act on the part of the appellants, and that the respondent did not, by reason of such severance, cease to be entitled to a supply of water for his premises; (3) that sect. 42 of the Waterworks Clauses Act 1847 had no application to the facts of this case, and that in any event "necessary repairs" only continued for about two hours on the morning of the 10th June; (4) that there was no power in the respondent to dig up the public highway, and no liability on the respondent to repair this pipe; (5) that upon the true construction of the Acts of Parliament the appellants could only justify cutting off the supply of water if the conduct of the respondent, in failing to repair, was either wilful or negligent; (6) that there was no evidence of any wilful wrong, or of any negligence on the part of the respondent; (7) that the penalty of 6*l.* was rightly imposed.

The magistrate was of opinion that the contention of the respondent was correct, and, as above stated, convicted the appellants and imposed a penalty of 6*l.*, being at the rate of 2*l.* for the 8th, 9th, and 10th June 1903 respectively.

The questions for the opinion of the court were: (1) whether upon the facts herein stated the magistrate properly convicted the appellants; (2) whether he was justified in imposing a penalty of 6*l.*

The Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17) provides:

Sect. 42. The undertakers shall at all times keep charged with water, under such pressure as aforesaid, all their pipes to which fire-plugs shall be fixed, unless prevented by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs, and shall allow all persons at all times to take and use such water for extinguishing fire without making compensation for the same.

Sect. 43. If, except when prevented as aforesaid, the undertakers neglect or refuse to fix, maintain, or repair such fire-plugs, or to furnish to the town commissioners a sufficient supply of water for the public purposes aforesaid, upon such terms as shall have been agreed on or settled as aforesaid, or if, except as aforesaid, they neglect to keep their pipes charged under such pressure as aforesaid, or neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered they shall be liable to a penalty of ten pounds, and shall also forfeit to the town commissioners, and to every person having paid or tendered the rate, the sum of forty shillings for every day during which such refusal or neglect shall continue after notice in writing

shall have been given to the undertakers of the want of supply.

Macmorran, K.C. (*Acland*, K.C. with him) for the appellants.—The magistrate was wrong in holding that the appellants were liable. If there was a leak in the communication pipe, then the waterworks company were not bound to supply the water until the respondent had repaired the leak, and the respondent had power to open the road for that purpose. The Metropolis Water Act 1871 (34 & 35 Vict. c. 113) applies in this case. Sects. 26 to 34 deal with the supply of prescribed fittings. By sect. 3 of the Act the term "fittings" is defined as including communication pipes. By sect. 26 notice relating to a constant supply may be given, and by sect. 27 where the company are required to provide a constant supply they may serve on the owner or occupier a notice requiring such owner or occupier to supply his premises with the prescribed fittings. Then sect. 28 is important; it provides: "Every owner or occupier of premises upon whom notice to that effect has been served, shall, within two months after the date of the service of such notice, provide the prescribed fittings, and shall from time to time keep the same in proper repair." He is not only to provide, but he is to keep in repair the prescribed fittings, which by sect. 3 includes communication pipes. The case finds that the notices under sect. 27 were duly served, so that the duty was thereby cast upon the respondent to keep in repair the communication pipes. By sect. 32 if any person supplied with water by the company wilfully or negligently causes or suffers any fittings to be out of repair, or to be so used that the water is likely to be wasted, he is liable to a penalty, or if he fails to do anything which ought to be done to prevent such waste, then the company may cut off any of the pipes through which water is supplied to him, "and may cease to supply him with water, so long as the cause of injury remains or is not remedied"; so that the company though they might conceivably do the repairs, are not bound to do them, and if the consumer does not do them the company may cut off the supply. The consumer can open the road to repair the fittings; and the company are not liable to penalties under sect. 43 of the Act of 1847 until the consumer himself has restored the communication with their main pipes: (*Sheffield Waterworks Company v. Wilkinson*, 41 L. T. Rep. 254; 4 C. P. Div. 410). Coming to the Act of 1847, sect. 43 imposes a penalty upon the company if they neglect or refuse to furnish to the owner or occupier a proper supply of water; and sect. 47 gives the owner a right to purchase from the company any communication pipes laid by the company, and thereupon such pipes are to become the property of the owner. Sect. 53 of the Act—which is important—provides that every owner and occupier, "when he has laid such communication pipes as aforesaid, and has paid or tendered the water rate, shall "be entitled to demand and receive" from the company a sufficient supply of water; so that one of the conditions of demanding a water supply is that he should have laid the communication pipes. Where the water has been lawfully cut off, a person is not entitled to have the supply restored until he has restored the communication pipes. *Bramwell*, L.J. in *Sheffield Waterworks Company v. Wilkinson* (*ubi sup.*), says: "I think there was no obligation on the

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appellants" — the waterworks company — "to supply water to the respondent's house until the communication was restored, and that they were not bound to restore it." The appellants were entitled in this case to cut off the supply to prevent waste of the water; if so the respondent was not entitled to say that the appellants were in the wrong until he himself was able to apply to them to restore the supply, which he could not do until he had restored the communication pipes. With regard to the second point, the magistrate imposed penalties for three days, when he could only have imposed them for two days.

William Finlay for the respondent. — The magistrate was right upon two grounds; first, upon the authorities there was no right to open the road for the purpose of getting at the pipe to repair it; and, secondly, under sect. 32 of the Act of 1871—which is the only section which can apply—there was no power to cut off the water; the section applies only to cases where there has been some wrongful act or default on the part of the person receiving the supply, and there was no such wrongful act or default in this case. First, as to the right of the respondent to open the road and repair the pipe, the respondent had no such right. That was clearly decided in *Chapman v. Fylde Waterworks Company* (71 L. T. Rep. 539; (1894) 2 Q. B. 599), where Kay, L.J. says: ". . . I have looked through the Act of 1847, and I cannot find anywhere in it an express power given to the owner or occupier of a house to repair a service-pipe, or to break up the surface of the street for the purpose of such repair." There is no power given anywhere to the owner or occupier to break up the street for the purpose of repair. That case arose outside the metropolis, and therefore the Metropolis Water Acts would not apply to it; but there is no power under the Metropolis Water Acts to break up the streets for the purpose of repair of the pipes, and there being no power in the respondent to break up the road, he ought not to be rendered liable to a penalty for not repairing the pipe, when he had no power to open the road for that purpose. The next point is that under sect. 32 of the Act of 1871, which is the only section under which the appellants can justify, even if there was a refusal to repair the pipe that refusal was not wrongful so as to bring that section into operation. Sect. 27 of that Act relates to notices as to the supply of fittings, and sect. 28 requires the owner or occupier to supply the prescribed fittings; then, coming to sect. 29, my proposition is that sect. 29 deals with the case of an innocent omission to repair and the proper proceedings to be taken where the fittings are out of repair without any wilful default or negligence of the occupier. Sect. 32 is a highly penal section, and the intention clearly was that in the case of an innocent failure to repair sect. 29 applies, but in case of a wilful failure to repair sect. 32 applies. The magistrate has found that there was no default and no negligence whatever on the respondent's part, and therefore there was no wrongful failure by him under sect. 32. The respondent was clearly a person entitled to a supply under sect. 43 of the Act of 1847, and as the appellants have not given the supply they must justify. Their justification can only be under sect. 32, which must fail for two reasons—first, that there was no power in

the respondent to break up the street, and therefore no power to get at the pipe to repair it; and, secondly, because there was no wilful default or negligence on the respondent's part.

Macmorran, K.C., in reply, was called upon as to what power there was in the respondent to break up the street, except that which could be inferred from the sections. I refer for that purpose to the group of sections in the Act of 1847, sects. 41 to 47, and to the group 48 to 53. Sect. 48 gives power to the occupier under certain conditions to lay pipes between his house and the main; and sect. 52 gives express power to the occupier to open so much of the pavement of any street as lies between his house and the undertakers' pipe. Then, when the owner and occupier has done all that, and when he has laid such communication pipes and has tendered the water rate, under sect. 53 he is entitled to a supply of water. So that there is no doubt that the owner or occupier is entitled to open the public street for the purpose of taking down or making up the communication pipe. In *Chapman v. Fylde Waterworks Company* (*sup.*) there was no obligation whatever on the tenant to repair the pipe, and the whole case seems to turn on that. Lord Esber, M.R. in his judgment makes that clear. He points out that sect. 52 gives the householder power to break up the street to lay down a service pipe or to remove it, but that in that case there was no power to break up the street to repair it, as there was no liability to repair. That was not this case, and has no bearing on this case. Here there was a duty on the tenant to repair the pipe. This is the case of an ordinary communication pipe, and if there is an obligation to repair it—as there was in this case—then there would be a clear right on the part of the consumer to do what was necessary to keep the pipe in repair, and necessarily a power to open the street for that purpose, just as he has a power to open the street to lay down a new pipe.

Cur. adv. vult.

March 28.—Lord ALVERSTONE, C.J. read the following judgment of the Court (Lord Alverstone, C.J., Wills and Kennedy, J.J.):—This was an appeal by way of a case stated by a police magistrate on a complaint preferred by the respondent against the appellants for refusing to furnish a supply of water, contrary to sect. 43 of the Waterworks Clauses Act 1847. The case was extremely well argued by counsel on behalf of the appellants, and on behalf of the respondent, and raises a point of general importance. It is not necessary to refer to the facts in detail, as to which there was no dispute, and which are clearly set out in the case; it is sufficient to say that on the 6th June 1903, a leak having occurred under the roadway opposite 113, Eastbourne-mews, the road was opened and the leak was found to be in the communication pipe, the property of the consumer. Notice was thereupon given to the respondent's coachman, who was occupying the premises which were supplied with water, to repair the pipe, and the notice stated that it would be the duty of the company to disconnect if the pipe was not repaired. The respondent took no steps to repair it, and the water was then cut off by the company. The pipe was subsequently repaired by the appellants at the request of the respondent's landlady. The

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magistrates convicted the appellants, the water company, and fined them a penalty of 6*l.* for neglecting, or refusing, to supply water in accordance with sect. 43. The question we have to consider is whether there was any evidence upon which this conviction can be supported. It must, we think, be taken upon these facts, and, in fact, it was so stated in the course of the argument, that the only refusal to supply the water was by the company's cutting it off upon the 6th June, and continuing to keep the water cut off until it was again supplied on the 10th. The questions we have to decide are whether, in the metropolis, if a leak is found in a pipe belonging to a consumer, the company is entitled to cut off the water until the pipe is restored; and, secondly, does a refusal to supply under the circumstances of the present case constitute an offence under sect. 43? It is found as a fact in the case, and for reasons which we state later on it must be the fact, that the pipe was the property of the consumer—that is, the owner of the premises let to the respondent. Under sect. 43 of the Waterworks Clauses Act 1847, if the undertakers, except when prevented, as provided in an earlier section, neglect or refuse to furnish to any owner or occupier entitled under the Waterworks Clauses Act, or the special Act, to receive a supply of water during any part of the time during which the rates for such supply shall have been settled, or tendered, they shall be liable to a penalty. The exception referred to in the earlier words of that section is to be found in the provisions of sect. 42, and does not, in our opinion, apply. Under sect. 28 powers are given to the undertakers to open the streets and lay down service pipes and other works for the supply of water; under sect. 29 they may not enter private property without consent, except in a case which does not apply here, and by sect. 31, before breaking up the street, they must give certain notices. By sect. 48 the owner or occupier of any dwelling-house who wishes to have water brought into his premises may open the ground between the pipes of the undertakers and his premises and lay communication pipes, and sect. 52 empowers such owner or occupier to open or break up the street for such purpose. There are also provisions in sects. 44-47 as to the laying of communication pipes, by the undertakers which are only material as supporting the view that communication pipes are, under ordinary circumstances, the property of the consumer. The Metropolis Water Act 1871, contains a group of sections—sects. 26 to 32—which were referred to in argument and require consideration. Under these sections the company may prescribe fittings, which by the interpretation clause, sect. 3 of the same Act, include communication pipes, and sect. 28 provides that in the case of a constant supply the owner or occupier of the premises shall provide all supply fittings, and from time to time keep the same in proper repair. Sect. 29 enables the company, if the fittings are out of order, to give notice requiring the owner or occupier within twenty-four hours to cause the same to be repaired so as to prevent any waste of water, and, if any person fails to comply with the terms of such notice, the company may repair the fittings of such person, and may recover the expenses incurred. Sect. 32 provides that if any person wilfully or negligently causes or suffers

any fittings to be out of repair, or to be so used that the water supplied to him is likely to be wasted, he shall be liable to a penalty, and the second paragraph of the same section provides that, if any person supplied with water wrongfully fails to do anything which ought to be done for the prevention of waste, the company may cut off any pipes by or through which the water is supplied to such customer, and may cease to supply him with water so long as the cause of injury remains or is not remedied. It will have been observed that neither the Waterworks Clauses Act 1847 nor the Metropolis Water Act 1871, nor any other Act to which our attention has been called, contains any express provision giving the consumer the right to open the street for the purpose of repairing the pipe, and this we gather from the statement in the case and from the judgment of the learned police magistrate to be one of the grounds on which he decided against the appellants. It is true that Bramwell, L.J., sitting in the Common Pleas Division, expressed the opinion, in the case of *Sheffield Waterworks Company v. Wilkinson* (4 C. P. Div., at p. 421), that the right to break up the soil followed from the right which the consumer had to lay down fresh pipes for the purpose of obtaining a supply, and it may be that the obligation imposed upon the owner and occupier by sect. 28 of the Metropolis Water Act 1871 to keep the prescribed fittings, which include communication pipes, in proper repair may give the consumer a right to open the road for the purpose of repair. On the other hand, the Court of Appeal, in the case of *Chapman v. Fylde Waterworks Company* (*ubi sup.*), expressly decided that the Waterworks Clauses Act 1847 gave the consumer no power to open streets for the purpose of repair. In the view, however, we take, this does not seem to us to be conclusive of the case. The question still remains—Is the consumer who, having the opportunity of doing so without opening the street, does not choose to repair his own communication pipe a person entitled to demand a supply of water under sect. 43? We do not think for the purpose of this question that any distinction can be drawn between owner and occupier. It was contended on behalf of the respondent that the duty of repairing the pipe rested with his landlady. The water company have no means of knowing what the contractual relations between the occupier and his landlady are, and, in our opinion, the liability of the company in respect of an offence under sect. 43 cannot depend upon the relations between the owner and occupier of the premises. No question in this case arises as to the opening of the street. The street was opened by the company: notice was given, and the company offered to reconnect the pipe upon payment of the expenses: they at the same time gave notice that if the pipe was not repaired the water would be cut off. In our opinion the duty to repair the defect in the communication pipe is by sect. 28 of the Act of 1871 cast upon the owner or occupier. We think that the owner or occupier who, after notice to him that the communication pipe belonging to him is out of repair, permits the pipe to remain in a condition in which it would cause waste of water has wrongfully failed to do something to prevent the waste within the meaning of the second paragraph of sect. 32 of the Act of 1871, and that under these

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Re BRADBURY; WING v. BRADBURY.

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circumstances the company were entitled to cut off the water and to cease to supply him as long as the injury to the pipe remained unremedied. It might be that the owner or occupier of a house did not wish to continue the supply, or preferred to put in a better, larger, or different communication pipe. The fact that the company could, if they were so minded, have repaired the pipe after twenty-four hours' notice under sect. 29 does not disentitle them from exercising their rights under sect. 32, and we therefore think that the owner or occupier who, under such circumstances as the present, will not repair the pipe which causes the waste is not a person entitled to receive a supply of water under sect. 43. We think the true view to be taken of the facts is that indicated by the court in *Young v. Southwark and Vauxhall Water Company* (69 L. T. Rep. 144); and, although no doubt in one sense it may be said that the question is one of fact, we think that the magistrate ought as a matter of law, upon the evidence in this case, to draw the conclusion which we have indicated upon the facts as stated. The appeal will therefore be allowed, with costs.

Appeal allowed.

Solicitors for the appellants, *Bircham and Co.*
Solicitors for the respondent, *Markby, Stewart, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, May 31.

(Before VAUGHAN WILLIAMS, ROMER, and
COZENS-HARDY, L.JJ.)

Re BRADBURY; WING v. BRADBURY. (a)

APPEAL FROM THE CHANCERY DIVISION.

*Will—Construction—Gift to the children of A.
—“Die without leaving children”—Vested
interests.*

A testator gave his property in trust for his wife for life and upon her death to his daughter A., but if she should be then dead to any child or children of A., and “failing such issue of” A., to his daughter B., but if she should be then dead to any child or children of B.; but should A. and B. be then both dead “leaving no issue,” then, in case of each or either of them being married leaving a husband or husbands them surviving, to the husbands or to the survivor of such husband.

B. was dead, leaving one child.

A. was still living, and had three children.

Held, that the case fell within the rule that where a vested interest was given to children it was not to be divested by a gift over if the parent died without leaving children.

Treharne v. Layton (L. Rep. 10 Q. B. 459, at p. 463) considered and applied.

Re Ball; Slattery v. Ball (59 L. T. Rep. 800; 40 Ch. Div. 11) distinguished.

Decision of Kekewich, J. affirmed.

ELIJAH BRADBURY, who died in 1895, by his will, dated in 1880, gave certain real and personal estate to his wife Catherine and her brother R. E.

Foster upon trust for sale and conversion and to pay the income to his wife during her life; and upon her death the testator directed that his real and personal estate should be paid and transferred to his youngest daughter Isabella Bradbury, but if she should be then dead, then the same should be transferred to any child or children of Isabella Bradbury in equal shares if more than one, and, “failing such issue of” Isabella Bradbury, then the same should be transferred to his elder daughter Mary Ann Bradbury, but if she should be then dead, then the same should be transferred to any child or children of Mary Ann Bradbury. But should Isabella Bradbury and Mary Ann Bradbury be then both dead, “leaving no issue,” then, in case of each or either of them being then married leaving a husband or husbands them surviving, the same should be transferred to their said husbands, share and share alike, or to the survivor of such husbands.

Mary Ann Bradbury was married in 1881 to Charles Henry Wing and was now dead, having had issue one child only.

Isabella Bradbury was married in 1898 to Frank Vigar and had three children, the eldest of whom was born in 1899, and who were all living.

This action was brought by Charles Henry Wing and his infant child against the testator's widow and Isabella Vigar, alleging a breach of trust and claiming an account and administration so far as was necessary of the testator's estate; and the plaintiffs took out a summons for the appointment of a receiver.

The question was whether, according to the true construction of the testator's will, the plaintiffs had such an interest thereunder as would enable them to maintain an action for the preservation of the trust property from the consequence of the alleged breach of trust.

The summons came on before Kekewich, J. in chambers, when the defendants raised the point that, according to the true construction of the testator's will, the children of Isabella Vigar took vested interests at birth; and that as she had had children the plaintiffs had no such contingent interest as they claimed to have, and could not therefore maintain the action.

The summons was adjourned into court for argument on this point, when Kekewich, J. upheld the defendants' contention and refused to make any order on the summons.

The plaintiffs now appealed.

P. Ogden Lawrence, K.C. and H. Langford Lewis for the appellants.—This appeal from the refusal of Kekewich, J. to appoint a receiver involves the construction of the will of the testator. We submit that that will shows a distinct intention that the person or persons to take the testator's property on the death of his widow should be a person or persons who survived her. In the case of the successive gifts to the testator's two daughters, Isabella and Mary Ann, it is an express condition that to enable them to take they shall be living at the death of the widow; and it should, we contend, be so implied in the case of their children, the words “failing such issue” being read as meaning “failing such issue then living.” There is a distinction between “failure” and “want” of issue under sect. 29 of the Wills Act (1 Vict. c. 26); failure means not only to be lacking, but to become lacking. The words

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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"leaving no issue" in the final gift over to the daughters' respective husbands must be taken in their natural meaning, and should not be construed "having had no issue." In all the cases where this construction has been adopted it has been with the object of preventing a clearly vested interest from being divested. Kekewich, J. decided in this case upon the authority of a line of cases beginning with *Maitland v. Chailie* (6 Madd. 244), and of which the last reported is

Re Cobbold; Cobbold v. Lawton, 88 L. T. Rep. 745; (1903) 2 Ch. 299.

[VAUGHAN WILLIAMS, L.J. referred to the proposition laid down by Amphlett, B. in *Treharne v. Layton* (L. Rep. 10 Q. B. 459, at p. 463).] We say that the present case is covered exactly by the principle laid down by North, J. and the Court of Appeal in

Re Ball; Slattery v. Ball, 59 L. T. Rep. 800; 36 Ch. Div. 508; 40 Ch. Div. 11.

The principle there established is that the court will construe words such as these according to their natural meaning where it is clear that the testator intended the interest of the children to be divested in some event. Here the interest of Isabella's children is not vested, but is contingent on Isabella dying before the widow. Should Isabella survive the widow she will take absolutely, and her children will be excluded. [VAUGHAN WILLIAMS, L.J.—In *Re Ball; Slattery v. Ball* (*ubi sup.*) there was no express gift to the children at all.] That is so, but that was not the ground of the decision there. It is amply wide enough to cover the present case, which at any rate differs essentially from all the reported cases where "leaving" has been construed as "having had."

Edward Clayton, for the respondents, was not called upon to argue.

VAUGHAN WILLIAMS, L.J.—In my opinion this case falls within the well established rule that where a vested interest is given to children it is not to be divested by a gift over if the parent dies without leaving children. Against that it is said that we ought to hold that there is no vested interest originally given to the children by reason of the latter part of the will, which contains these words: "But should the said Isabella Bradbury and Mary Ann Rachel Foster Bradbury be then both dead, leaving no issue, then in case of each or either of them being then married, leaving a husband or husbands then surviving, the same shall be transferred to their said husbands, share and share alike, or to the survivor of such husbands. That, however, is not my view. In my judgment, we ought not to read the gift in the way suggested on behalf of the appellants. The case is really governed by the proposition laid down in *Treharne v. Layton* (L. Rep. 10 Q. B. 459) to which I referred in the course of the argument. In that case Amphlett, B. said (at p. 463): "I have always considered that the canon of construction which has been applied to this will has been established upon authority it was impossible to gainsay. The counsel for the defendants has been unable to adduce a single case at variance with the uniform current of decisions which establish the principle that where a gift is a vested gift it will not become divested by the use of the words 'in case the parent dies without leaving issue.'" With regard

to the case which has been relied upon of *Re Ball; Slattery v. Ball* (59 L. T. Rep. 400; 40 Ch. Div. 11) it is only necessary to say that that case obviously belongs to quite a different class of case from that with which we have now to deal.

ROMER, L.J.—I am of the same opinion. When you once find out that there is a gift to the children of Isabella which was a vested interest at birth, there is an end of the appeal.

COZENS-HARDY, L.J.—I agree.

Appeal dismissed.

Solicitors for the appellants, *Westbury, Preston, and Stavridi.*

Solicitors for the respondents, *Boulton, Sons, and Sandeman.*

Wednesday, June 1.

(Before VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.)

Re ATKINSON; BARBERS' COMPANY v. GROSE-SMITH. (a)

APPEAL FROM THE CHANCERY DIVISION.

Tenant for life and remainderman—Authorised investment—Proceeds of realisation of insufficient mortgage security—Arrears of interest—Apportionment of fund available.

The true principle of apportionment, as between tenant for life and remainderman, of a fund representing the proceeds of the realisation of an authorised, but insufficient, mortgage security, upon which there are arrears of interest due, in order that there may be a rateable equality in the incidence of the deficiency, is to take the amount due to the tenant for life in respect of arrears of interest, and the amount due to the remainderman in respect of capital, and to apportion the fund, as at the date when the same is recovered, in proportion to those amounts respectively.

Re Moore; Moore v. Johnson (52 L. T. Rep. 510) and *Re Alston; Alston v. Houston* (1901) 2 Ch. 584) considered and approved.

Re Foster; Lloyd v. Carr (63 L. T. Rep. 443; 45 Ch. Div. 629) overruled.

Decision of Kekewich, J. affirmed.

JOHN ATKINSON, by his will, dated the 30th Aug. 1858, so far as is material for the present report, gave and bequeathed his residuary estate to his trustees upon trust for conversion and investment of the proceeds as therein mentioned, and upon further trust, subject to certain interests which have since determined or become satisfied, to pay the income to his eleven nephews and nieces for life and the survivors and survivor of them, with remainder to the master, governors, and commonalty of the Mystery of Barbers, London (hereinafter termed the Barbers' Company) upon charitable trusts.

The testator died on the 8th Nov. 1861.

The present trustees of the will were Henley Grose Grose-Smith, Charles Howard Atkinson, and Frank Chorlton Lingard.

In 1892, when these proceedings were instituted, the surviving life tenants were John George Atkinson, Richard James Atkinson, Mary Thornton Smith, and Charles Howard Atkinson.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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John George Atkinson died on the 12th Oct. 1894, and Alice Margaret Hyde was his personal representative.

Part of the testator's residuary estate was invested on mortgage of three farms in Essex (hereinafter termed the Essex mortgage), known as Belshams and Clements Hall Farms at Hawkwell, and Butlers Farm at Shopland.

Another part of the testator's residuary estate was invested on a mortgage called "Sutton's mortgage," not material to be more specifically referred to.

The Essex mortgage was dated the 13th Jan. 1864, and was for 29,000*l.* and interest at 5 per cent., reducible to 4 per cent. on punctual payment.

The interest on the Essex mortgage falling into arrear, the trustees entered into possession in May 1889, at which time the principal sum of 23,340*l.* 2*s.* 8*d.* was due on the security.

The rents received by the mortgagees from the mortgaged properties proved insufficient to keep down the interest on the Essex mortgage, and in March 1892 this action was commenced, by originating summons, by the Barbers' Company as plaintiffs against the then trustees of the testator's will and the then tenants for life, for the purpose of determining whether the mortgaged properties ought not to be realised.

At the date when this action was commenced Clements Hall and Belshams farms were occupied by the representatives of William Perry under a lease which would expire at Michaelmas 1892 at the yearly rent of 375*l.*, and Butlers Farm was occupied by Seaman Jeffries and Arthur William Jeffries on a tenancy which commenced at Michaelmas 1889 and was determinable by either party on two years' notice at the yearly rent of 450*l.*

By an order made on the originating summons on the 2nd June 1892 the court declared that the trusts of the will of the testator John Atkinson ought to be performed and carried into execution, and did order and adjudge the same accordingly. And it was ordered that an inquiry should be made whether any and what proceedings should be taken to realise the mortgage securities in the summons mentioned (being the Essex and Sutton's mortgages) or either of them.

At Michaelmas 1892 the Clements Hall and Belshams Farms became vacant. Belshams Farm was immediately relet.

By an order in this action made on the 23rd Jan. 1893 it was ordered that the income in the hands of the trustees should be from time to time paid to the defendants, the tenants for life. And it was ordered that the trustees should be at liberty to raise and pay out of the Consols forming part of the capital of the testator's residuary estate the moneys payable to the executors of William Perry as outgoing tenants for tenant right in respect of Clements Hall and Belshams Farms, after deducting what was due from them for rent and also to raise and pay any moneys necessary to be expended for cultivation of Clements Hall Farm until it was relet, but without prejudice to any question as to the manner in which such moneys ought ultimately to be borne as between capital and income, or as to the right, if any, of the tenants for life under the testator's will to such rent (the trustees replacing any moneys so expended by them as last aforesaid out of the first

moneys received in respect of rents and profits of Clements Hall Farm).

In accordance with this order the trustees raised and paid 522*l.* 9*s.* 4*d.* to the executors of William Perry for tenant's right, but they did not deduct from this sum the rent received by the trustees from such executors on quitting, amounting to 84*l.* 6*s.* 4*d.*

The trustees claimed to treat this money as capital, but the matter being brought before the judge by the master, the judge authorised the trustees to treat such sum of 84*l.* 6*s.* 4*d.* as income, and the same was distributed by the trustees among the tenants for life accordingly. The trustees placed Clements Hall Farm under the care of Charles Howard Atkinson, one of the trustees and also one of the tenants for life, who kept it in cultivation from Michaelmas 1892 to Lady Day 1897, the money required for the purpose being raised out of the Consols forming part of the testator's residuary personal estate.

On the 4th Feb. 1898 an order was made giving leave to sell to Robert Watkinson Clements Hall Farm for 4250*l.* and the Manor of Clements for a sum to be ascertained by valuation (which valuation amounted to 462*l.*) and for Charles Howard Atkinson's farming accounts to be passed.

Since May 1899, when the trustees took possession of the farms subject to the Essex mortgage, the rents had never been sufficient to pay the mortgage interest, and there were considerable arrears due to life tenants, but the amount of such arrears depended to a great extent whether mortgage interest should be charged at the rate of 4 or 5 per cent.

A summons was accordingly taken out by Richard James Atkinson and Mary Thornton Smith, two of the three surviving tenants for life, asking for a declaration that the net proceeds of sale of Clements Hall Farm, and also the proceeds of sale of the other hereditaments remaining subject to the mortgage of the 13th Jan. 1864, when the same should be sold, ought to be apportioned between the tenants for life for the time being of the residuary estate of the testator, under the trusts of his will and the trustees of the will as representing the capital of such residuary estate, in proportion to the amounts due in respect of arrears of interest under the mortgage, and the amount of capital remaining due on the mortgage, including sums advanced out of capital of the testator's residuary estate towards the expenses of cultivating the property pursuant to the order of the 23rd Jan. 1893; or, in the alternative, that the rights and interests of the beneficiaries under the testator's will in such net proceeds of sale might be ascertained and declared.

The summons also asked for a declaration that the rent, amounting to 87*l.* 10*s.*, of Clements Hall Farm and of Belshams Farm, and the rent, amounting to 197*l.* 3*s.* 3*d.*, subsequently received in respect of the same farms after the same were relet, ought to be treated as income and paid to the tenants for life; or otherwise that the rights and interests of the beneficiaries in relation to such rent might be ascertained and declared.

The summons further asked that directions might be given for the realisation of the other properties now remaining subject to the mortgage of the 13th Jan. 1864.

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The summons was adjourned into court and came on to be heard before Kekewich, J. on the 9th Nov. 1903, when the following judgment was delivered:—

KEKEWICH, J.—The mortgage of the 13th Jan. 1864 comprised several distinct properties. One of them was called the Clements Hall Farm. The Clements Hall Farm was realised some years ago, and the purchase money was available for distribution among the parties entitled, subject, of course, if it be necessary, to a provision for costs. The other properties remain unsold. There is no reason why, subject to such a provision as I have mentioned, the proceeds of sale of the Clements Hall Farm should not now be distributed among those entitled to the proceeds and in the proportions in which they are entitled to them. The question is, In what proportions are they entitled to those proceeds? There is a tenant for life—there are more than one, I know, but, for the purpose of the proposition, I will say there is a tenant for life—and there is a remainderman; and the real question is in what proportions the tenant for life and the remainderman are to be entitled to this money. I went into this question in *Re Alston; Alston v. Houston* (1901) 2 Ch. 584. I expressed my opinion in that case, and I do not intend now to go into my own judgment there. But I shall certainly adhere to it, and not the less because the whole question has since been considered in Ireland in a case of *Stewart v. Kingsale* (1902) 1 Ir. 496, and the Master of the Rolls, although he quoted my judgment, not professing to follow it, has arrived at the same conclusion as I did. Before going further, as I am now on the cases I may mention that I do not see that as regards the matter in hand Swinfen Eady, J.'s decision in *Re Phillimore; Phillimore v. Herbert* (88 L. T. Rep. 765; (1903) 1 Ch. 942) in the slightest degree conflicts with my view. He had there to determine from what date the account should be taken, and he put the question in this way: Should the account be taken from the testator's death or from another date he mentions when the mortgage became payable, and it appeared that the security was insufficient; or from another date he mentions when the income first fell into arrear? Of course I have here no doubt. The account must be taken from the time when the income first fell into arrear. But that was not what he adopted. He adopted the date when it was first ascertained that the security was insufficient. It is impossible for me to apply that decision supposing it to be otherwise applicable here, because I do not know that the security is insufficient. It never has been known, and is not known now. As I pointed out not long ago in the course of the argument—when Mr. Vaughan Hawkins endeavoured to persuade me to postpone the realisation of the rest of the security because it was hoped that the property would rise in price so much that everybody would be paid in full—*non constat* that they will not be paid in full. I cannot yet say that the security has been found to be insufficient. Is that any reason why I should not distribute what has been realised? If the sale is postponed, as it may be, for some time, reasons may yet appear for putting it off longer than I at present think it ought to be put off. But is there any reason why, having got a large sum of money in hand, the parties should not have the benefit of that because there are other pro-

perties which will by and bye be realised to bring in more money available for distribution? Therefore it seems to me I must start with this, that I have a part of the property realised. I know that that is not enough, certainly, to pay 20s. in the pound; but I have to distribute it as far as it will go among the parties entitled—that is to say, among the tenants for life and the remainderman—and I apply *Re Alston; Alston v. Houston* (*ubi sup.*). I find what to-day is due to the tenants for life for interest; I find what to-day is due to the remainderman for capital; and, having got those sums, whatever they are, I distribute what is distributable among the two parties in the proportions which those sums bear to one another. That is the application of *Re Alston; Alston v. Houston* (*ubi sup.*). That is all that I can do by my present order. But other points of detail have been argued, and one or two of them must be dealt with. In the first place, in order to ascertain what is due to the tenants for life, am I to calculate interest as running at 5 per cent. or at some other rate? It has been decided by Kay, J. as long ago as 1889, in the case of *Bright v. Campbell* (60 L. T. Rep. 731; 41 Ch. Div. 388), and I believe the decision has never been questioned in the slightest degree, that the receipt by a mortgagee in possession of rents and profits is not receipt of interest so as to make it a payment of interest under the ordinary provision of a mortgage deed reducing the rate from, say, 5 per cent. to 4 per cent. on punctual payment. That seems to apply here. The mortgagees are entitled to calculate the sum due to them at 5 per cent. interest. The tenants for life to whom the interest is payable are therefore entitled to 5 per cent. interest on the capital sum due from the mortgagor. Then what is the capital sum due from the mortgagor? The mortgagees entered into possession and they have necessarily increased—that is to say, they have as a matter of fact, as does sometimes happen, increased—the amount due from the mortgagor to the mortgagees. The mortgagor is not here and I cannot bind him, and I do not attempt to bind him by anything that may be said. But it seems as if the mortgagees had, while in possession, from time to time expended moneys, taking them possibly out of the rents and profits and possibly out of other trust moneys. They have taken moneys to make those payments, which the mortgagor must allow them, and, allowing them, must pay interest on them at 5 per cent. The tenants for life are, it seems to me, entitled to say: "What is due to us is 5 per cent. interest on the sum originally advanced and on whatever has been added to the capital sum by taking the money which would have been available for the payment of our interest and expending it on permanent improvements." Then there is possibly another class of expenditure. It looks to me from the account as if there would be another class of expenditure—that is, where mortgagees in possession have expended money on cultivation—the result being that money has been taken which might have been available for distribution among the parties for the use of the farms, but, at the same time, cannot be charged against the mortgagor. If it comes under the head of permanent improvements it can be charged against him. If it is merely cultivation it cannot. I cannot do more than indicate the line. Not being chargeable

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against the mortgagor, or such part as is not chargeable against the mortgagor, it cannot bear interest at 5 per cent. or any other rate per cent. for the benefit of the tenants for life. That will be dealt with, and must be dealt with, on a different footing. The tenants for life are entitled to 5 per cent. on what is due, whether it was the sum originally advanced or that which has, according to the ordinary rules between mortgagor and mortgagee, been added to it. The remainderman is entitled to that which bears interest. What there is available for distribution must be distributed among them according to those proportions. Really the order may with great advantage follow that made in *Re Alston; Alston v. Houston* (*ubi sup.*), which simply directs an apportionment between the tenant for life and the remainderman according to what is due to them respectively, using those words as implying that an account must be taken of what is due.

The order as drawn up was in the following terms:

"This court doth order that the hereditaments remaining subject to the mortgage dated the 13th Jan. 1864 in the summons mentioned be sold with the approbation of the judge, and that the money to arise from such sale be paid into court to the credit of" the action. And, after ordering that accounts be taken of what is due to the trustees under the mortgage and of all sums of money properly laid out by them in necessary repairs and lasting improvements and insurance of the hereditaments comprised in the mortgage, it was ordered that "the net proceeds of the sale of Clements Hall Farm and Manor of Hawkwell be apportioned between the defendants Charles Howard Atkinson, Richard James Atkinson, and Mary Thornton Smith, the tenants for life, and the defendant Alice Margaret Hyde, representing John George Atkinson, a deceased tenant for life, on the one hand and the capital of the trust fund on the other hand in the proportion which the amount of interest in arrear at 5l. per cent. per annum bears to the amount of principal due under the said mortgage, and that the amounts so apportioned and the names of the persons to whom the same are payable be certified. And it is ordered that the said trustees do pay the amounts so apportioned to the said defendants Charles Howard Atkinson, Richard James Atkinson, Mary Thornton Smith, and Alice Margaret Hyde less the said sums of 200l. already paid as aforesaid and do retain the residue of such proceeds as capital moneys of the testator's estate, and the rest of the said application is to stand over until after the sale hereby directed."

From that decision the plaintiffs appealed.

By their notice of appeal the plaintiffs asked that the decision of Kekewich, J. might be reversed; and that in lieu thereof it might be ordered that for the purpose of apportioning the net proceeds of sale between the defendants, the tenants for life, on the one hand and the capital of the trust fund on the other hand, the total amount of interest and income received by the tenants for life for the time being from the mortgage ought to be added to the net proceeds of sale, together with any other capital sum or sums repaid to or received by the trustees for the

time being of the testator's will in respect of the mortgage (such aggregate sum being hereinafter referred to as "the net aggregate amount received from the mortgage") and that the net aggregate amount received from the mortgage should be divided between the tenants for life on the one hand and the capital of the trust estate on the other hand in the proportion which the total amount of interest and income which the tenants for life would have received from the mortgage if the same had been punctually paid (after deducting income tax) bore to the total amount of capital invested on the mortgage security. But that in estimating the sum due to the tenants for life they were to give credit for the total amount received by them in respect of interest and income from the capital sum invested on the mortgage security and in estimating the sum due to capital credit shall be given for all capital sums repaid to or received by the trustees for the time being in respect of the mortgage. And that for the purpose of making the apportionment aforesaid all necessary directions should be given and necessary and proper accounts and inquiries be ordered, or that such other order should be made as to the court should seem fit.

The appeal now came on to be heard.

T. H. Carson K.C. and A. J. Spencer for the appellants.—The appeal raises a question upon which there is some conflict of authority—namely, what is the true principle of apportionment as between tenant for life and remainderman of a fund representing the proceeds of the realisation of a mortgaged property which turns out to be an insufficient security? Two principles have been enumerated—one by Kay, J., that the court is to deal with the sum as a whole, and so apportion the deficiency as to make it fall proportionately between capital and income:

Re Foster; Lloyd v. Carr, 63 L. T. Rep. 443; 45 Ch. Div. 629.

That principle was applied by Farwell, J. in *Re Bird; Re Evans; Dodd v. Evans* (84 L. T. Rep. 294; (1901) 1 Ch. 916), and by Swinfen Eady, J. in *Re Phillimore; Phillimore v. Herbert* (88 L. T. Rep. 765; (1903) 1 Ch. 942). The other principle is that enunciated by Kekewich, J., in which his Lordship has taken the period of realisation as the date at which an apportionment ought to be made, and directed such apportionment between the tenant for life and the remainderman, according to what is due to them respectively:

Re Alston; Alston v. Houston, (1901) 2 Ch. 584.

In the present case Kekewich, J. has adopted his own decision in *Re Alston; Alston v. Houston* (*ubi sup.*). That decision was followed with approval by the Master of the Rolls in Ireland:

Stewart v. Kingsale, (1902) 1 Ir. 496, at p. 508.

We submit, however, that the court should adopt and approve the principle laid down by Kay, J. in *Re Foster; Lloyd v. Carr* (*ubi sup.*). The earlier cases on the subject are

Turner v. Newport, 2 Ph. 14;

Cox v. Cox, L. Rep. 8 Eq. 343;

Re Earl of Chesterfield's Trusts, 49 L. Rep. 261; 24 Ch. Div. 643;

Re Moore; Moore v. Johnson, 52 L. T. Rep. 510;

Re Barker, (1897) W. N. 154;

Lyon v. Mitchell, (1899) W. N. 27.

They referred also, on the question as to what

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sume may be included as just allowances in taking accounts between mortgagor and mortgagee, to

Union Bank of London v. Ingram, 43 L. T. Rep. 659; 16 Ch. Div. 53.

P. Ogden Lawrence, K.C. and *Lyttelton Chubb* for the respondents the tenants for life; *Samuel Dickinson* for the respondents, two of the trustees; and *Vaughan Hawkins* for the respondent, the third trustee, were not called upon to argue.

VAUGHAN WILLIAMS, L.J.—I think that this appeal fails. I think that the judgment of Kekewich, J. in this case, and also his judgment in *Re Alston*; *Alston v. Houston* (1901) 2 Ch. 584 were quite right. In this case there was an authorised investment, a mortgage, and that investment was a security for capital and interest at the rate of 5 per cent., and for a long time the security was sufficient and the interest was paid. Then subsequently the security began to be deficient; there was not enough to keep up the full payment of the interest; and there was a grave probability that the security might not be sufficient to provide payment of the capital. Under these circumstances a portion of the securities was realised, and that produced over 4000*l.* A question has arisen about apportioning this amount. Strictly speaking, one cannot make a final adjustment in the case. It is impossible at present to ascertain all the factors which are necessary for such an adjustment. One does not know at present what the unsold residue of the estate may be. But it is said that it will be a convenient course, although the time for a final adjustment has not come and the conditions are not present which would enable one to make that final adjustment, that we should declare now what will be the principle of the final adjustment. It is said that that course will be desirable in order that, for the convenience really of all parties, this sum that has been realised may be provisionally apportioned—only provisionally apportioned—and then any adjustment which is ultimately necessary when all the factors have been ascertained can be made on the occasion of the final adjustment. But in the meanwhile we have to make an order which will constitute really a provisional apportionment, and I may say that I do not think, so far as I can judge from Kekewich's, J. judgment that he meant what he did to be anything more than a provisional apportionment. That being the case, we have now to deal with the question of what is the right principle of apportionment. Now, as the Master of the Rolls said in the Irish case of *Stewart v. Kingsale* (1902) 1 Ir. 496, he had to choose there between *Re Foster*; *Lloyd v. Carr* (63 L. T. Rep. 443; 45 Ch. Div. 629) and *Re Moore*; *Moore v. Johnson* (52 L. T. Rep. 510), and he said that he preferred the principle laid down in *Re Moore*; *Moore v. Johnson* (*ubi sup.*). I say, as he did, that I prefer that principle; and really the Master of the Rolls gives such clear and forcible reasons in his judgment for his preference that I feel that I could not better them in any way by anything that I may add now to them. But in only one respect do I at all criticise what the Master of the Rolls said. I do not think that the question whether *Re Foster*; *Lloyd v. Carr* (*ubi sup.*) or *Re Moore*; *Moore v. Johnson* (*ubi sup.*) laid down the right principle of apportionment was quite as open a question, according to the English cases, as the Master of the Rolls

assumed. It seems to me that with regard to *Re Foster*; *Lloyd v. Carr* (*ubi sup.*) it is a case which, as Mr. Carson told us, has never been followed, and, as he also practically had to admit, it has never been preceded, by that I mean that there never was before the decision in *Re Foster*; *Lloyd v. Carr* (*ubi sup.*) a case in which the principle which would support that decision was in the slightest degree indicated. One cannot help seeing that when one looks at the judgment of Kay, J. and considers it with the greatest care, having regard to his learning and carefulness as a judge. Curiously enough, in the judgment in *Re Foster*; *Lloyd v. Carr* (*ubi sup.*), he practically refused to follow the decision in *Re Moore*; *Moore v. Johnson* (*ubi sup.*), and he does so without the indication of any reason why he disapproved of *Re Moore*; *Moore v. Johnson* (*ubi sup.*), or preferred the calculation which he enunciated in *Re Foster*; *Lloyd v. Carr* (*ubi sup.*). I say, therefore, that I prefer *Re Moore*; *Moore v. Johnson* (*ubi sup.*), and the principle laid down in that case, as I understand it. In the present case we have not got a case of unauthorised investment, and cases were cited to us of unauthorised investment. But I do not mean to trouble myself with those cases, because I think that they have no bearing on the present case whatsoever. We have a case here of authorised investment. There are tenants for life, and the fund is to go ultimately to remaindermen. Now, having that state of things, and the security being a security both for principal and for interest on mortgage at the rate of 5 per cent., What is to be done in a case where, for a considerable time, that interest has been paid, and then the security is realised and proves insufficient? What was it a security for? It was a security equally for the principal and the interest. Now, I will venture to try and enunciate—not a calculation, but a principle, here, which one ought to apply in these cases. That principle is that there being a security for the principal and the interest, and there having been a loss, you ought to take care that there is rateable equality in the incidence of that loss. That is all that you have got to do. Now, I will proceed to make the calculation which follows upon that principle, and I will now follow the very words of *Re Moore*; *Moore v. Johnson* (*ubi sup.*). Take the amount due for capital and the amount due to the tenants for life for arrears of interest, and then apportion the fund accordingly. That is the principle which it seems to me we have to apply in the present case. The result of this will be that the appeal fails, and that we must introduce what words may be necessary by way of precaution to prevent it being supposed that this is a final apportionment. It seems to me that, under the circumstances, there is nothing more to be said in this case. I just mention the matter of interest, but really the rate of interest was disposed of in the course of the argument for the reasons which have been given.

ROMER, L.J.—I am of the same opinion. I must say that, but for the cases of *Re Foster*; *Lloyd v. Carr* (*ubi sup.*) and *Re Phillimore*; *Phillimore v. Herbert* (88 L. T. Rep. 765; (1903) 1 Ch. 942), I should have thought that the principle to be applied in a case like the present was quite clear. The question may be shortly stated as follows: There is a mortgage debt on authorised security.

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It is settled by a settlement to certain tenants for life, with remainder to some remaindermen. Interest is paid on the mortgage debt for some time in full. Then the interest falls into arrear, and, after there are some arrears outstanding and due, the security has to be realised, and it turns out that there is not sufficient to pay the arrears of interest and the capital of the mortgage debt. What is to be done under the circumstances? I should have thought, as I have said, that the way to proceed was pretty clear; and that the considerations which would lead to the way in which the fund should be dealt with were pretty obvious. In the first place, as to the interest which was paid to the tenants for life, it is clear that the tenants for life were entitled to receive it, and that the remaindermen could have no possible claim upon the sum so received by the tenants for life—no equity against the tenants for life in respect of those sums in any point of view whatever. That being so, what is the position of the tenants for life and the remaindermen so far as concerns the property that represents the security for the debt? They are simply in the position of persons who have one security for the two debts belonging to them respectively. Notwithstanding the payment of interest to the tenants for life, so far as concerns their arrears of interest they have a right, as against remaindermen, to see that those arrears are charged upon the security. The security is a security not only for principal but for interest, and that is a right the tenants for life had. And I fail to see any equity on the part of the remaindermen which would enable them to challenge the position or right of the tenants for life. That being so, when the security is insufficient to pay the two debts charged upon the security, I should have thought that it would follow as a matter of clear right that the tenants for life would say to the remaindermen: "Apportion our security, which is a security for our debt as well as yours, between us in proportion to the amount of the respective debts, in the same way as you would if you had a joint mortgage given on one security—a security for two separate debts, and the security is insufficient." In such a case you apportion the insufficient proceeds between the two mortgage debts. That is the simple principle, and there is no possible equity that I can see to prevent the ordinary rights applying and being enforced. That, on principle, as I have said, ends the case. About the authorities only let me say a few words after what my Lord has said. So far as concerns *Turner v. Newport* (2 Ph. 14), *Cox v. Cox* (L. Rep. 8 Eq. 343), and *Re Bird*; *Re Evans*; *Dodd v. Evans* (84 L. T. Rep. 294; (1901) 1 Ch. 916), they are all authorities dealing with cases of unauthorised investment, and have no application in principle to such a case as we have to deal with here. Where you are dealing with cases of unauthorised investment, from the very nature of the transaction you have to consider the rights of the parties at the time it was made. Almost of necessity you must go back to readjust those rights, as I have said, at that time. Those cases, in my opinion, have no real bearing upon the case which we have now to decide. The exact question that we have here had to be considered, and properly considered, in *Re Moore*; *Moore v. Johnson* (*ubi sup.*), and there it received, to my mind, proper and sufficient

treatment. The principle which I have referred to was carried out, and rightly carried out, in that case, as indeed it was also in *Lyon v. Mitchell* (1899) W. N. 27 and in *Re Barker* (1897) W. N. 194, and in *Re Alston*; *Alston v. Houston* (1901) 2 Ch. 584; also in *Stewart v. Kingsale* (1902) 1 Ir. 496. The only authorities that cause the slightest trouble are those of *Re Foster*; *Lloyd v. Carr* (*ubi sup.*) and *Re Phillimore*; *Phillimore v. Herbert* (*ubi sup.*). As my Lord has pointed out, *Re Foster*; *Lloyd v. Carr* (*ubi sup.*) had no previous authority to justify it. And speaking with great respect of the very learned judge who decided it, I cannot help thinking that the decision in that case was wrong. The learned judge there appears to have arrived at a method of apportionment which, so far as I can see, was not argued and not authorised by any previous authority; and he gave no reason for his adopting the method of apportionment which he did. He states no principle on which he is said to have proceeded, and that case has never been followed. It was not really followed even in *Re Phillimore*; *Phillimore v. Herbert* (*ubi sup.*), and the other judges have expressly declined to follow it, as, for example, in *Lyon v. Mitchell* (*ubi sup.*) and in *Re Barker* (*ubi sup.*). With regard to *Re Phillimore*; *Phillimore v. Herbert* (*ubi sup.*) I need only say this, that I think Swinfen Eady, J. was misled there by the form the argument took before him. The real point of principle on which that case ought to have been decided was, in my opinion, never brought to the attention of the learned judge. He was led to believe by the arguments before him that the whole question which he had to decide was one as to the point of time from which an account should be taken as against the tenant for life in respect of the income received by the tenant for life to be brought in by the tenant for life as a sort of hotchpot in order to procure the apportionment. He was, I repeat, led to consider that that was the only question which he had to decide. As it was, he declined to follow *Re Foster*; *Lloyd v. Carr* (*ubi sup.*) But it is really for the reasons that I have given, no authority upon the question we have here. So far as it really proceeded on a different basis from that which I have indicated as the correct basis, I cannot help again saying that, in my opinion, it was wrongly decided. Those are the only two cases which are really in any way in conflict with the principle which I have indicated. To my mind, as I have already said, it is a perfectly clear and intelligible principle, and one that ought to be applied without any difficulty. I will only add that in this case we are really deciding a hypothetical question. But we are led to do that under the advisability, if not the necessity, of allowing some interim division—some provisional division—to be made in respect of the fund realised between the tenant for life and the remaindermen. I think that that justifies the court in deciding the question, though, as I have said, it is up to the present time hypothetical. I think that the order that was made by Kekewich, J., as to the apportionment of the fund ought to be prefaced by a statement to the effect indicated by my learned brother Cozens-Hardy in the course of the argument, to the effect that the apportionment of that fund is to be without prejudice to a final adjustment when the estate is ultimately realised. It is not until

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the estate is completely realised that you can finally adjust the rights, and not till then can you take a proper account between the parties. You cannot treat the fund, for example, as representing any specific portion of the original mortgage, and for that reason, amongst others, you cannot possibly at the present time, have a complete and final adjustment and apportionment so far as regards the fund. Therefore, as I have said, the division of the fund can only be treated as provisional, and the final adjustment of the rights must take place when the estate is fully realised. There will be then time to apply for the taking of such accounts as may be necessary to finally adjust the rights of the parties, on the principle which we have decided.

COZENS-HARDY, L.J.—I am of the same opinion, and have very little to add after the judgments given by my Lord and Romer, L.J. I think that the true way to approach this question is to treat it as though the whole security had been realised and had produced a sum. What would then be the inquiry which the court would have to make? What was due on the security at the time of realisation? The answer would be the capital and the arrears of interest; nothing more would be due. It would be idle to say that the interest which had been paid, wholly or in part, to the tenants for life was then due upon the security of the land or upon the proceeds of the sale of the land. The only charge would be for those two sums—capital and arrears of interest. On what principle are you to apportion? Just in the same way as you would if it were a contributory mortgage, part owing to A. and part owing to B. You would apportion it rateably. Just so here. When the larger realisation comes to pass you will have to ascertain what was due for capital and what was due for arrears of interest. It is a plain, simple, and intelligible rule which was adopted by Pearson, J. in the case of *Re Moore*; *Moore v. Johnson* (*ubi sup.*). It follows from what has been said in the case of *Re Moore*; *Moore v. Johnson* (*ubi sup.*), which was followed by Kekewich, J. in *Re Alston*; *Alston v. Houston* (*ubi sup.*), and by the Irish Master of the Rolls in what I may very respectfully refer to as his very able judgment in *Stewart v. Kingsale* (*ubi sup.*), and again by Kekewich J. in his judgment in the present case, that that is correct. But, with the greatest respect to Kay, J. and Swinfen Eady, J., I cannot consider that the decisions in *Re Foster*; *Lloyd v. Carr* (*ubi sup.*) or in *Re Phillimore*; *Phillimore v. Herbert* (*ubi sup.*) are correct. I do not refer to those cases as to unauthorised investments. They are on a different footing from a case like the present, where the tenants for life were entitled to the income derived from this investment. The appeal will be dismissed, the only variation being that the order made by Kekewich, J. is without prejudice to any ultimate adjustment of the whole realisation.

Appeal dismissed.

Solicitors for the appellants, *Lingard and Leach*.

Solicitors for the respondents, *Russell, Son, and Cumming*; *Lingard and Leach*; *Weir, Ford, and Leach*.

Thursday, April 14.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

Re AN ARBITRATION BETWEEN THE CHELSEA WATERWORKS COMPANY AND THE METROPOLITAN WATER BOARD. (a)

APPEAL UNDER THE METROPOLIS WATER ACT 1902.

Waterworks — Dividends — "Prescribed rate" — Preference shares issued under special Act — Rate of interest fixed by company — Profits divisible among ordinary shareholders — Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), ss. 2, 75 — Companies Clauses Act 1863 (26 & 27 Vict. c. 118), s. 13.

The *Waterworks Clauses Act 1847* enacts by sect. 75 that the profits of the undertaking to be divided among the undertakers in any year shall not exceed "the prescribed rate," or, where no rate is prescribed, the rate of 10 per cent. on the paid-up capital in the undertaking; and by sect. 2 "prescribed" means "prescribed for that purpose in the special Act."

The *Companies Clauses Act 1863* provides by sect. 13 that where a company is authorised by any special Act to raise money by the issue of new preference shares or stock, it may issue the shares or stock with a dividend or interest not exceeding the rate prescribed in the special Act, and, if no rate is prescribed, then not exceeding the rate of 5 per cent. per annum.

A waterworks company whose Acts incorporated the above-mentioned enactments obtained power to raise additional capital by the issue of new preference stock, no rate of interest being named in their special Act. This stock was in fact issued, some at 5 per cent. and the rest at $4\frac{1}{2}$ per cent.

Held, that 5 per cent. and $4\frac{1}{2}$ per cent. respectively were the "prescribed rate" for this preference stock within the meaning of sect. 75 of the *Waterworks Clauses Act 1847*.

APPEAL by the Chelsea Waterworks Company from an award by the Court of Arbitration appointed under the Metropolis Water Act 1902.

The award was in the form of a special case stated by the Court of Arbitration (Sir Edward Fry, Sir Hugh Owen, and Sir John Wolfe Barry) for the determination by the Court of Appeal of a question of law.

During the hearing of the arbitration it was agreed between the counsel for the Chelsea Waterworks Company and the Metropolitan Water Board that in ascertaining the balance of the certified accounts under sect. 40, sub-sect. 2, of the Metropolis Water Act 1902, the contingency fund of the company should be treated as profits available for immediate distribution as dividends and legally distributable as such, and that the contingency fund, together with the estimated balance of other profits available as aforesaid should be treated by the Court of Arbitration as a deduction from the amount payable as back dividend, and in making their award the Court of Arbitration took into consideration and acted upon this agreement.

During the hearing of the matter it appeared that the total capital of the company in shares and stock created, issued, and paid up consisted

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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of the following items, viz., 782,322*l.* ordinary stock; 150,000*l.* 5 per cent. preference stock; 160,000*l.* 4½ per cent. preference stock; 643*l.* 4½ per cent. convertible preference stock, making in all 1,092,965*l.*

On this state of facts a question of law arose on which the Court of Arbitration held that, on the true construction of the Chelsea Company's Acts of 1852, 1864, and 1875, and the Waterworks Clauses Act 1847, and the Companies Clauses Act 1863, the rates of 5 per cent. and 4½ per cent. on the above-mentioned 5 per cent. preference stock and 4½ per cent. preference stock (other than the above-named 4½ per cent. convertible preference stock) were the prescribed rates on those stocks respectively, and that the company were entitled to divide as maximum dividends the sums of 10 per cent. on the sums of 782,322*l.* ordinary stock and 643*l.* 4½ per cent. convertible preference stock, of 5 per cent. on the sum of 150,000*l.* 5 per cent. preference stock, and of 4½ per cent. on the sum of 160,000*l.* 4½ per cent. preference stock, and no more.

The Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17) provides as follows:

Sect. 2. The expression "the special Act" used in this Act shall be construed to mean any Act which shall be hereafter passed authorising the construction of waterworks, and with which this Act shall be incorporated; and the word "prescribed" used in this Act in reference to any matter herein stated, shall be construed to refer to such matters as the same shall be prescribed or provided for in the special Act, and the sentence in which such word occurs, shall be construed as if, instead of the word "prescribed," the expression "prescribed for that purpose in the special Act" had been used;

Sect. 75. The profits of the undertaking to be divided among the undertakers in any year (shall not exceed the prescribed rate, or where no rate is prescribed they shall not exceed the rate of ten pounds in the hundred by the year on the paid-up capital in the undertaking, which in such case shall be deemed the prescribed rate, unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate.

The Companies Clauses Act 1863 (26 & 27 Vict. c. 118) provides as follows:

Sect. 13. Where any such company is authorised by any special Act hereafter passed and incorporating this part of this Act to raise any additional sum or sums by the issue of new preference shares, or by the issue of new preference stock or (at the option of the company) by either of those modes—then and in every such case the company, with the like sanction as aforesaid, may for the purpose of raising such additional sum or sums from time to time create and issue (according as the authority given by the special Act extends to shares only or to stock only, or to both), such new shares or new stock, either ordinary or preference, and either of one class and with like privileges, or of several classes and with different privileges, and of the same or different amounts, and respectively with any fixed, fluctuating, contingent, preferential, perpetual, terminable, deferred, or other dividend or interest, not exceeding the rate prescribed in the special Act, and if no rate is prescribed, then not exceeding the rate of five pounds per centum per annum, and subject (as to any such new shares) to the payment of calls.

The Chelsea Waterworks Act 1852 (15 & 16 Vict. c. clvi.) by sect. 13 incorporated the Waterworks Clauses Act 1847.

The Chelsea Waterworks Act 1864 (27 & 28 Vict. c. xxxix.) provided as follows:

Sect. 7. The second and third parts of the Companies Clauses Act 1863 are incorporated in this Act.

Sect. 8. The company from time to time . . . may (by way of addition to their present share capital) raise any sum or sums not exceeding altogether the sum of 285,000*l.* by the issue of new ordinary shares, or by the issue of new ordinary stock, or by the issue of new preference shares, or by the issue of new preference stock, or (at the option of the company) by all or any of those modes . . .

The Chelsea Waterworks Act 1875 (38 & 39 Vict. c. cviii.), by sect. 2, incorporated, with other Acts, Part 2 (relating to additional capital) and Part 3 (relating to debenture stock) of the Companies Clauses Act 1863 and also the provisions "with respect to the amount of profit to be received by the undertakers" in the Waterworks Clauses Act 1847, and it provided:

Sect. 7. The company from time for the purposes of this Act, may raise, by the creation and issue of new shares or new stock, whether preferential, or ordinary, or both, any further sums not exceeding in the whole 160,000*l.*

Neither these two Acts of 1864 and 1875 prescribed any rate of dividend.

Under the Act of 1864 the company issued the 150,000*l.* 5 per cent. preference stock, and under the Act of 1875 the 160,000*l.* 4½ preference stock.

Sir Edward Fry in delivering the judgment of the Court of Arbitration, said that he had no doubt that the whole sum of 1,092,965*l.* was "the paid-up capital in the undertaking" within the meaning of sect. 75 of the Waterworks Clauses Act 1847, and in no case could the profits to be divided ever go beyond 10 per cent. on that 1,092,965*l.*, the total ordinary and preference capital of the company. The provision in sect. 13 of the Companies Clauses Act 1863 for a rate "if no rate is prescribed, then not exceeding the rate of five pounds per centum per annum," was the prescription of a rate, and, therefore, as regards the 150,000*l.* 5 per cent preference stock, no more than 5 per cent. could be deemed to be the prescribed amount. As to the 4½ preference stock, the company had the right of prescribing something less than the 5 per cent. mentioned in sect. 13, and therefore 4½ must be taken as the prescribed amount. Therefore, the highest amounts that could be divided among the shareholders was not more than 10 per cent. in respect of the ordinary stock, 5 per cent in respect of the 5 per cent. preference stock, and 4½ per cent. in respect of the 4½ per cent. preference stock.

From this decision the company appealed.

Sir Edward Clarke, K.C. and Haldane, K.C. (Edward Boyle, K.C. and Boydell Houghton with him) for the company.—The decision of the arbitrators was wrong. There is nothing to prevent the company from distributing and paying back dividends up to an amount ascertained by the measure of 10 per cent. on its entire capital. By sect. 75 of the Waterworks Clauses Act 1847 a dividend of 10 per cent. "on the paid-up capital in the undertaking" is allowed unless a smaller rate is prescribed in the special Act. It is not denied by the respondents that the company is entitled to pay back dividends up to 10 per cent on the ordinary shares. The company contends that in calculating the 10 per cent., the 5 per cent. and the 4½ per cent. preference stock should be

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included as part of the capital in the undertaking. The limitation to 10 per cent. which was imposed by sect. 75 was imposed for the benefit of the public. It is immaterial to the public whether the capital of the company consists wholly of ordinary shares or partly of ordinary and partly of preference. By a domestic arrangement the shareholders of the company have decided that some shares shall be preference and shall receive 5 per cent. interest and that the other shares shall be ordinary. That is to say that the preference shareholders contract with the ordinary shareholders that in return for certain privileges they are not to be entitled to more than 5 per cent. They have sacrificed for the benefit of the ordinary shareholders a part of the maximum of 10 per cent. which is the statutory limit. The ordinary shareholders would now get more than 10 per cent., but that is a matter between them and the preference shareholders which does not concern the public. Against that view the arbitrators have decided that the 5 per cent. and the $4\frac{1}{2}$ per cent. rates at which the preference stock was raised are "prescribed rates" within sect. 75. But "prescribed" there means "prescribed by the special Act." The company's special Acts of 1864 and 1875 did not prescribe any rate. The Acts gave power to the company to raise the money, at its option, either as ordinary or preference stock, and the company in deciding to raise the money as 5 per cent. or as $4\frac{1}{2}$ per cent. preference stock did not thereby make a "prescribed rate" within sect. 75. The arbitrators have held that the incorporation in the company's special Acts of sect. 13 of the Companies Clauses Act 1863 makes 5 per cent. the "prescribed rate" as regards the preference stock. But even so, as regards the preference stock raised under the Act of 1875, the company ought to have the benefit of the difference between the prescribed rate of 5 per cent., and the $4\frac{1}{2}$ per cent. at which the money was in fact raised.

Moulton, K.C., J. D. Fitzgerald, K.C., and A. B. Shaw, for the Metropolitan Water Board, were not called upon.

COLLINS, M.R.—This is an appeal from a decision of Sir Edward Fry and his brother Commissioners, in an arbitration under the Metropolitan Water Act 1902. The point really is whether, on the true construction of sect. 75 of the Waterworks Clauses Act 1847, the Chelsea Waterworks Company is entitled to distribute in the shape of back dividends among the ordinary shareholders a sum which will result in their receiving an amount considerably larger than 10 per cent. Sect. 75 provides as follows: [His Lordship read it, and also the definitions of the expressions "special Act" and "prescribed" in sect. 2.] Now part of the capital of this company consists of preference shares, some of 5 per cent., and a smaller proportion at $4\frac{1}{2}$ per cent. Mr. Haldane, on behalf of the company, contends that the only "prescribed rate" that he has got to deal with is the rate of 10 per cent. which is prescribed by sect. 75 in a case where no rate is prescribed by the special Act. His argument is that, notwithstanding the fact that a portion of the shareholders are limited, as between themselves and the other shareholders, to the right to receive only 5, or it may be, $4\frac{1}{2}$ per cent., yet the sum available for distribution under sect. 75 is

the full amount of 10 per cent. on the whole of the capital of the company, so that if the full amount of 10 per cent. on the whole of the capital has not been paid, those shareholders who have received 10 per cent. are entitled, over and above that 10 per cent., to share in the unpaid surplus of the aggregate amount of 10 per cent. on the whole capital. He says that there is nothing in the Act of Parliament to prevent that amount being distributed among those of the shareholders who are not deterred by any arrangement between themselves and the preference shareholders from taking more than 10 per cent. It seems to me that Sir Edward Fry is correct in arriving at the conclusion that there is a prescribed rate for all the capital of the company. As regards the ordinary shareholders sect. 75 of the general Act has prescribed a rate of 10 per cent., no rate being prescribed in the special Act. As regards the preference shareholders, I agree with the conclusion of the learned Commissioner, that for them the prescribed rate is 5 per cent., or $4\frac{1}{2}$ per cent., as the case may be. The process by which he arrived at that conclusion is this: The company's special Act empowers the raising of preference and ordinary shares, and also incorporates the Companies Clauses Act 1863, and when we come to look at the provisions of the Act as to the raising of capital, we find that there is a provision which limits the dividend in the case of preference shares to 5 per cent., and therefore, by the terms of the incorporated Act, 5 per cent. becomes the prescribed rate in respect of that part of the capital. With regard to that part of the capital which was raised at $4\frac{1}{2}$ per cent., that rate is undoubtedly below the 5 per cent. which is prescribed, but on that point the argument which was adopted by Sir Edward Fry appears to me to be quite conclusive. The legislature has put it into the power of the company to issue preference stock, and it has also conferred upon the company a statutory power to determine the rate at which that preference stock is to be raised. It was by the exercise of that statutory power that the company fixed $4\frac{1}{2}$ per cent. as the rate at which that preference stock was raised. It appears to me that on the exercise of those statutory powers $4\frac{1}{2}$ per cent. was the "prescribed rate" as to that stock. Therefore, as to the $4\frac{1}{2}$ per cent., as well as the 5 per cent., there is equally a "prescribed rate." Where there is a prescribed rate the company has no business to distribute among the shareholders any sum over and above that prescribed rate. The surplus is for other purposes. It seems to me, therefore, that the argument fails. The argument rests upon this, that, there being no prescribed rate, the company is entitled to distribute its surplus among the shareholders until the total deficiencies of 10 per cent. dividends on all its capital during the time of its existence have been made up. That argument breaks down when a different rate than 10 per cent. is the prescribed rate. There is a prescribed rate with reference to the subscribed capital of the company, except as to the ordinary shares. These shares have 10 per cent. substituted for the prescribed rate; the other shares have been limited under statutory powers to 5 per cent. as regards one class, and to $4\frac{1}{2}$ per cent. as regards the other. For these reasons it seems to me that the conclusion arrived at by Sir

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Edward Fry is right, and that this appeal fails.

ROMER, L.J.—I agree with the reasons given by Sir Edward Fry for the conclusion arrived at by him and his co-arbitrators, and with the judgment just delivered by my Lord, and I have nothing to add.

MATHEW, L.J.—I am of the same opinion. It really is not necessary to add anything as to the point which has been first discussed, and I will only deal with the last point made. It is said that the preference stock raised at $4\frac{1}{2}$ per cent. stands on a different footing from the preference stock raised at 5 per cent. It is impossible to doubt that if the company had raised all their preference stock at 5 per cent., that would have been the prescribed rate under sect. 13. The language of the section is perfectly plain. The company had the most ample powers to issue this preference stock at any of the different rates mentioned or referred to in the course of the section, and where no rate is prescribed by the special Act, which is the case here, then, as it seems to me, the prescribed rate is the sum fixed by the company as the rate which they are willing to pay. Whether you are dealing with the 5 per cent. or with the $4\frac{1}{2}$ per cent. preference stock the position is exactly the same. In each case the interest arrived at is the prescribed rate.

Appeal dismissed.

Solicitors for the company, *Hollams, Sons, Coward, and Hawksley.*

Solicitors for the water board, *Linklater and Co.*

Tuesday, May 3.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

JAMES V. OCEAN COAL COMPANY LIMITED. (a)
APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1897.

Employer and workman—Injury by accident—Compensation—Review of weekly payment—Fluctuations of wages at collieries—Alteration in maximum of compensation—Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37), sched. 1, pars. 1 (b) 2, 12.

A workman employed as a haulier in a colliery was injured by an accident arising out of and in the course of his employment, by which he was totally incapacitated for work for several months. In the district where he was working the rate of wages for hauliers were fixed every three months by a conciliation board, the rate varying with the price of coal.

During the workman's total incapacity for work, his employers made him a weekly payment of half the wages which he was earning at the date of the accident, as compensation under the Workmen's Compensation Act 1897. Afterwards they took him back into their service at an employment on light work, and gave him as weekly wages a sum which was larger than the weekly payment which they had been making him, and which was the same amount as hauliers then were receiving, the rate of hauliers' wages having fallen since his accident. At the same time the

employers ceased to continue the weekly payment to the workman. He therefore applied to the County Court judge, as for a review of his weekly payment, to have the weekly payment fixed.

The County Court judge held that the maximum which had been originally fixed on the average weekly earnings at the time of the accident was subject to variation from time to time to the same extent as the rate of wages as fixed by the conciliation board; and he also held that as the workman was then receiving from his employers the same rate of wages as was then being received by hauliers, the workman was not entitled to any weekly payment, but he made a declaration of the employers' liability under the Workmen's Compensation Act 1897. Upon the workman's appeal:

Held, that the County Court judge was wrong in holding that the maximum weekly payment, which was originally fixed at the date of the accident, could be varied according to the variations in the rate of hauliers' wages.

APPEAL by a workman from the decision of the judge of the Bridgend County Court of Glamorganshire in an application under the Workmen's Compensation Act 1897.

The workman had been employed as a haulier by the defendants, a colliery company.

On the 9th Oct. 1901 he met with an injury to his spine by an accident arising out of and in the course of his employment, which totally incapacitated him from work up to the 15th June 1903.

His average weekly earnings for the twelve months preceding the accident were 34s., and the defendants agreed to make him a weekly payment of half that amount—i.e., 17s.—which was the maximum that he could have obtained under the Workmen's Compensation Act 1897.

There was no award, nor was any memorandum of the agreement registered.

On the 15th June 1903 the defendants took him again into their employ, and gave him light work in the lamp room, for which they paid him 29s. 5d. a week, and they at the same time ceased to make him the weekly payment which they had made to him since his accident.

At the pit where this workman was employed lampmen received fixed weekly wages, which did not vary with the price of coals as did the wages paid to hauliers.

The workman then made an application to the County Court judge, in the nature of an application for a review, asking for an order fixing the amount of compensation to which he was lawfully entitled, and contending that he was entitled to 4s. 7d. a week—i.e., the difference between 34s. and 29s. 5d.

It appeared that in the case of hauliers, and most of the persons working in the coalfields of South Wales, there is a standard day wage to which is added a percentage varying with the price of coal.

These percentages are regulated every three months by a conciliation board.

In June 1903 the price of coal had fallen, compared with what it had been in Oct. 1901, and the wages of a haulier, which had been 34s. a week in Oct. 1901, were in June 1903 only 29s. 5d. a week, so that the wages which this workman was

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

getting, at the time of his application to the County Court judge, for his light work in the lamp room, were the same as he would have been getting if he had then been employed at his former work, as a haulier.

The County Court judge, in the course of his judgment, said:

The principal question for decision in this case is whether, when the amount of compensation has been decided either by award or agreement, on the basis of the earnings of the injured person prior to the accident, by which for a time he was totally incapacitated from working, that compensation is subject to revision when he is able to undertake light employment, and whether it is subject to the variations governing the wages paid to persons doing similar work to that which he performed prior to the accident. I am of opinion that the proper principle to be adopted in such circumstances is that the basis—i.e., the wages on which the amount of compensation was originally fixed—should be varied to the extent of the variation of the percentages in the wages earned by persons performing similar work at the time, but that the wages earned by the injured person when he undertook light employment should be supplemented by a sum which would bring up his earnings to the same amount as is paid to persons in similar employment to that in which he was engaged prior to the accident. Now, in the case of *Jamieson v. Fife Coal Company* (5 Fraser, 958), Lord McLaren, in delivering judgment, concurring with his learned colleagues, makes use of these words: "Where in an application for review you have to consider wage-earning capacity, that is a thing which may vary from time to time, and if this was a question of wage-earning capacity, it might be right for the arbiter to consider the present rate of wages." That dictum appears to me to support the view I have expressed above. The effect of my decision is to place the injured workman in the same position with regard to earnings as he would have been in if he had not been injured, for if he had continued to work without interruption, his wages would have been subject to the variations in the percentages, and would therefore in this case be less than those which he earned prior to the accident. On the other hand, if the applicant's contention is to be allowed—viz., that the wages earned by him in undertaking light employment are to be supplemented by a sum which would bring them up to those which he earned prior to the accident, he would be receiving higher wages than those who were at that time engaged in a similar capacity. That, in my opinion, would be absurd. In arriving at these conclusions I have not lost sight of the fact that he is, as a consequence of the injuries he has received, still unable to undertake the duties which he performed prior to the accident, or, indeed, any heavy work. In applying the principle which I have laid down as affecting the variations in the percentages I find that the respondents have, since the 15th June 1903, paid the applicant the proper amount of compensation, for he has received the same rate of wages as those hauliers who performed the same duties as he did prior to the accident. Their wages have, by the stop in the percentages, been reduced to the same amount as he has been paid. He therefore fails in his application to review the amount of compensation paid to him. I therefore award to the applicant compensation at the same rate as he has received since the 15th June, and, as he is still suffering from the effect of the accident, and unable to resume his former occupation, there will be a declaration of liability.

From this decision the workman appealed.

The Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides:

Sched. 1, par. 1. The amount of compensation under this Act shall be . . . (b) Where total or partial incapacity for work results from the injury, a weekly

payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings, during the previous twelve months, if he has been so long employed . . . Par. 2. In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment, not being wages, which he may receive from the employer in respect of his injury, during the period of his incapacity.

Abel Thomas, K.C. and Rhys Williams (Sankey with them) for the workman.—The County Court judge was bound to exercise his discretion as to how much compensation the workman ought to have under the circumstances of the case, but in exercising that discretion he has held that he was bound to take into consideration the general fall in wages since the accident. He was wrong in so holding, and has to that extent misdirected himself. We therefore ask that the case may be sent back to him that he may decide it upon his discretion, without his decision being fettered in any way by the general fall in wages since the accident. The maximum compensation which the workman could get is limited by sched. 1, par. 1 (b) to half his average weekly earnings before the accident. When once that maximum has been calculated, it remains fixed. Nothing happening after the accident can alter it. If it is proposed to alter this weekly payment then, according to par. 2, regard is to be had to the difference between his average weekly earnings before the accident and the average amount which he is able to earn after the accident. The variations in the general rate of wages in the district has nothing to do with the question before the County Court judge. Wages in the coalfields are liable to alteration every three months, and are continually changing either upwards or downwards. If the County Court judge was right in his opinion, there will be an application for a review every three months in all cases in which a workman who has been accidentally injured in a colliery is in receipt of a weekly payment as compensation under the Act. The County Court judge has misunderstood what Lord McLaren said in *Jamieson v. Fife Coal Company* (*ubi sup.*).

Ruegg, K.C. (A. Parsons with him) for the employers.—In considering the change in the workman's wage-earning capacity the County Court judge was right to give some weight to the general fall of wages paid to men doing the same work as this workman did before the accident. In effect, the County Court judge said that he was not going to put the workman into a better position as regards money than he would have been if he had not met with the accident. His decision was perfectly correct. The consideration of the question of the proper amount of compensation was altogether a matter for the discretion of the County Court judge, and this court ought not to interfere with his exercise of his discretion.

Collins, M.R.—This is an appeal from a decision of the County Court judge upon an application by a workman, not in the strictest sense for revision of a weekly payment, but to have it determined what amount of compensation ought to be paid to him under the Workmen's Compensation Act 1897 under the particular circumstances of the case. What happened was that the workman, who had been a haulier in the service

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of the defendant company, met with an accident arising out of and in the course of his employment, which resulted in total incapacity on his part to do work, for a time at all events. His average weekly earnings for the preceding twelve months had been 34s. In so far as that sum was an average, consideration was doubtless given to the fluctuations of wages. But that was the sum which was fixed by the parties themselves without the intervention or assistance of the County Court judge, as the average weekly earnings, and accordingly the defendants made the workman after the accident a weekly payment of 17s., which would be the maximum that he could claim under the Act. Afterwards when he was sufficiently recovered to accept light work, he was taken back into the employment of the defendants, and for the work which he was able to do, which was not the same kind of work that he had done before the accident, he received wages at the rate of 29s. 5d. a week. Now 29s. 5d. is the full present rate of wages for a haulier—that is to say, for a person in the kind of employment in which he was engaged at the time of his accident. Under these circumstances, the defendants naturally refused to continue paying compensation to the workman in addition to his wages. The workman, being unsatisfied with that, applied to the County Court judge for an order settling what amount of compensation the defendants ought to pay. In the result the learned County Court judge found that the defendants' contention that the workman was getting enough was right; he therefore did not award the workman any compensation, but made a declaration of the defendants' liability so as to keep seisin of the case. Now, if the learned judge had simply declared his view that he saw no reason under the circumstances for interfering with the arrangement then in existence whereby the workman was receiving the sum of 29s. 5d. a week, and if he had not travelled into a discussion as to reasons and principles I think that we should have had no ground for interfering with his decision. I have no right to express any opinion as to whether he was right or wrong in the particular amount that he assessed. It is sufficient for me to see no reason to suppose that it is not a perfectly proper amount. But now comes the real difficulty. The learned County Court judge has given reasons. A question was raised which, we are told, the parties on both sides were very anxious to have decided, and therefore, at the invitation of counsel, the learned judge travelled into a discussion of principle, and he has laid down some rule of calculation which I myself am not prepared to adopt. Now, the first question which the learned judge put to himself was whether, when the amount of compensation has been decided, either by award or by agreement, upon the basis of the earnings of the injured workman before the accident, by which he has for a time been totally incapacitated from work, that compensation is subject to revision when he is able to undertake light employment. It is perfectly clear that under sched. 1 the answer to that question must be that the compensation is subject to revision. It is perfectly clear. The Act admits no doubt about it. It is the second question that he put to himself which seems to me, when analysed, to involve a misconception of the law on his part, and in so far as that misconception

was a factor in arriving at the amount which he has actually arrived at it is no doubt important, and I do not think that we should be justified in ignoring it and treating it as having no relation to the final decision. Now, the second question which the learned County Court judge put to himself was whether the compensation—which, *ex hypothesi*, was the maximum allowed in the case of total incapacity—is subject to the variations governing the wages paid to persons doing similar work to that which he performed prior to the accident. That question arises for consideration on an application to review. The learned judge went on to say: "I am of opinion that the proper principle to be adopted in such circumstances is that the basis—i.e., the wages on which the amount of compensation was originally fixed—should be varied to the extent of the variation of the percentages in the wages earned by persons performing similar work at the time, but that the wages earned by the injured person when he undertook light employment should be supplemented by a sum which would bring up his earnings to the same amount as is paid to persons in similar employment to that in which he was engaged prior to the accident." That seems to me to carry out what would apparently appear to be the *prima facie* meaning of the second question that he puts to himself, and to be an opinion that the basis—i.e., the maximum which has been fixed by reference to the then amount of wages—is to be varied, on an application for a revision, to the extent of the variation of the percentages in the wages earned by persons performing similar work at the time. In so far as he committed himself to that view and acted on it, the learned judge was, in my opinion, wrong, because, in my judgment, the maximum fixed in the first instance is entirely independent of any fluctuation in the wages afterwards. That is in accordance with the decision of the Court of Session in the case of *Jamieson v. Fife Coal Company Limited* (5 Fraser, 958), and also in accordance with the whole scheme and actual wording of the Act. When the compensation for total incapacity has been arrived at, whether it be the maximum allowed, or whether it be under the maximum, that factor is not to be altered by matters that occur subsequently. I take exception also to what the learned judge said with regard to the wages earned by the injured man being supplemented by a sum which would bring up his earnings to the same amount as is paid to persons in similar employment to that in which he was engaged prior to the accident. I do not think that in this particular case it would be at all wrong to supplement the original maximum by a sum which would bring the workman's wages up to the same amount as are paid to persons in similar employment to that in which he was engaged prior to the accident. But it is impossible to lay down a general principle that that ought to be the sum which is arrived at. In fact we have repeatedly held in this court in cases of this kind, that the County Court judge must not lay down rigid canons obliging him to come to conclusions for special amounts—for the same amount in any number of different cases. He must not apply a general rigid rule like that. He must be governed by his discretion in each particular case. Therefore, so far as the learned

County Court judge here laid down a fixed rule of calculation, I think he was wrong. His direction to himself involved an opinion that the original maximum is itself subject to variation by matters subsequently arising. As I have said, that seems to me to be wrong, and if and so far as that error entered into the calculation that he has made, that calculation ought to be reviewed. I am not sure myself that it did enter into his calculation. It seems to me that it was entirely irrelevant to the discussion, because, if it were not for this reference to the principles governing the matter and the rigid rules to be applied, the matter, upon the Act itself, is perfectly clear. When compensation to an injured workman has to be assessed in a case of total incapacity to work, his average weekly earnings have to be found, and that involves an examination of what the injured workman has been earning in that particular employment. When the amount of those average weekly earnings has been found, the weekly payment awarded cannot be more than half that amount. When that is arrived at the matter is done with and ended. But then comes the case where the law provides for a revision of the weekly payment. In fixing the amount of the weekly payment par. 2 of sched. 1 provides that "regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident, and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity." So that when the new factor is introduced, the County Court judge ought to consider the question: "What ought this workman to get in order to receive the nearest equivalent that in my judgment I can give him under all the circumstances so as to put him back again, as far as the Act will permit, into the position which he was in originally? The Act does not contemplate complete compensation, and in cases of total incapacity to work, fixes the maximum at half the average weekly earnings. What am I to do now, when it is proved that the man is no longer suffering from total incapacity to work, but is able to earn something?" It seems to me that the elements of fluctuation in the original maximum is entirely remote from the discussion. In such a case as this, where there is an application for a review, what the County Court judge has to do is to reduce the weekly payment by reason of the fact that the incapacity to work is no longer total, but how far he is to reduce it is a matter which is left by the law entirely to his discretion subject to the rule which I have just read, laid down in par. 2. That is all that is laid down for the judge. He is to regard those facts. The facts there mentioned do not embrace the consideration which the learned County Court judge appears to have introduced here as to whether the maximum originally awarded has been subject to a fluctuation. That maximum is out of the discussion in the question that he has now to deal with. He has to consider how much the workman was capable of earning before and how much he is capable of earning now. Having regard to those facts, the learned judge must arrive at the best conclusions he can. It seems to me, therefore, that in the course of his judgment the County

Court judge has expressed an opinion which, in my view, is wrong. I cannot be quite clear that it did not really affect the calculation that he made, and therefore I see no alternative myself but to send the matter back to him. It may be that I have not completely understood what he himself intended by that expression of opinion, and it may be that when he comes to reconsider the matter he will make no alteration whatever in the award that he has actually given. But I cannot be sure of that, and as the point was strongly pressed upon him as an element which was material in determining the case, I think that it is possible he may have been influenced by it, and therefore there may be a mistake, and he would not arrive at the same amount if he cleared his mind of that. There is another point in the form of his judgment which seems to show that he had not quite cleared his mind. He says: "I find that the respondents have since the 15th June paid the applicant the proper amount of compensation, for he has received the same rate of wages as those hauliers who performed the same duties as he did prior to the accident. Their wages have by the drop in the percentages been reduced to the same amount as he has been paid; he therefore fails in his application to review the amount of compensation paid to him. I therefore award to the applicant compensation at the same rate as he has received since the 15th June." That, on the face of it, is clearly wrong. What he does give him is 1*l.*, because he thinks that, being in receipt of the sum named, he is not really entitled to demand from the employers anything by way of compensation now under the Act, so that there is a technical mistake there. How far that entered into and confused his mind on the main discussion I cannot tell, and under the circumstances I think we have no alternative but to send the matter back to the learned County Court judge.

ROMER, L.J.—My brethren are both clearly of opinion that the learned County Court judge has misdirected himself in this case, and has not, or may have not, properly exercised the discretion which he ought to have exercised. There are some passages in his judgment which certainly do not appear to me to be accurate statements of the law. I regret the result, however, for I cannot think that the conclusion arrived at by the learned judge was in itself improper. I say this because, in the circumstances of the case, it appears to me clear that the judge, in reviewing the weekly payment, could take, and ought to have taken, into consideration the fact that the workman was again in the employment of his old employers, and was being paid the same wages—far exceeding the amount of compensation awarded—that he would have been earning had no accident occurred. I cannot see that the judge would have been wrong in refusing to make the employers pay the workman any further sum so long as they continued to pay him those wages. I further cannot help thinking that the sole effect of the matter going back to the learned judge will be, or may be, that he will arrive, after properly exercising his discretion, at the same conclusion that he has already arrived at, and that the sole practical result of the appeal will be that further costs will be incurred. However, as the point has been taken and insisted upon by

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the appellants, the case must go back to the County Court judge.

MATHEW, L.J.—I am of the same opinion. The question that has been argued is whether or not the learned County Court judge thought that he was bound, in dealing with the question of the reduction of the weekly payment, to look at the wages which the man was earning at that time, and he came to the conclusion that, if the man were whole, he could not have earned more at that time, and the learned judge therefore thought he was bound to dismiss the man's application. I think that was wrong. In order to get away from that statement of what the learned judge intended to decide, it was said that he dealt with the case upon the footing that the arrangement with the employers was a fluctuating arrangement, an arrangement that the man should be paid for his light employment such wages as he would have earned as a haulier. If that had been the point made, and the learned judge thought that such an arrangement had been come to, there would have been nothing further to decide. I am clearly of opinion that he did not proceed upon any such footing. Then it was said that if he did not decide it upon that view, and if there was not an agreement to that effect when the parties were before him, we ought to deal with it upon the footing that he did exercise the discretion which is undoubtedly confided to him by the Act of Parliament. I act upon the learned judge's own statement of the principle upon which he proceeded. That principle seems to me to be wrong, and the case must therefore go back to him.

Case sent back to County Court judge.

Solicitors for the plaintiffs, *Smith, Rundell, and Dods*, for *Walter Morgan, Bruce, and Nicholas, Pontypridd*.

Solicitor for the defendants, *H. P. Becher*, for *Vazie Simons, Pontypridd*.

Friday, May 6.

(Before COLLINS, M.R., ROMER, and
MATHEW, L.JJ.)

STEPHENS v. DUDBRIDGE IRONWORKS COMPANY
LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

*Employer and workman—Injury by accident—
Compensation—Right of action for damages—
Exercise of option between two remedies—
Infant—"Workman"—Workmen's Compensation
Act 1897 (60 & 61 Vict. c. 37), ss. 1, sub-s. 2
(b), 7.*

An infant workman met with an injury in the course of his employment under circumstances which entitled him either to compensation under the Workmen's Compensation Act 1897, or to bring an action for damages for negligence against his employers. The employers offered him compensation under the Act, which he accepted in full satisfaction and discharge of all his claims against them in respect of his injury. He afterwards brought an action against them for damages for negligence. At the trial Bruce, J. held that the agreement by the plaintiff to accept compensation under the Act in satisfaction of all his claims in respect of the injury was not for the

plaintiff's benefit, and therefore did not afford any defence to the action. Upon appeal:

Held (affirming the decision of Bruce, J.), that there was nothing in the Workmen's Compensation Act 1897 which deprived the infant workman of his right to repudiate a contract which was not to his benefit.

APPEAL by the defendants from the judgment of Bruce, J. on further consideration after the trial of the action with a jury at Gloucester assizes.

The action was brought by John Stevens, an infant of the age of seventeen years, suing by S. R. Smith, his guardian and next friend, to recover damages for an injury which he had received, while working as an apprentice to the defendants, in consequence of the alleged negligence of the defendants.

On the 12th April 1901 the plaintiff was apprenticed to the defendants.

On the 15th Aug. 1902, while he was working on the defendant's premises at a planing machine, which was unfenced, or not properly fenced, he met with an accident whereby he lost three fingers of his left hand.

On the 30th Sept. his uncle, S. R. Smith, with whom he was living, wrote a letter to the defendants, claiming, on behalf of John Stevens, the sum of 50*l.* as compensation under the Workmen's Compensation Act 1897.

On the 3rd Oct. the company wrote in reply that they could not accede to the request for a lump sum, but were willing to pay compensation in accordance with the Workmen's Compensation Act—i.e., half his weekly wages during disablement; and as the plaintiff's wages were 5*s.* a week, they offered 2*s.* 6*d.* a week for the third and subsequent weeks of disablement.

On the 4th Oct. the plaintiff went to the defendant's office, and having read the letters of the 30th Sept. and the 3rd Oct., received a sum of 12*s.* 6*d.* as the first five of the successive weekly payments of 2*s.* 6*d.* each, and signed a receipt in the following form:

Received of the Dudbridge Ironworks Limited by payment of the Employers' Liability Assurance Corporation Limited, this 4th day of October, 1902, the sum of 12*s.* 6*d.*, being the first five of the successive weekly payments which I elect to accept under the Workmen's Compensation Act 1897, in full satisfaction and discharge of all claims to compensation accrued or to accrue in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 15th day of August last, while in the employment of the above.—JOHN STEPHENS.

On the 4th Nov. 1902, the plaintiff's solicitor served upon the defendants a formal notice, headed the Employers' Liability Act 1880, and the Workmen's Compensation Acts 1897 to 1900, in which he claimed compensation for the injuries received by the plaintiff on the 15th Aug.

The defendants continued to pay the plaintiff the agreed weekly payment of 2*s.* 6*d.* until they had paid him in all the sum of 17*s.*, when they took him back into their employment at higher wages than he had formerly received.

On the 4th Jan. S. R. Smith was appointed guardian to the plaintiff.

On the 23rd Jan. 1903 the present action was commenced, in which the plaintiff claimed 150*l.* damages for personal injuries sustained by him

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at Law.

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whilst in the employ of the defendants, in consequence of the defective condition of the defendants' plant and machinery, and the negligence of the defendants and their responsible servant or servants.

At the trial of the action, before Bruce, J. with a jury, upon the defendants admitting negligence on their part in not fencing the planing machine, and the damages being agreed to at 75*l.*, the jury was discharged, and the defendants relied upon their contention that, under sect. 1, sub-sect. 2 (*b*), of the Workmen's Compensation Act 1897, they could not be liable to pay compensation both under that Act and independently of the Act, and that the plaintiff by electing to accept compensation under the Act had debarred himself from succeeding in the present action.

Bruce, J., upon further consideration, said in the course of his judgment: The sole point is whether in the circumstances that I have mentioned the infant plaintiff has forfeited his right of action. In my opinion he has not done anything to disentitle him from recovering in the present action. The plaintiff, as an infant, was incapable of exercising an option whether to claim under the Workmen's Compensation Act 1897 or to proceed for negligence. The law considers that an infant is incapable of forming a judgment as to the necessity or expediency of applying for protection or redress to the tribunals of the country. The plaintiff, as an infant, was incapable of forming a judgment as to which of the two courses open to him it was most expedient to adopt. In view of the fact which is now established that the defendants were guilty of negligence in not fencing a dangerous machine, it was clearly in the plaintiff's interest not to elect to proceed under the Workmen's Compensation Act, because the compensation he could recover under that Act was very much smaller than the compensation he could recover in an action for negligence. Beyond the claim made by Mr. Smith on behalf of the plaintiff by the letter of the 30th Sept., and the acceptance by the plaintiff of the sums paid to him by the defendants as compensation under the Workmen's Compensation Act, there is nothing to operate as an estoppel. I entertain some doubt whether there ever was a claim by the plaintiff for compensation under the Workmen's Compensation Act within the meaning of sect. 1, sub-sect. 2 (*b*). No steps were ever taken to proceed to arbitration or to institute proceedings in any form under the Workmen's Compensation Act, nor was any next friend appointed to represent the interest of the plaintiff in accordance with the County Court Rules. All that took place was done by the voluntary act of the parties, and there was no formal proceeding under the Act. Had there been any such proceeding, and had a next friend been appointed, the County Court judge might have instituted an inquiry as to whether it was to the interest of the plaintiff to proceed under the Workmen's Compensation Act, and had such an inquiry been instituted I think it would certainly have been determined that it was not to the interest of the plaintiff so to proceed. But it is not necessary to speculate as to what might have been the state of things had a different procedure been adopted. It is enough for me to determine that in the circumstances which have happened there is nothing to prevent the plaintiff from recovering

damages in the present action. The plaintiff was not capable of bargaining away his common law rights, and no one was ever appointed whose duty it was and who was capable of advising him as to the course which he could pursue, and no proceedings were ever taken in such a form as to be binding upon the plaintiff. But I think the plaintiff is not entitled to retain the sum of money received by him as compensation under the Workmen's Compensation Act. Courts of equity, in setting aside proceeding on behalf of infants, always took care to make special provisions to provide against injustice being done, and to prevent the infant from deriving a benefit from the proceedings which were set aside. I must therefore direct that the sums of money received by the plaintiff as compensation under the Workmen's Compensation Act be deducted from the amount agreed upon as the damages in the present action, and that judgment for the balance so ascertained be given for the plaintiff with costs.

The defendants appealed.

The Workmen's Compensation Act 1897 (60 & 61 Vict. c. 37) provides as follows:

Sect. 1, sub-sect. 2 (*b*). When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of his employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid.

Sect. 7. In this Act . . . "workman" includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service, or apprenticeship, or otherwise. . . .

Ruegg, K.C. (Corner and A. S. Poyser with him) for the defendants.—The plaintiff has disabled himself from succeeding in this action by his acceptance of compensation under the Workmen's Compensation Act 1897. Sect. 1, sub-sect. 2 (*b*) provides that a "workman" may exercise an option, either to claim compensation under the Act or to take such proceedings as were open to him before the commencement of the Act, and the employer is not to be liable to pay compensation to a "workman" both independently of and also under the Act. The interpretation clause, sect. 7, expressly says that the word "workman" is to include an apprentice. Whatever may be the rights of an infant to repudiate a contract he has entered into on the ground that it is not for his benefit, they are not material for consideration in this case. The right of compensation under the Act of 1897 is purely statutory. It is a right which the plaintiff could not obtain unless he first showed that he came within the definition "workman" in sect. 7. If he is a "workman" for the purposes of any part of the Act, he is a "workman" for the purposes of sect. 1, sub-sect. 2 (*b*). He had a statutory ability to bind himself, just as much as though he were a workman of full age, by his exercise of the option given by that sub-section, and he has bound

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himself irrevocably by what he has done. The Act makes no exception in favour of infants.

A. T. Lawrence, K.C. and L. Morton Brown for the plaintiff.

COLLINS, M.R.—This is an appeal from a judgment of Bruce, J. in an action brought by an infant by his next friend in which damages at common law were claimed in respect of personal injuries suffered by the plaintiff through the alleged negligence of his employers in not fencing certain machinery. At the trial of the action the defendants admitted that they had been guilty of negligence, and the amount of damages was agreed to, so that the only question left for decision was whether, by reason of proceedings which had taken place before action brought, the plaintiff was prevented from putting his claim in suit. What had taken place was this: Upon the happening of the accident by which the plaintiff lost three of his fingers, his uncle wrote to the defendants asking for a lump sum of money as compensation, that being a thing which the plaintiff was not entitled to under the Workmen's Compensation Act 1897. The defendants' answer was that under that Act the plaintiff was only entitled to a weekly payment of half his wages, and they offered to pay him that amount—i.e., 2s. 6d. a week. The boy accepted that offer and signed a receipt in which he acknowledged that the weekly payments were accepted by him under the Workmen's Compensation Act 1897 in full satisfaction and discharge of all claims to compensation in respect of injuries resulting from the accident. He continued to receive the weekly payment of 2s. 6d. until he was restored to health and able to work again. He then seems to have consulted a solicitor, who served on the defendants a notice claiming compensation, and a few weeks later the writ in the present action was issued. The question now is, whether by reason of the events which occurred after the accident and before this action was brought the plaintiff is debarred from succeeding in the action. The point arises under sect. 1, sub-sect. 2 (b), of the Workmen's Compensation Act 1897. [His Lordship read it.] It is contended on behalf of the defendants that the plaintiff is a "workman" within the meaning of the Act, and that under this sub-section he was given an option either to claim compensation under the Act or to claim damages independently of the Act, and that he had exercised his option. Now, the definition of "workman" in sect. 7 of the Act covers the case of an apprentice, and therefore it was argued that a person who is engaged in an employment to which the Act applies has a statutory permission, though he is under the age of twenty-one years, to exercise the option which is given by sect. 1, sub-sect. 2 (b). But, in my opinion, the definition of workman in sect. 7 does not alter the ordinary law of the land that an infant cannot bind himself by a contract which is not for his benefit. Bruce, J. held at the trial of this action that the contract by which the plaintiff agreed to accept the weekly payment in satisfaction of all his claims in respect of the injury was not for his benefit, and that, as the defendants admitted negligence on their part, the plaintiff was entitled to the agreed amount of damages. In my opinion his decision was right. The definition of "workman" in

sect. 7 of the Workmen's Compensation Act 1897 does not, by its inclusion of apprentices, alter the general law as to the inability of infants to bind themselves by contracts which are not for their benefit. I think, therefore, that the appeal fails.

ROMER, L.J.—I agree. Apart from the Workmen's Compensation Act 1897 it is clear that the course taken by this infant plaintiff before commencing this action would not estop him in any way from succeeding in it or afford any defence to the defendants; and I think that there is nothing in the Act to prevent the action being brought.

MATHEW, L.J.—I am of the same opinion. There is no reason that I can see for supposing that the Legislature intended to impose by this Act any special disabilities on infants.

Appeal dismissed.

Solicitor for the plaintiff, C. T. Courtney Lewis, for W. Langley Smith, Gloucester.

Solicitors for the defendants, Ford and Ford, for Wansbrough, Dickinson, Robinson, and Tayler, Bristol.

Friday, May 6.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

CULLEN v. ELWIN AND OTHERS. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Trade union—Application of funds to provide benefits to members—Principal object of society—Divisibility of objects—Rules in restraint of trade—Illegal society—Action by member to enforce benefit rules—Trade Union Act 1871 (34 & 35 Vict. c. 31), s. 4.

A society registered under the Trade Union Acts was governed by rules some of which made provision for benefits to members, and the others were illegal as being in restraint of trade.

A member brought an action against the officers of the society to enforce a rule of the society under which he claimed to be entitled to a superannuation allowance.

Held, upon the consideration of all the rules of the society, that the main object of the society was illegal at common law as being in restraint of trade, and that those rules which made provision for benefits to members were merely ancillary to that main object, and could not be separated from it.

Held, therefore, affirming the judgment of the Divisional Court (88 L. T. Rep. 686), that under sect. 4 of the Trade Union Act 1871 the action must fail.

APPEAL by the plaintiff from the judgment of the Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.) reversing the decision of the judge of the Nottingham County Court.

The plaintiff was a member of the Amalgamated Society of Tailors and Tailoresses, and brought this action in the Nottingham County Court against the officers of the society to recover arrears of a superannuation allowance, which he claimed to be entitled to under the rules of the society.

The County Court judge gave judgment in favour of the plaintiff.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

Upon appeal, the Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.) were of opinion that the society was illegal, and that therefore the action would not lie; and they reversed the decision of the County Court judge, and gave judgment for the society.

The case is reported 88 L. T. Rep. 636.

The plaintiff appealed.

The Trade Union Act 1871 (34 & 35 Vict. c. 31) provides as follows:

Sect. 4. Nothing in this Act shall entitle any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements—namely . . . (3) Any agreement for the application of the funds of a trade union (a) to provide benefits to members. . .

The Amalgamated Society of Tailors and Tailoresses was registered in England under the Trade Union Acts 1871 and 1876, and was governed by rules of which the following parts are material:

Preamble. Much good has been accomplished by trade unions in times past, and still greater results remain to be achieved in the future. . . . The rules of the Amalgamated Society of Tailors, as now submitted, are constituted to mutually relieve each other in distress, disease, old age, and death. . . . Being convinced by experience that true unity can only be achieved by combining trade protection and benevolent objects in the benefits of one association, it has been endeavoured to frame the rules of the Amalgamated Society of Tailors so that individual right might be respected as well as the general weal secured. . . . We contend that no society, association, or insurance is so well calculated to achieve success, and give more general benefits to their members as a trade society. Whilst it not only secures to them all the benefits held forth by a friendly society by its unity and usefulness, it enhances the position of its members as workmen, who are in a position, by thorough organisation, to resist encroachments on their interests, but it is also an indispensable means of effecting whatever changes may be discovered as desirable between the relative positions of employer and employed. . . .

Rule i. Name and Objects. . . . (2) The objects of this society are (i.) the protection and furtherance of the interests of its members, the improvement of the conditions of employment in the tailoring trade, the moral and social elevation of its members, the regulation of the relation between workmen and employers, and to bring about the complete emancipation of labour from the exploitation of capital. (ii.) To raise funds for the mutual support of its members whilst travelling in search of work, or in cases of sickness and superannuation, and the burial of members and their wives.

Rules ii. to viii. inclusive related to the government of the society, the method of conducting its business, and entrance fees and contributions. Under the head of "Trade Benefits" came rules ix. (Power of Executive Council to assist Branches) and rules x. and xi.

Rule x. Protection. . . . (2) Any member or members leaving his or their employment under circumstances satisfactory to the executive council shall be entitled to the sum of 15s. per week, providing they have been members over six months; under six months and over three months, 12s.; if under three months 10s., while the strike lasts, except superannuated members, who shall only receive 15s. per week, superannuation pay included. A member in receipt of strike pay shall attend the club-house three times a day, to answer or sign his name, and shall be paid for the number of times he attends; but no member to receive support for

any week wherein he has had four days' work. Members shall pay full contribution when in receipt of any benefit. When a strike or lock-out has been pending for a length of time, and the executive council consider it useless to prolong the struggle, they shall confer with the members of the branch and, if possible, bring the dispute to a close; but should the branch be unwilling to act upon their advice, the executive council shall cause the branch to make out a statement of their case, which shall accompany a statement to the executive council, to be sent to the country by the general secretary to be voted upon . . . (5) It is to be distinctly understood that all branches labouring under any grievance will use all legitimate means in their power to bring the matter to an amicable adjustment before requesting the aid of the executive council. In the event of such means failing, it will be the duty of the secretary in any of the said towns where the grievance exists, to forward in clear and laud terms the matter in dispute to the executive council, who shall take immediate steps to consider the case, and recommend a course of action subject to the approval of the majority of the members of the amalgamation, pending whose decision the aggrieved parties may continue to work. . . . (6) The decision of branches on all cases of appeal to be lodged with the general secretary within twelve days. . . . Should such decision stamp the case as a valid grievance, it will be the duty of the executive council to withdraw the men, and declare the town or towns on strike, intimate the same to all branches in the amalgamation, and recommend that no men apply for work in any of the towns during the dispute. . . . (7) Any officer being discharged from his employment for holding office, or any member being delegated on the business of the amalgamation and losing his employment in consequence, or an officer or member being victimised on the conclusion of a dispute for any action he may have taken in that dispute satisfactory to his branch, shall attend the club-house three times each day, and shall be allowed the statement of the town until he find employment satisfactory to the members of the branch, and shall be paid the expenses of removing himself and family to where he may obtain employment.

Rule xii. related to sick benefits. Rule xiii., relating to superannuation, was struck out in 1901 by a vote of the members of the country under rule i. (6). Rule xiv. related to general benefits. Rules xv. to xxv. related to the regulation of branches. Rules xxvi. to xxviii. related to the funds of the society: rule xxix. to members defrauding; rule xxx. to members leaving the United Kingdom.

Rule xxxi. Misconduct of Members. . . . (8) Any member acting contrary to the interest of the society, such as working for a shop on strike or lock-out, becoming a middleman or master sweater, and employing others to do the work, or working for a middleman or master sweater, or in other ways injuring the trade, contrary to the rules of the branch, shall be fined a sum not exceeding 5l., or expelled from the society. . . .

E. A. Jelf for the plaintiff.—This society is not illegal. Its fundamental object is the relief of members when disabled by age or accident, or when out of employment. Though some of the rules may be in restraint of trade, and as such illegal, yet, if the general objects of the society are not illegal, the existence of the illegal rules, though they could not be enforced, will not prevent the enforcement of rules in favour of members which are not in restraint of trade, or otherwise illegal:

Swaine v. Wilson, 62 L. T. Rep. 309; 24 Q. B. Div. 252.

In that case the Court of Appeal followed the

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judgment of the Privy Council delivered by Sir Montagu Smith:

Collins v. Locke, 41 L. T. Rep. 292; 4 App. Cas. 674.

The Divisional Court referred to a decision of the Divisional Court (Pollock, B. and Wills, J.) as being against me:

Old v. Robson, 62 L. T. Rep. 282.

In that case the society was held to be illegal, but though it was decided a few weeks later than *Swaine v. Wilson* (*ubi sup.*) in which the Court of Appeal enforced a rule in favour of a member, the decision of the Court of Appeal was not cited. Then again *Rigby v. Connol* (42 L. T. Rep. 139; 14 Ch. Div. 482) was cited against me. But in that case Sir George Jessel was not addressing his mind to the case of a society, some of the rules of which were legal and some illegal, and the illegal rules were capable of being separated from the legal rules.

Hugo Young, K.C. (*Edmund Browne* with him) for the defendants.—This society before the Trade Union Act 1871 would have been illegal, and though it is now to a certain extent legalised, this action is one that, under sect. 4 of the Act of 1871, cannot be maintained. The rules as to members' benefits are so mixed up with the illegal rules of the society that they cannot be separated so as to become enforceable. In *Swaine v. Wilson* (*ubi sup.*) there was no nexus, as there is here, between the legal and illegal rules. [He was stopped.]

Jelf in reply.

COLLINS, M.R.—This is an appeal from a decision of the Divisional Court in an action brought by a member of a trade union to recover some benefits which he alleged he was entitled to under the rules of the trade union. Now I entirely agree with the decision of the court below, and the only thing that troubles me in the matter is that the Lord Chief Justice and Channell, J. expressed some hesitation in the view they took. The law on the subject was well established by the decision of the late Sir George Jessel, M.R. in *Rigby v. Connol* (*ubi sup.*), and as I understand it, it is this. At common law agreements in restraint of trade are bad, and combinations in restraint of trade are illegal. But the Trade Union Acts have, to a certain extent, and for certain limited purposes, modified the rigour of the common law. Sects. 2 and 3 of the Trade Union Act 1871 are as follows: [His Lordship read them]. That was the law which Sir George Jessel had to deal with, and he dealt with it, as it appears to me, in the most clear and unambiguous manner. With reference to an application to enforce one of these agreements *inter se* by members of a trade union, he pointed out that this statute did not confer any power, and did not take away any power, if it existed; and therefore you have to look to the common law to see whether the power existed or not, and try the matter by the common law. That is the effect of what Sir George Jessel said as to the construction of the Act, and he then went on to say: "The question therefore which I have to consider is, what would have happened without the Act? And it appears to me that without the Act it is clearly an unlawful association; it is an association by which men are not only restrained in trade, but

they are bound to do certain acts under a penalty. Take the very act for which this man was expelled. He was expelled because he bound his son apprentice in a shop where the workmen did not belong to this union, but to another union. That is the allegation." That is the law. The question therefore here is whether there is anything in the rules of this society which makes it an illegal association at common law. It is possible for societies to frame rules which contain an element of illegality in them, without at the same time vitiating the whole system. It is possible. It is also possible for them to make rules which are apparently and ostensibly innocuous, and yet may vitiate the whole system, because, rightly understood and considered as a whole, their innocent parts are merely ancillary to that part which is not in point of law deemed to be legal. The question on which side of the line the particular rules of a particular society fall is a question of fact in each case. We have had authorities cited to us, one of them in particular falling on one side of the line, and the other as distinctly falling on the other side of the line. The case which was pressed upon us was *Swaine v. Wilson* (*ubi sup.*). There the Court of Appeal, on perusing the rules of the society, were able to arrive at the opinion that there was not such illegality in the rules as to vitiate the whole scheme and render it impossible to enforce them at common law. The rules are summarised in the report of the case, and the crucial point was whether they were ancillary to the illegal purpose of the society, or whether the illegal purpose came in only in particular rules, without being so inter-connected and indispensable to the rest as to carry its vicious character through the whole system. The Court of Appeal came to the conclusion, after looking at the rules, that the illegality was entirely separate from, and not mixed up with, the innocuous part of the rules, and therefore did not vitiate the whole scheme. The other case, *Old v. Robson* (*ubi sup.*), was one in which the court, upon reviewing the rules of the society, came to the opposite conclusion. In the present instance the question that we have to consider is on which side of the line does this case fall. In *Swaine v. Wilson* (*ubi sup.*) the society purported to be a friendly society. I do not say that that would be conclusive, but the society purported to be a friendly society, and not a trade union, and the greater number of the rules, on the face of them, were obviously fit rules for carrying out the purposes of a friendly society. Now, let us look at the rules of the present society. [His Lordship read the extracts from the preamble and the rules above set out.] There are other rules which were referred to by the learned judges in their judgments in the court below. It seems to me that it is perfectly impossible to say that the primary object of this society is not "trade protection," as they call it, by the ordinary means employed by trade unions—viz., strikes and so on, which at common law are illegal. That is the main purpose of the society, and all these other provisions are really ancillary to that main purpose. I cannot put the point better than in the words of Wills, J. After referring to the rules which provide that a member acting contrary to the interests of the society may be expelled, he said: "How can that be said to be such a society as Lord Esher's

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observations (in *Suaine v. Wilson*) apply to? The portions which are objectionable are of express intention and purpose. They are so mixed up with the friendly society part of it that any member who breaks the trade rules is liable to lose everything that he has put into the society. It seems to me that it is quite impossible under these circumstances to say that it is not a society with the most effectual guarantee that the members of it shall observe the rules which are made in restraint of trade. I cannot think under these circumstances that the expressions used in Lord Esher's judgment about whether the rules are mainly for the benefit purpose have any application. The two things are mixed up inextricably and you cannot separate the one from the other. If you cannot separate the one from the other, it seems to me the illegal portion is necessarily incorporated into the scheme of the friendly society portion of the work of the society." Those words seem to me to express exactly the substance of the case. The case is one as to which I feel no difficulty, and I am of opinion that the appeal fails.

ROMER, L.J.—I entirely agree with the judgment of the Master of the Rolls, and with the reasons given by him and by the learned judges in the court below for the conclusions they have arrived at; and I have nothing to add to what they have said.

MATHEW, L.J.—I am of the same opinion. It is said that this is not a trade union, but a friendly society, and that, therefore, as far as the rules apply to a friendly society, this action may be maintained. On reading the rules and considering the whole system, I think that there can be no doubt that this is not a friendly society. The friendly part of it is only ancillary to the trade union part; and the condition and consideration for granting a superannuation allowance is that the applicant should belong from the first to the trade union. The society had power at any moment to terminate the membership and expel him for interfering with the main objects of the society.

Appeal dismissed.

Solicitors for the plaintiff, *Clinton and Co.*, for *H. P. Day and Jarvis*, Nottingham.

Solicitors for the defendants, *Frank Osbaldeston and Son*, for *Green and Williams*, Nottingham.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, May 4.

(Before Lord ALVERSTONE, C.J., WILLS and KENNEDY, JJ.)

O'DONOGHUE (app.) v. MOON (resp.). (a)

Revenue—Excise duty—Carriage—Motor bicycle—Necessity of excise licence for—"Carriage drawn or propelled upon road by any mechanical power"—Customs and Inland Revenue Act 1888 (51 & 52 Vict. c. 8), s. 4.

A motor bicycle is, within the meaning of sect. 4 of the Customs and Inland Revenue Act 1888, a "carriage" for which a licence is required, as

(a) Reported by W. W. OUN, Esq., Barrister-at-Law.

being a carriage drawn or propelled upon a road by mechanical power.

CASE stated by two justices of the peace for the city and county of Bristol, sitting as a court of summary jurisdiction.

The appellant was a supervisor of Inland Revenue for the city of Bristol.

The information laid by the appellant was as follows:

That the respondent, on the 23rd July 1903, in the city and county of Bristol, did keep a carriage—to wit, a motor bicycle—for the keeping of which a licence was and is required by the statute in that behalf, without having a proper licence under the statute, contrary to the form of the statutes in that case made and provided.

The definition of a "carriage" in the statute 51 & 52 Vict. c. 8 (the Customs and Inland Revenue Act 1888), s. 4, is as follows:

"Carriage" means and includes any carriage (except a hackney carriage) drawn by a horse or mule, or horses or mules, or drawn or propelled upon a road or tramway, or elsewhere than upon a railway, by steam or electricity or any other mechanical power, but shall not include a waggon, cart, or other such vehicle, which is constructed or adapted for use, and is used, solely for the conveyance of any goods or burden in the course of trade or husbandry, and whereon the Christian name and surname, and place of abode, or place of business of the person, or the name or style and principal or only place of business of the company or firm, keeping the same, shall be visibly and legibly painted in letters of not less than one inch in length.

The section imposes duties of excise upon every carriage as therein defined, as follows:

For every carriage as hereinafter defined—If such carriage shall have four or more wheels, and shall be drawn, or be adapted or fitted to be drawn, by two or more horses or mules, or shall be drawn or propelled by mechanical power, 2*l.* 2*s.* If such carriage shall have four or more wheels, and shall be drawn, or be adapted or fitted to be drawn, by one horse or mule only, 1*l.* 1*s.* If such carriage shall have less than four wheels, 1*s.*

The facts proved were as follows:—

On the 23rd July 1903 the respondent was riding on a motor bicycle. The motive power of the motor bicycle is an engine working by means of petrol under the control of the rider.

The respondent was the owner of and kept the motor bicycle alleged to be a carriage. He stated that he understood that it had been decided in Bristol that the motor bicycle was not a carriage in respect of which he could be required to take out an excise licence, or he would have complied with the law.

The appellant was represented by a solicitor from the office of the Inland Revenue at Somerset House, and he contended that the respondent kept a carriage, and asked the justices to inflict a nominal penalty.

With the knowledge that their decision, if they convicted the respondent, would be in conflict with the decision of the learned Recorder of Bristol, the justices decided not to convict, as the appellant's solicitor intimated that he would apply for a case for the opinion of the High Court.

Accordingly the justices gave their judgment as follows:

We personally think a motor bicycle is a "carriage" within the meaning of the Acts for the taxation of carriages, but the learned recorder in quarter sessions has taken the opposite view. We here, sitting in petty sessions, are bound to treat with the utmost respect the

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judgment of the recorder who sits in quarter sessions and as a court of appeal from the magistrates; and so we are going to uphold that judgment, and we are going to say in accordance with that judgment—though it is not in accordance with our own opinion—that a motor bicycle is not a “carriage,” and this information will consequently be dismissed.

The question for the opinion of the court was whether a motor bicycle is within the meaning of the statute a carriage for which a licence should have been taken out by the respondent.

Sir Edward Carson (S.-G.) (*Rowlatt* with him) for the appellant.—The short point raised is whether a motor bicycle—that is, a bicycle propelled by mechanical means—is a carriage under the Customs and Inland Revenue Act 1888 for which an excise licence must be taken out. But for the fact that the justices were told that the Recorder of Bristol had given a contrary decision, they state that they would have decided that this motor bicycle was a carriage within the meaning of the Act and required a licence. The Act under which the penalty is claimed is the Customs and Inland Revenue Act 1869 (32 & 33 Vict. c. 14); that Act has been altered as regards the definition of “carriage.” “Carriage” was there defined in sect. 19, sub-sect. 6, as meaning and including “any vehicle drawn by a horse or mule, or by horses or mules, except a waggon, cart,” and so forth. Then that definition was altered by sect. 4 of the Act of 1888, and after the words “or horses or mules” were added these words, “or drawn or propelled upon a road or tramway, or elsewhere than upon a railway, by steam or electricity or any other mechanical power.” The only question would seem to be whether this motor bicycle is a carriage drawn or propelled by mechanical power. It carries somebody; it has got two wheels, and it is driven by mechanical power. The matter does not rest there, because there have been a number of decisions on various Acts as to whether bicycles and tricycles were carriages or not, and what seems to be laid down is that you must take the context as regards each Act. Under the

Locomotives on Highways Act 1896 (59 & 60 Vict. c. 36), the matter is set at rest, because a light locomotive is a vehicle propelled by mechanical power. Light locomotives are defined in sect. 1 of that Act, and this motor bicycle was undoubtedly within that description. Even before that Act it had been held that a bicycle was a carriage, but this last Act meant to put an end to all these questions as regards light locomotives, as this undoubtedly was. It says, in sect. 1 (1) (b): “A light locomotive shall be deemed to be a carriage within the meaning of any Act of Parliament, whether public, general, or local, and of any rule, regulation, or by-law, made under any Act of Parliament, and, if used as a carriage of any particular class, shall be deemed to be a carriage of that class, and the law relating to carriages of that class shall apply accordingly.”

The respondent did not appear.

LORD ALVERSTONE, C.J. — Notwithstanding that this case has not been argued on the other side, I do not think that there is anything which could give rise to a reasonable doubt that a bicycle propelled by some mechanical means or other and carrying a person would be a carriage within the meaning of this Act. The definition of “carriage” in the Act includes “any carriage drawn or propelled upon a road or tramway, or elsewhere than upon a railway, by steam or electricity or any other mechanical power”; and, having regard to the gradual extension of this Act and common knowledge of what is going on, it seems to me that a machine which carries a person along a road is none the less a “carriage” because it is a very uncomfortable thing and because the person on it is shaken very much when he is going along. I think the decision was wrong, and that this appeal ought to be allowed.

WILLS and KENNEDY, JJ. concurred.

Appeal allowed.

Solicitor for the appellant, *Solicitor of Inland Revenue.*

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